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CASES ARGUED AND DECIDED  
IN THE  
SUPREME COURT  
OF THE  
UNITED STATES

1820-1823,

5, 6, 7, 8 Wheaton,

BOOK 5,

LAWYERS' EDITION,

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AND  
AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES,

BY

STEPHEN K. WILLIAMS, LL.D.

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WITH  
"NOTES ON U. S. REPORTS"  
BY  
WALTER MALINS ROSE.

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## PREFACE TO SECOND EDITION.

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THE first republication, nearly twenty years ago, of the United States Supreme Court Reports in the Lawyers' Edition, was an event of public importance. It has resulted, not merely in the increase, but in the literal multiplication, of the number of lawyers and judges who own and use this great series of decisions. It has, therefore, materially extended the influence of those decisions upon the general jurisprudence of the country. Now the inclusion of Rose's Notes obviously adds great value to these reports.

At the end of each volume of reports, several of which are bound in every book of this set, will be found Rose's Notes for that volume. These volumes are separated by colored sheets.





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# REPORTS

OF

## CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of the United States.

FEBRUARY TERM, 1820.

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BY HENRY WHEATON,

Counselor at Law.

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VOLUME V.



JUDGES  
OF THE  
SUPREME COURT OF THE UNITED STATES,  
DURING THE TIME OF THESE REPORTS.

---

The Hon. JOHN MARSHALL, *Chief Justice.*  
The Hon. BUSHROD WASHINGTON, *Associate Justice.*  
The Hon. WILLIAM JOHNSON, *Associate Justice.*  
The Hon. BROCKHOLST LIVINGSTON, *Associate Justice.*  
The Hon. THOMAS TODD, *Associate Justice.*  
The Hon. GABRIEL DUVALL, *Associate Justice.*  
The Hon. JOSEPH STORY, *Associate Justice.*  
WILLIAM WIRT, Esq., *Attorney-General.*





## REPORTS OF THE DECISIONS

OF THE

# Supreme Court of the United States.

FEBRUARY TERM, 1820.

1\*] \*[CONSTITUTIONAL LAW.]

HOUSTON v. MOORE.

The act of the state of Pennsylvania, of the 28th of March, 1814, (providing, (sec. 21.) that the officers and privates of the militia of that state, neglecting or refusing to serve, when called into actual service, in pursuance of any order or requisition of the President of the United States, shall be liable to the penalties defined in the act of Congress of the 28th of February, 1795, c. 277, or to any penalty which may have been prescribed since the date of that act, or which may hereafter be prescribed by any law of the United States, and also providing for the trial of such delinquents by a state court-martial, and that a list of the delinquents fined by such court should be furnished to the Marshal of the United States, &c., and also to the Comptroller of the Treasury of the United States, in order that the further proceedings directed to be had thereon by the laws of the United States might be completed), is not repugnant to the constitution and laws of the United States.

THIS was a writ of error to the Supreme Court of the state of Pennsylvania, in a case where was drawn in question the validity 2\*] of a statute of that state, on the ground of its repugnancy to the constitution and laws of the United States, and the decision was in favor of its validity. The statute which formed the ground of controversy in the state court was passed on the 28th of March, 1814, and enacts among other things (sec. 21), that every non-commissioned officer and private of the militia who shall have neglected or refused to serve when called into actual service, in pursuance of any order or requisition of the President of the United States, shall be liable to the penalties defined in the act of the Congress of the United States, passed on the 28th of February, 1795; and then proceeds to enumerate them, and to each clause adds, "or shall be liable to any penalty which may have been prescribed since the date of the passing of the said act, or which may hereafter be prescribed by any law of the United States." The statute then further provides, that "within one month after the expiration of the time for which any detachment of militia shall have been called into the service of the United States, by or in pursuance of orders from the President of the United States, the proper brigade inspector shall summon a general or a regimental court-martial, as the case may be, for the trial of such person or persons belonging to the detachment called

out, who shall have refused or neglected to march therewith, or to furnish a sufficient substitute; or who, after having marched therewith, shall have returned without leave from his commanding officer, of which delinquents the proper brigade inspector shall furnish to the said court-martial \*an accurate list. [\*3 And as soon as the said court-martial shall have decided in each of the cases which shall be submitted to their consideration, the President thereof shall furnish to the Marshal of the United States, or to his deputy, and also to the Comptroller of the Treasury of the United States, a list of the delinquents fined, in order that the further proceedings directed to be had thereon by the laws of the United States may be completed."

Houston, the plaintiff in error, and in the original suit, was a private, enrolled in the Pennsylvania militia, and belonging to the detachment of the militia which was ordered out by the Governor of that state, in pursuance of a requisition from the President of the United States, dated the 4th of July, 1814. Being duly notified and called upon, he neglected to march with the detachment to the appointed place of rendezvous. He was tried for this delinquency before a court-martial summoned under the authority of the executive of that state, in pursuance of the section of the statute above referred to. He appeared before the court-martial, pleaded not guilty, and was in due form sentenced to pay a fine; for levying of which on his property, he brought an action of trespass in the State Court of Common Pleas, against the deputy-marshal by whom it was levied. At the trial in that court, the plaintiff prayed the court to instruct the jury, that the first, second and third paragraphs of the 21st section of the above statute of Pennsylvania, so far as they related to the militia called into the \*service of the United [\*4 States, under the laws of Congress, and who failed to obey the orders of the President of the United States, are contrary to the constitution of the United States, and the laws of Congress made in pursuance thereof, and are, therefore, null and void. The court instructed the jury that these paragraphs were not contrary to the constitution or laws of the United States, and were, therefore, not null and void. A verdict and judgment was thereupon rendered for

the defendant, Moore; which judgment being carried by writ of error before the Supreme Court of Pennsylvania, the highest court of law or equity of that state, was affirmed; and the cause was then brought before this court, under the 25th section of the judiciary act of 1789, c. 20.

This cause was argued at the last term, and continued to the present term for advisement.

*Mr. Hopkins*, for the plaintiff in error, argued, that the constitutional power of Congress over the militia is exclusive of state authority, except as to officering and training them according to the discipline prescribed by Congress. By the constitution of the United States (art. 1, s. 8), Congress is invested with power "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions." And also, "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively [\*5] \*the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." The terms "to provide for calling forth" import an authority to place the militia under the power of the United States; in certain cases, implying a command, which the militia are bound to obey. Congress has exercised this authority by authorizing the President to call forth the militia in the cases mentioned in the constitution, and inflicting penalties on those who disobey the call.<sup>1</sup> Whenever a draft is made, the persons drafted are immediately, and to all intents and purposes, in the service of the United States, and from that moment all state authority over them ceases. The power to govern the militia thus called forth, and employed in the service of the United States, is exclusively in the national government. A national militia grew out of the federal constitution, and did not previously exist. It is in its very nature one indivisible object, and of the utmost importance to the support of the federal authority and government.<sup>2</sup> But even supposing this power not to be exclusively vested in Congress, and admitting it to be concurrent between the United States government, and the respective state governments; as Congress having legislated on the subject-matter, to the extent of the authority given, state legislation, which is subordinate, is necessarily excluded. Even where the grant of a certain power to the government of the Union is not, [\*6] \*in express terms, exclusive, yet if the exercise of it by that government be practically inconsistent with the exercise of the same power by the states, their laws must yield to the supremacy of the laws of the United States.<sup>3</sup> Meade's case is an example of the application of the same principle to the very question now before the court.<sup>4</sup> Is it possible that Congress meant to give power to a state court, without naming the court, or granting the power in ex-

press terms? The exercise of this jurisdiction by a state court-martial would either oust the United States courts of their jurisdiction or might subject the alleged delinquents to be twice tried and punished for the same offense. If the state court could try them, the Governor of the state could pardon them for an offense committed against the laws of the United States. There is, in various particulars, a manifest repugnancy between the two laws. They are in direct collision; and, consequently, the state law is void. Again, if the state of Pennsylvania had power to pass the act of the 28th of March, 1814, or the 21st section of that act, it was superseded by the act of Congress of the 18th of April, 1814, c. 670, occupying the same ground, and making a more complete provision on the same subject. These two laws are still more manifestly repugnant and inconsistent with each other. Again, if the state law was constitutional, and not superseded by the act of Congress of the 18th of April, 1814, c. 670, still the treaty of peace \*between the [\*7] United States and Great Britain, ratified in February, 1815, suspended and abrogated all proceedings under the state law.

*Mr. C. J. Ingersoll* and *Mr. Rogers*, contra, insisted, that there were many cases in which the laws of the United States are carried into effect by state courts and state officers; that this was contemplated by the framers of the constitution; that the Governor of Pennsylvania, by whom the court-martial, in the present case, was summoned, is the commander-in-chief of the militia of that state, except when called into the actual service of the United States. The militia drafted in pursuance of the requisition of the President were not in actual service, until mustered, and in the pay of the United States, until they reached the place of rendezvous, and were put under the command of the United States officers. It is not the requisition, but the obedience to the requisition, which makes the person drafted amenable to martial law, as a part of the military force of the Union. When the constitution speaks of the power of "calling forth" the militia, it means an effectual calling. The plaintiff was called, but not called forth. The power invested in Congress is to determine in what mode the requisition shall be made, how the quota of each state is to be apportioned, from what states requisitions shall be made in particular cases, and by what process the call is to be enforced. Congress not having directed the mode by which courts-martial are to be summoned and held for the purpose of enforcing it, the states have a constitutional \*authority to supply the omission. [\*8] Before this court proceeds to declare the state law made for this purpose to be void, it must be satisfied, beyond all doubt, of its repugnancy to the constitution.<sup>5</sup> The case must fall within some of the express prohibitory clauses of the constitution, or some of its clearly implied prohibitions. It must not be the exercise of a political discretion with which the legislature is invested, for that can never become the subject of judicial cognizance. It is insisted that the power of Congress over the militia is a concurrent, and not an exclusive power. All

1.—Act of the 28th of February, 1795, c. 277, (CI).

2.—*Livingston v. Van Ingen*, 9 Johns. Rep. 507, 565, 575.

3.—*Livingston v. Van Ingen*, 9 Johns. Rep. 507, 565, 575.

4.—5 Hall's Law Journ. 536.

5.—*Calder et ux. v. Bull et ux.*, 3 Dall. 399; *Emerick v. Harris*, 1 Binney, 416, 423; 6 Cranch, 87; *Cooper v. Telfair*, 4 Dall. 14, 18.



powers, which previously existed in the states, and which are not expressly delegated to the United States, are reserved.<sup>1</sup> The power of making laws on the subject of the militia is not prohibited to the states, and has always been exercised by them. The necessity of a concurrent jurisdiction in certain cases results from the peculiar division of the powers of sovereignty in our government; and the principle, that all authorities of which the states are not expressly divested in favor of the Union, or the exercise of which, by the states, would be repugnant to those granted to the Union, are reserved to the states, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the constitution. The contemporaneous construction of the constitution, \*by those who supported its adoption, supposes the power in question to be concurrent, and not exclusive.<sup>2</sup> The power of the states over the militia is not taken away; it existed in them before the establishment of the constitution, and there being no negative clause prohibiting its exercise by them, it still resides in the states, so far as an exercise of it by them is not absolutely repugnant to the authority of the Union. Before the militia are actually employed in the service of the United States, Congress has only a power concurrent with that of the states, to provide for organizing, arming, and disciplining them. The authority of appointing the officers and training the militia, is expressly reserved to the states, because, in these respects, it was intended that they should have an exclusive power. So, also, Congress has the exclusive power of governing such part of the militia as may be actually employed in the service of the United States; but not until it is thus actually employed. The power of governing the militia is the power of subjecting it to the rules and articles of war. But it is a principle manifestly implied in the constitution, that the militia cannot be subjected to martial law, except when in actual service, in time of war, rebellion, or invasion.<sup>3</sup> It necessarily results from the circumstance of the power of making provision for organizing, arming, and disciplining the militia being concurrent, that 10\*] if \*Congress has not legislated upon any part of the subject, the states have a right to supply the omission. This right has been exercised, in the present case, in aid of, and not in hostility to, the federal authority. The fines which are collected under the law are not appropriated to the use of the state, but are to be paid into the treasury of the Union. The power of making uniform laws of naturalization is different from that now under consideration. The power of naturalization is an authority granted to the Union, to which a similar authority in the states would be absolutely and totally repugnant. A naturalized citizen of one state would be entitled to all the privileges of a citizen in every other state, and the greatest confusion would be produced by a variety of rules on the subject. But even naturalization has been sometimes held to be a power residing concur-

rently in the Union and the states, and to be exercised by the latter in such a way as not to contravene the rule established by the Union.<sup>4</sup> But in the present case, the state law is not inconsistent with the act of Congress. It comes in aid of it. It supplies its defects, and remedies its imperfections. It co-operates with it for the promotion of the same end. The offense which is made punishable by the state law, is an offense against the state, as well as the Union. It being the duty of the state to furnish its quota, it has a right to compel the drafted militia to appear and march. Calling the militia forth, and governing them after they are in actual service, \*are two distinct [\*11 things. A state law, acting upon the militia before they have entered into the actual service of the Union, is so far from interfering with the power of Congress to legislate on the same subject that it may have, and, we contend, that it does have, in the present case, a powerful effect in aid of the national authority. But it would be almost impossible for the state to enact a law concerning the militia, after they are in the actual service of the United States, which would not be irreconcilable with the authority of the latter. Even supposing that Congress should pass a law inflicting one penalty for disobedience to the call, and the state inflict another, they would still both co-operate to the same end. In practice, the delinquent could not be punished twice for the same offense; but there would be no theoretical repugnancy between the two laws. Congress, in the statutes enacted by them, have not intended to compel citizens enrolled in the militia to enter into the actual service of the United States. It is not a conscription; but a draft, with the option to the individual to be excused from a specific performance of the duty by the payment of a pecuniary composition. The acts of Congress are defective in not providing how, or by whom, courts-martial shall be held, for the trial of delinquents, and the collection of these pecuniary penalties. The state legislature, acting with a sincere desire to promote the objects of the national government, supplied these defects, by adding such details as were indispensably necessary to execute the acts of Congress. \*There is, then, a per- [\*12 fect harmony between the two laws.

The judgment of the court was delivered at the present term, by Mr. Justice WASHINGTON, who, after stating the facts of the case, proceeded as follows:

There is but one question in this cause, and it is, whether the act of the legislature of Pennsylvania, under the authority of which the plaintiff in error was tried, and sentenced to pay a fine, is repugnant to the constitution of the United States, or not?

But before this question can be clearly understood, it will be necessary to inquire: 1. What are the powers granted to the general government, by the constitution of the United States over the militia? and, 2. To what extent they have been assumed and exercised.

1. The constitution declares that Congress shall have power to provide for calling forth the militia in three specified cases; for organizing, arming, and disciplining them; and for governing such part of them as may be em-

4.—Collet v. Collet, 2 Dall. 294, 296.

1.—Livingston et al. v. Van Ingen, 9 Johns. Rep. 501, 565, 573, *et seq.*; 1 Tuck. Bl. Com. Appx. 308.

2.—Letters of Publius, or The Federalist, Nos. 27, 33; Debates in the Virginia Convention, 272, 284, 296, 298.

3.—1 Tucker's Bl. Com. 213; Duffield v. Smith, 6 Binney, 306.

Wheat. 5.

ployed in the service of the United States; reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress. It is further provided, that the President of the United States shall be commander of the militia, when called into the actual service of the United States.

2. After the constitution went into operation, Congress proceeded by many successive acts to 13\*] exercise these powers, and to provide for all the cases contemplated by the constitution.

The act of the 2d of May, 1792, which is re-enacted almost *verbatim* by that of the 28th of February, 1795, authorizes the President of the United States, in case of invasion, or of imminent danger of it, or when it may be necessary for executing the laws of the United States, or to suppress insurrections, to call forth such number of the militia of the states most convenient to the scene of action, as he may judge necessary, and to issue his orders for that purpose to such officer of the militia as he shall think proper. It prescribes the amount of pay and allowances of the militia so called forth, and employed in the service of the United States, and subjects them to the rules and articles of war applicable to the regular troops. It then proceeds to prescribe the punishment to be inflicted upon delinquents, and the tribunal which is to try them, by declaring that every officer or private who should fail to obey the orders of the President, in any of the cases before recited, should be liable to pay a certain fine, to be determined and adjudged by a court-martial, and to be imprisoned, by a like sentence, on failure of payment. The courts-martial for the trial of militia, are to be composed of militia officers only, and the fines to be certified by the presiding officer of the court, to the martial of the district, and to be levied by him, and, also, to the supervisor, to whom the fines are to be paid over.

The act of the 18th of April, 1814, provides, that courts-martial, to be composed of militia 14\*] officers \*only, for the trial of militia, drafted, detached and called forth for the service of the United States, whether acting in conjunction with the regular forces or otherwise, shall, whenever necessary, be appointed, held, and conducted in the manner prescribed by the rules and articles of war, for appointing, holding, and conducting courts-martial for the trial of delinquents in the army of the United States. Where the punishment prescribed is by stoppage of pay, or imposing a fine limited by the amount of pay, the same is to have relation to the monthly pay existing at the time the offense was committed. The residue of the act is employed in prescribing the manner of conducting the trial; the rules of evidence for the government of the court; the time of service, and other matters not so material to the present inquiry. The only remaining act of Congress which it will be necessary to notice in this general summary of the laws, is that of the 8th of May, 1792, for establishing an uniform militia in the United States. It declares who shall be subject to be enrolled in the militia, and who shall be exempt; what arms and accoutrements the officers and privates shall provide themselves with; arranges them into divisions, brigades, regiments, battalions,

and companies, in such manner as the state legislatures may direct; declares the rules of discipline by which the militia is to be governed, and makes provision for such as should be disabled whilst in the actual service of the United States. The pay and subsistence of the militia, whilst in service, are provided \*for by other acts of Congress, and par- [\*15 ticularly by one passed on the third of January, 1795.

The laws which I have referred to, amount to a full execution of the powers conferred upon Congress by the constitution. They provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasion. They also provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; leaving to the states respectively the appointment of the officers, and the authority of training them according to the discipline prescribed by Congress.

This system may not be formed with as much wisdom as, in the opinion of some, it might have been, or as time and experience may hereafter suggest. But to my apprehension, the whole ground of Congressional legislation is covered by the laws referred to. The manner in which the militia is to be organized, armed, disciplined, and governed, is fully prescribed; provisions are made for drafting, detaching, and calling forth the state quotas, when required by the President. The President's orders may be given to the chief executive magistrate of the state, or to any militia officer he may think proper; neglect, or refusal to obey orders, is declared to be an offense against the laws of the United States, and subjects the offender to trial, sentence and punishment, to be adjudged by a court-martial, to be summoned in the way pointed out by the articles and rules of war; and the mode of proceeding to \*be observed by these courts, [\*16 is detailed with all necessary perspicuity.

If I am not mistaken in this view of the subject, the way is now open for the examination of the great question in the cause. Is it competent to a court-martial, deriving its jurisdiction under state authority, to try, and to punish militia-men, drafted, detached, and called forth by the President into the service of the United States, who have refused, or neglected to obey the call?

In support of the judgment of the court below, I understand the leading arguments to be the two following: 1. That militia-men, when called into the service of the United States by the President's orders, communicated either to the executive magistrate or to any inferior militia officer of a state, are not to be considered as being in the service of the United States until they are mustered at the place of rendezvous. If this be so, then, 2d. The state retains a right, concurrent with the government of the United States, to punish his delinquency. It is admitted on the one side, that so long as the militia are acting under the military jurisdiction of the state to which they belong, the powers of legislation over them are concurrent in the general and state government. Congress has power to provide for organizing, arming, and disciplining them; and this power being

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unlimited, except in the two particulars of officering and training them, according to the discipline to be prescribed by Congress, it may be exercised to any extent that may be deemed necessary by Congress. But as state militia, **17\*** the power of \*the state governments to legislate on the same subjects, having existed prior to the formation of the constitution, and not having been prohibited by that instrument, it remains with the states, subordinate nevertheless to the paramount law of the general government, operating upon the same subject. On the other side, it is conceded, that after a detachment of the militia have been called forth, and have entered into the service of the United States, the authority of the general government over such detachment is exclusive. This is also obvious. Over the national militia, the state governments never had, or could have, jurisdiction. None such is conferred by the constitution of the United States; consequently, none such can exist.

The first question, then, is, at what time, and under what circumstances, does a portion of militia, drafted, detached, and called forth by the President, enter into the service of the United States, and change their character from State to national militia? That Congress might by law have fixed the period, by confining it to the draft; the order given to the Chief Magistrate, or other militia officer of the state; to the arrival of the men at the place of rendezvous; or to any other circumstance, I can entertain no doubt. This would certainly be included in the more extensive powers of calling forth the militia, organizing, arming, disciplining, and governing them. But has Congress made any declaration on this subject, and in what manner is the will of that body, as expressed in the before-mentioned laws, to be construed? It **18\*** must be conceded that there is \*no law of the United States which declares in express terms that the organizing, arming, and equipping the detachment, on the order of the President to the state militia officers, or to the militia-men personally, places them in the service of the United States. It is true that the refusal or neglect of the militia to obey the orders of the President is declared to be an offense against the United States, and subjects the offender to a certain prescribed punishment. But this flows from the power bestowed upon the general government to call them forth; and, consequently, to punish disobedience to a legal order, and by no means proves that the call of the President places the detachment in the service of the United States. But although Congress has been less explicit on this subject than they might have been, and it could be wished they had been, I am, nevertheless, of opinion, that a fair construction of the different militia laws of the United States will lead to a conclusion that something more than organizing and equipping a detachment, and ordering it into service, was considered as necessary to place the militia in the service of the United States. That preparing a detachment for such service does not place it in the service, is clearly to be collected from the various temporary laws, which have been passed, authorizing the President to require of the state executives to organize, arm, and equip their state quotas of militia for the service of the United States. Because

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they all provide that the requisition shall be to hold such quotas in readiness to march at a moment's warning; and some, if not all of them, authorize \*the President to call into actual [**\*19** service any part, or the whole of said quotas, or detachments; clearly distinguishing between the orders of the President to organize and hold the detachments in readiness for service, and their entering into service.

The act of the 28th of February, 1795, declares that the militia employed in the service of the United States shall receive the same pay and allowance as the troops of the United States, and shall be subject to the same rules and articles of war. The provisions made for disabled militia-men, and for their families, in case of their death, are, by other laws, confined to such militia as are, or have been, in actual service. There are other laws which seem very strongly to indicate the time at which they are considered as being in service. Thus, the act of the 28th of February, 1795, declares, that a militiaman called into the service of the United States, shall not be compelled to serve more than three months after his arrival at the place of rendezvous, in any one year. The 8th section of the act of the 18th of April, 1814, declares, that the militia, when called into the service of the United States, if, in the President's opinion, the public interest requires it, may be compelled to serve for a term not exceeding six months, after their arrival at the place of rendezvous, in any one year; and by the 10th section, provision is made for the expenses which may be incurred by marching the militia to their places of rendezvous, in pursuance of a requisition of the President, and they are to be adjusted and paid in like manner as those incurred after their arrival at the rendezvous. \*The 3d [**\*20** section of the act of the 2d of January, 1795, provides, that whenever the militia shall be called into the actual service of the United States, their pay shall be deemed to commence from the day of their appearing at the place of battalion, regimental or brigade rendezvous, allowing a day's pay and ration for every 15 miles from their homes to said rendezvous.

From this brief summary of the laws, it would seem that actual service was considered by Congress as the criterion of national militia; and that the service did not commence until the arrival of the militia at the place of rendezvous. That is, the *terminus a quo*, the service, the pay, and subjection to the articles of war, are to commence and continue. If the service, in particular, is to continue for a certain length of time, from a certain day, it would seem to follow, almost conclusively, that the service commenced on that, and not on some prior day. And, indeed, it would seem to border somewhat upon an absurdity to say that a militiaman was in the service of the United States at any time, who, so far from entering into it for a single moment, had refused to do so, and who never did any act to connect him with such service. It has already been admitted, that if Congress had pleased so to declare, a militiaman, called into the service of the United States, might have been held and considered as being constructively in that service, though not actually so; and might have been treated in like manner as if he had appeared at the place of rendezvous. But Congress has not so declared,



**21\*]** nor have they made \*any provision applicable to such a case; on the contrary, it would appear, that a fine to be paid by the delinquent militia-man was deemed an equivalent for his services, and an atonement for his disobedience.

If, then, a militia-man, called into the service of the United States, shall refuse to obey the order, and is, consequently, not to be considered as in the service of the United States, or removed from the military jurisdiction of the state to which he belongs, the next question is, is it competent to the state to provide for trying and punishing him for his disobedience, by a court-martial, deriving its authority under the state? It may be admitted at once that the militia belong to the states, respectively, in which they are enrolled, and that they are subject, both in their civil and military capacities, to the jurisdiction and laws of such state, except so far as those laws are controlled by acts of Congress constitutionally made. Congress has power to provide for organizing, arming, and disciplining the militia; and it is presumable that the framers of the constitution contemplated a full exercise of all these powers. Nevertheless, if Congress had declined to exercise them, it was competent to the state governments to provide for organizing, arming, and disciplining their respective militia, in such manner as they might think proper. But Congress has provided for all these subjects, in the way which that body must have supposed the best calculated to promote the general welfare, and to provide for the national defense. After **22\*]** this, can the state governments \*enter upon the same ground, provide for the same objects as they may think proper, and punish in their own way violations of the laws they have so enacted? The affirmative of this question is asserted by the defendant's counsel, who, it is understood, contend, that unless such state laws are in direct contradiction to those of the United States, they are not repugnant to the constitution of the United States.

From this doctrine, I must, for one, be permitted to dissent. The two laws may not be in such absolute opposition to each other as to render the one incapable of execution without violating the injunctions of the other; and yet, the will of the one legislature may be in direct collision with that of the other. This will is to be discovered as well by what the legislature has not declared as by what they have expressed. Congress, for example, has declared that the punishment for disobedience of the act of Congress shall be a certain fine; if that provided by the state legislature for the same offense be a similar fine, with the addition of imprisonment or death, the latter law would not prevent the former from being carried into execution, and may be said, therefore, not to be repugnant to it. But surely the will of Congress is, nevertheless, thwarted and opposed.

This question does not so much involve a contest for power between the two governments, as the rights and privileges of the citizen, secured to him by the constitution of the United States, the benefit of which he may lawfully claim.

**23\*]** \*If, in a specified case, the people have thought proper to bestow certain powers on Congress as the safest depository of them, and Congress has legislated within the scope of

them, the people have reason to complain that the same powers should be exercised at the same time by the state legislatures. To subject them to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my apprehension, something very much like oppression, if not worse. In short, I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with each other. If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other, so far as they do differ. If the one imposes a certain punishment for a certain offense, the presumption is, that this was deemed sufficient, and, under all circumstances the only proper one. If the other legislature impose a different punishment, in kind or degree, I am at a loss to conceive how they can both consist harmoniously together.

I admit that a legislative body may, by different laws, impose upon the same person, for the same offense, different and cumulative punishments; but then it is the will of the same body to do so, and the second, equally with the first law, is the will of that body. There is, therefore, and can be, no opposition of wills. But the case is altogether different where \*the laws flow from the wills of distinct, [\***24** co-ordinate bodies.

This course of reasoning is intended as an answer to what I consider a novel and unconstitutional doctrine, that in cases where the state governments have a concurrent power of legislation with the national government, they may legislate upon any subject on which Congress has acted, provided the two laws are not in terms, or in their operation, contradictory and repugnant to each other.

Upon the subject of the militia, Congress has exercised the powers conferred on that body by the constitution, as fully as was thought right, and has thus excluded the power of legislation by the states on these subjects, except so far as it has been permitted by Congress; although it should be conceded, that important provisions have been omitted, or that others which have been made might have been more extended, or more wisely devised.

There still remains another question to be considered, which more immediately involves the merits of this cause. Admit that the legislature of Pennsylvania could not constitutionally legislate in respect to delinquent militia-men, and to prescribe the punishment to which they should be subject, had the state court-martial jurisdiction over the subject, so as to enforce the laws of Congress against these delinquents?

This, it will be seen, is a different question from that which has been just examined. That respects the power of a state legislature to legislate upon a subject, on which Congress has declared its will. This concerns the jurisdiction of a state military tribunal \*to adjudicate [\***25** in a case which depends on a law of Congress, and to enforce it.

It has been already shown that Congress has prescribed the punishment to be inflicted on a militia-man detached and called forth, but who has refused to march; and has also provided



that courts-martial for the trial of such delinquents, to be composed of militia officers only, shall be held and conducted in the manner pointed out by the rules and articles of war.

That Congress might have vested the exclusive jurisdiction in courts-martial to be held, and conducted as the laws of the United States have prescribed, will, I presume, hardly be questioned. The offense to be punished grows out of the constitution and laws of the United States, and is, therefore, clearly a case which might have been withdrawn from the concurrent jurisdiction of the state tribunals. But an exclusive jurisdiction is not given to courts-martial, deriving their authority under the national government, by express words. The question then (and I admit the difficulty of it) occurs, is this a case in which the state courts-martial could exercise jurisdiction?

Speaking upon the subject of the federal judiciary The Federalist distinctly asserts the doctrine that the United States, in the course of legislation upon the objects entrusted to their direction, may commit the decision of causes arising upon a particular regulation to the federal courts solely, if it should be deemed expedient; yet that in every case in which the state tribunals should not be expressly excluded **26\*** by the acts of the national legislature, they would, of course, take cognizance of the causes to which those acts might give birth.<sup>1</sup>

I can discover, I confess, nothing unreasonable in this doctrine; nor can I perceive any inconvenience which can grow out of it, so long as the power of Congress to withdraw the whole, or any part of those cases, from the jurisdiction of the state courts, is, as I think it must be, admitted.

The practice of the general government seems strongly to confirm this doctrine; for at the first session of Congress which commenced after the adoption of the constitution, the judicial system was formed; and the exclusive and concurrent jurisdiction conferred upon the courts created by that law were clearly distinguished and marked; showing that, in the opinion of that body, it was not sufficient to vest an exclusive jurisdiction, where it was deemed proper, merely by a grant of jurisdiction generally. In particular, this law grants exclusive jurisdiction to the circuit courts of all crimes and offenses cognizable under the authority of the United States, except where the laws of the United States should otherwise provide; and this will account for the proviso in the act of the 24th of February, 1807, ch. 75, concerning the forgery of the notes of the Bank of the United States, "that nothing in that act contained should be construed to deprive the courts of the individual States of jurisdiction under the laws of the several states over offenses made punishable by that act." A similar proviso is to be found in the act of the **27\*** 21st of April, 1806, ch. 49, concerning the counterfeiters of the current coin of the United States. It is clear that, in the opinion of Congress, this saving was necessary in order to authorize the exercise of concurrent jurisdiction by the state courts over those offenses; and there can be very little doubt but that this opinion was well founded. The ju-

diciary act had vested in the federal courts exclusive jurisdiction of all offenses cognizable under the authority of the United States, unless where the laws of the United States should otherwise direct. The states could not, therefore, exercise a concurrent jurisdiction in those cases, without coming into direct collision with the laws of Congress. But by these savings Congress did provide that the jurisdiction of the federal courts in the specified cases should not be exclusive; and the concurrent jurisdiction of the state courts was instantly restored, so far as, under state authority, it could be exercised by them.

There are many other acts of Congress which permit jurisdiction over the offenses therein described, to be exercised by state magistrates and courts; not, I presume, because such permission was considered to be necessary under the constitution, in order to vest a concurrent jurisdiction in those tribunals; but because, without it, the jurisdiction was exclusively vested in the national courts by the judiciary act, and consequently could not be otherwise exercised by the state courts. For I hold it to be perfectly clear that Congress cannot confer jurisdiction upon any courts but such as exist under the constitution and laws of the United States, although the state courts may **\*28** exercise jurisdiction on cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal courts.

What, then, is the real object of the law of Pennsylvania which we are considering? I answer, to confer authority upon a state court-martial to enforce the laws of the United States against delinquent militia-men, who had disobeyed the call of the President to enter into the service of the United States; for, except the provisions for vesting this jurisdiction in such a court, this act is, in substance, a re-enactment of the acts of Congress, as to the description of the offense, the nature and extent of the punishment, and the collection and appropriation of the fines imposed.

Why might not this court-martial exercise the authority thus vested in it by this law? As to crimes and offenses against the United States, the law of Congress had vested the cognizance of them exclusively in the federal courts. The state courts, therefore, could exercise no jurisdiction whatever over such offenses, unless where, in particular cases, other laws of the United States had otherwise provided; and wherever such provision was made, the claim of exclusive jurisdiction to the particular cases was withdrawn by the United States, and the concurrent jurisdiction of the state courts was *eo instanti* restored, not by way of grant from the national government, but by the removal of a disability before imposed upon the state tribunals.

But military offenses are not included in the act of Congress, conferring jurisdiction upon the circuit and district courts; no person has **\*29** ever contended that such offenses are cognizable before the common law courts. The militia laws have, therefore, provided, that the offense of disobedience to the President's call upon the militia shall be cognizable by a court-martial of the United States; but an exclusive cognizance is not conferred upon that court, as it had been upon the common law courts as to other

1.—Letters of Publius, or The Federalist, No. 8 Wheat. 5.

offenses, by the judiciary act. It follows, then, as I conceive, that jurisdiction over this offense remains to be concurrently exercised by the national and state courts-martial, since it is authorized by the laws of the state, and not prohibited by those of the United States. Where is the repugnance of the one law to the other? The jurisdiction was clearly concurrent over militia-men, not engaged in the service of the United States; and the acts of Congress have not disturbed this state of things, by asserting an exclusive jurisdiction. They certainly have not done so in terms; and I do not think that it can be made out by any fair construction of them. The act of 1795 merely declares that this offense shall be tried by a court-martial. This was clearly not exclusive; but, on the contrary, it would seem to import that such court might be held under national, or state authority.

The act of 1814 does not render the jurisdiction necessarily exclusive. It provides that courts-martial for the trial of militia, drafted and called forth, shall, when necessary, be appointed, held, and conducted, in the manner prescribed by the rules of war.

If the mere assignment of jurisdiction to a **30\*** particular \*court does not necessarily render it exclusive, as I have already endeavored to prove, then it would follow that this law can have no such effect; unless, indeed, there is a difference in this respect between the same language, when applied to military, and to civil courts; and if there be a difference, I have not been able to perceive it. But the law uses the expression "when necessary." How is this to be understood? It may mean, I acknowledge, whenever there are delinquents to try; but, surely, if it import no more than this, it was very unnecessarily used, since it would have been sufficient to say that courts-martial for the trial of militia called into service should be formed and conducted in the manner prescribed by the law. The act of 1795 had declared who were liable to be tried, but had not said with precision before what court the trial should be had. This act describes the court; and the two laws being construed together, would seem to mean that every such delinquent as is described in the act of 1795 should pay a certain fine, to be determined and adjudged by a court-martial, to be composed of militia officers, to be appointed and conducted in the manner prescribed by the articles of war. These words, when necessary, have no definite meaning, if they are confined to the existence of cases for trial before the court. But if they be construed (as I think they ought to be) to apply to trials rendered necessary by the omission of the states to provide for state courts-martial to exercise a jurisdiction in the case, or of such courts to take cognizance of them, when so authorized, they have an important **31\*** and a useful \*meaning. If the state court-martial proceeds to take cognizance of the cases, it may not appear necessary to the proper officer in the service of the United States to summon a court to try the same cases; if they do not, or for want of authority cannot try them, then it may be deemed necessary to convene a court-martial under the articles of war, to take and to exercise the jurisdiction.

There are two objections which were made

by the plaintiff's counsel, to the exercise of jurisdiction in this case, by the state court-martial, which remain to be noticed.

1. It was contended, that if the exercise of this jurisdiction be admitted, that the sentence of the court would either oust the jurisdiction of the United States court-martial or might subject the accused to be twice tried for the same offense. To this I answer, that, if the jurisdiction of the two courts be concurrent, the sentence of either court, either of conviction or acquittal, might be pleaded in bar of the prosecution before the other, as much so as the judgment of a state court, in a civil case of concurrent jurisdiction, may be pleaded in bar of an action for the same cause, instituted in a circuit court of the United States.

Another objection is, that if the state court-martial had authority to try these men, the governor of that state, in case of conviction, might have pardoned them. I am by no means satisfied that he could have done so; but if he could, this would only furnish a reason why Congress should vest the jurisdiction in these cases exclusively in a court-martial acting under the authority of the United States.

\*Upon the whole, I am of opinion, after **[32]** the most laborious examination of this delicate question, that the state court-martial had a concurrent jurisdiction with the tribunal pointed out by the acts of Congress to try a militia-man who had disobeyed the call of the President, and to enforce the laws of Congress against such delinquent; and that this authority will remain to be so exercised until it shall please Congress to vest it exclusively elsewhere, or until the state of Pennsylvania shall withdraw from their court-martial the authority to take such jurisdiction. At all events, this is not one of those clear cases of repugnance to the constitution of the United States where I should feel myself at liberty to declare the law to be unconstitutional; the sentence of the court *coram non judice*, and the judgment of the Supreme Court of Pennsylvania erroneous on these grounds.

Two of the judges are of opinion that the law in question is unconstitutional, and that the judgment below ought to be reversed.

The other judges are of opinion that the judgment ought to be affirmed; but they do not concur in all respects in the reasons which influence my opinion.

Mr. Justice JOHNSON. It is not very easy to form a distinct idea of what the question in this case really is. An individual having offended against a law of his own state, has been cited before a court constituted under the laws of that state, and there convicted and fined. His complaint is, that his offense was an \*offense against the laws of the United **[33]** States, that he is liable to be punished under those laws, and cannot, therefore, be constitutionally punished under the laws of his own state.

If any right secured to him under the state constitution has been violated, it is not our affair. His complaint before this court must be either that some law or some constitutional provision of the United States, has been violated in this instance; or he must seek else-

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where for redress. This court can relieve him only upon the supposition that the state law under which he has been fined is inconsistent with some right secured to him, or secured to the United States, under the constitution. Now, the United States complain of nothing; the act of Pennsylvania was a candid, spontaneous, ancillary effort in the service of the United States; and all the plaintiff in error has to complain of is, that he has been punished by a state law, when he ought to have been punished under a law of the United States, which he contends he has violated.

I really have not been able to satisfy myself that it is any case at all for the cognizance of this court; but from respect for the opinion of others, I will proceed to make some remarks on the questions which have been raised in the argument.

Why may not the same offense be made punishable both under the laws of the states and of the United States? Every citizen of a state owes a double allegiance; he enjoys the protection and participates in the government of both the state and the United States. It is **34\*** obvious that in those cases in which the United States may exercise the right of exclusive legislation it will rest with Congress to determine whether the general government shall exercise the right of punishing exclusively, or leave the states at liberty to exercise their own discretion. But where the United States cannot assume, or where they have not assumed, this exclusive exercise of power, I cannot imagine a reason why the states may not also, if they feel themselves injured by the same offense, assert their right of inflicting punishment also. In cases affecting life or member, there is an express restraint upon the exercise of the punishing power. But it is a restriction which operates equally upon both governments; and according to a very familiar principle of construction, this exception would seem to establish the existence of the general right. The actual exercise of this concurrent right of punishing is familiar to every day's practice. The laws of the United States have made many offenses punishable in their courts which were and still continue punishable under the laws of the states. Witness the case of counterfeiting the current coin of the United States, under the act of April 21st, 1806, in which the state right of punishing is expressly recognized and preserved. Witness also the crime of robbing the mail on the highway, which is unquestionably cognizable as highway-robbery under the state laws, although made punishable under those of the United States.

With regard to militia-men ordered into service, there exists a peculiar propriety in leaving them subject to the coercive regulations of **35\*** both governments. \*The safety of each is so worked up with that of all the states, and the honor and peculiar safety of a particular state may so often be dependent upon the alacrity with which her citizens repair to the field, that the most serious mortifications and evils might result from refusing the right of lending the strength of the state authority to quicken their obedience to the calls of the United States.

But, it is contended, if the states can at all legislate or adjudicate on the subject, they may  
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affect to aid, when their real object is nothing less than to embarrass the progress of the general government.

I acknowledge myself at a loss to imagine how this could ever be successfully attempted. Opposition, whether disguised or real, is the same thing. It is true, if we could admit that an acquittal in the state courts could be pleaded in bar to a prosecution in the courts of the United States, the evil might occur. But this is a doctrine which can only be maintained on the ground that an offense against the laws of the one government, is an offense against the other government; and can surely never be successfully asserted in any instances but those in which jurisdiction is vested in the state courts by statutory provisions of the United States. In contracts, the law is otherwise. The decision of any court of competent jurisdiction is final, whatever be the government that gives existence to the court. But crimes against a government are only cognizable in its own courts, or in those which derive their right of holding jurisdiction from the offended government.

\*Yet, were it otherwise, I cannot perceive with what correctness we can, from the possible abuse of a power, reason away the actual possession of it in the states. Such considerations were only proper for the ears of those who established the actual distribution of powers between the states and the United States. The absurdities that might grow out of an affected co-operation in the states, with a real view to produce embarrassment, furnish the best guaranty against the probability of its ever being attempted, and the surest means of detecting and defeating it. We may declare defects in the constitution, without being justly chargeable with creating them; but if they exist, it is not for us to correct them. In the present instance, I believe the danger imaginary, and if it is not, it must pass *ad alium examen*.

But whatever be the views entertained on this question, I am perfectly satisfied that the individual in this case was not amenable to any law of the United States. Both that there was no law of the United States that reached his case, and that there was nothing done or intended to be done by the government of the United States, to bring him within their laws, before he reached the place of rendezvous.

It is obvious that there are two ways by which the militia may be called into service; the one is under state authority, the other under authority of the United States. The power of Congress over the militia is limited but by two reservations in favor of the states—viz., the right of officering and that of training them. When distributed by the states under their own officers the general government have the right, if they choose to exercise it, of **37\*** designating both the officer and private who shall serve, and to call him forth or punish him for not coming. But the possession of this power, or even the passing of laws in the exercise of it, does not preclude the general government from leaning upon the state authority, if they think proper, for the purpose of calling the militia into service. They may command or request; and in the case before us, they obviously confined themselves to the

latter mode. Indeed, extensive as their power over the militia is, the United States are obviously intended to be made in some measure dependent upon the states for the aid of this species of force. For, if the states will not officer or train their men; there is no power given to Congress to supply the deficiency.

The method of calling forth the militia by requisition is, it is believed, the only one hitherto resorted to in any instance. Being partially dependent upon the integrity of the states, the general government has hitherto been satisfied to rest wholly on that integrity, and, except in very few instances, has never been disappointed. The compulsory power has been in its practice held in reserve, as only intended for use when the other shall fail. Historically it is known that the act of 1795 was passed with a view to a state of things then existing in the interior of Pennsylvania, when it became probable that the President of the United States would have to exert the authority of the general government immediately on detached portions of the officers or militia of the Union, to aid in the execution of the laws **38\***] of \*the United States. And instances may still occur in which the exercise of that power may become necessary for the same purpose. But, whenever bodies of militia have been called forth for the purposes of general defense, it is believed, that in no instance has it been done otherwise than by requisition, the only mode practiced toward the states from the commencement of the revolution to the present day. That it was the mode intended to be pursued in this case, is obvious from the perusal of the letter of the Secretary of War to the Governor of Pennsylvania.<sup>1</sup> The words made **39\***] use of are: "The President \*has deemed it advisable to invite the executives of certain states to organize," &c. Words which no military man would construe into a military command.

It is true that this letter also refers to the acts of 1795 and 1814, as the authority under which the requisition is made, and the act of 1795 authorizes the President to issue his order for that purpose; but this makes no difference in the case; it only leaves him the power of proceeding by order if he thinks proper, without enjoining that mode, or depriving him of the option to pursue the other mode as long as the principles upon which the states acted were such as to render it advisable. Or, if the construction be otherwise, the result only will be that the President has not pursued the mode

pointed out by that act, and, therefore, has not brought the case within it.

But suppose the letter of the Secretary of War was intended by him to operate as an order (although I cannot believe that Congress ever intended an order should issue immediately to the governor of a \*state), how is this [**\*40**] individual made punishable under the acts of 1795 and 1814?

The doctrine must be admitted, that Congress might, if they thought proper, have authorized the issuing of the President's order even to the Governor. For when the constitution of Pennsylvania makes her Governor commander-in-chief of the militia, it must subject him in that capacity (at least when in actual service) to the orders of him who is made commander-in-chief of all the militia of the Union. Yet if he is to be addressed in that capacity, and not as the general organ or representative of the state sovereignty, surely he has a right to be apprised of it. But is he, then, to be charged as a delinquent? Where is the law that has provided, or can provide, a court-martial for his trial? And where is the law that would oblige him to consider such a letter as this a military order? It would then seem somewhat strange, if he, to whom this letter was immediately addressed, received no order from the President, that one to whom his order was transmitted through fifty grades, should yet be adjudged to have disobeyed the President's order.

But the situation of the private in this case is still more favorable. It must be recollected we are now construing a penal statute; and the criminality of the person charged depends altogether on the 5th section of the act of 1795. The 1st section of the act of 1814 makes no difference in this particular, inasmuch as it does no more than create a tribunal for the trial of crimes, and supposes the commission of such crimes to be against the provisions of some existing law. The command of the President, then, \*I hold to have been indispensable [**\*41**] to the creation of an offense under the 5th section of this act. But how the President could, in the actual state of things, have issued such a command to the private, consistently with the provisions of this act, it is not easy to show. For, by the section immediately preceding the 5th, it is provided, "That no officer, non-commissioned officer, or private of the militia, shall be compelled to serve more than three months, after his arrival at the place of rendezvous, in any one year, nor more than in due rotation with

1.—Letter from the Secretary of War, to the Governor of Pennsylvania.

"WAR DEPARTMENT, July 4, 1814.

"SIR: The late pacification in Europe offers to the enemy a large disposable force, both naval and military, and with it the means of giving to the war here a character of new and increased activity and extent.

"Without knowing, with certainty, that such will be its application, and still less that any particular point or points will become objects of attack; the President has deemed it advisable, as a measure of precaution, to strengthen ourselves on the line of the Atlantic; and (as the principal means of doing this will be found in the militia) to invite the executives of certain states to organize and hold in readiness for immediate service a corps of ninety-three thousand five hundred men, under the laws

of the 28th of February, 1795, and the 18th of April, 1814.

"The inclosed detail will show your Excellency what, under this requisition, will be the quota of Pennsylvania. As far as volunteer uniform companies can be found, they will be preferred. The expediency of regarding (as well in the designations of the militia as of their places of rendezvous) the points, the importance or exposure of which will be most likely to attract the views of the enemy, need but be suggested.

"A report of the organization of your quota, when completed, and of its place or places of rendezvous, will be acceptable.

(Signed)

"I have the honor to be, &c.

"JOHN ARMSTRONG.

"P. S.—The points to be defended, by the quota from Pennsylvania, will be the shores of the Delaware, Baltimore, and this city."



every other able-bodied man of the same rank in the battalion to which he belongs." Now, what was meant by due rotation? and how was the President's order to reach the individual without previously establishing this due rotation? I admit that this rotation may have been established through the aid of a state law; but it became indispensable that such law should have been authorized or adopted by some law of Congress; and there exists no law that I know of, either authorizing or requiring the designation or distribution by the states, which this law contemplates. On a call of the whole militia, there would have been no difficulty; but in the case of a partial call, some designation legally known to the President became indispensable, before he could issue his orders with that precision which may well be required in a criminal prosecution. And this probably operated as forcibly as considerations of comity, in determining the government to proceed by the ancient mode of requisition, instead of addressing the executive of Pennsylvania in the language of command and authority; \*if, indeed (what I will not readily admit), the act was ever intended to apply to the case of an immediate order to the executive.

Pursuing the same course of reasoning a little further, we shall also be led to the conclusion that neither could there be a court constituted by a law of the United States for the trial of this offender. I hold it unquestionable that whenever, in the statutes of any government, a general reference is made to law, either implicitly or expressly, that it can only relate to the laws of the government making this reference. Now, the only act which it is pretended vests any court with jurisdiction of offenses created by the 5th section of the act of 1795, as to persons not yet mustered into service, is the 1st section of the act of 1814. The 4th and 6th sections of the act of 1795, taken together, furnish courts-martial for the trial of offenses committed by militia employed by the United States; and the act of 1814, I admit, was intended to act upon the offenses of those who were not yet in actual service, but had been called into service. Can it, on any legal principle, be so construed as to answer the end proposed? The words are, "That courts-martial for the trial of militia, drafted, detached and called forth for the service of the United States, shall be appointed," &c. But how drafted, detached, and called forth? Under the laws of the United States, or of Russia? For the laws of the states, unless adopted by Congress, are no more the laws of the United States than those of any foreign power. There is nothing in this act, or any other act, that designates the drafting, and detaching, or **43** \*calling forth, there expressed as the grounds of jurisdiction, as a drafting, &c., under the laws of a state. Nor would it have had such a drafting, &c., in view, if it was intended to provide for punishing offenses against the provisions of the act of 1795; for, in that act it is required to be a calling forth by the President, not by state authority. And this suggests the only reasonable exposition that can be given it, consistent with the principle, that it must be a drafting, detaching, and calling forth under laws of the United States. If Wheat. 5.

we can find a sensible and consistent exposition, we are bound to adopt it as the only one intended.

I have no doubt, that under the powers given the President by the act of 1795, and under the restriction contained in the 4th section of that act, it was in the power of the President to have issued orders to the Adjutant-General of Pennsylvania, to bring into the field this quota of militia, and to have prescribed the manner in which they should be drafted and detached; and had this been done, everything would have been sensible and consistent, and the exigencies of both these laws would have been satisfied. It is obvious that the act of 1814 recognizes the construction which makes the drafting and detaching, as necessary to precede the calling forth; and if the power to call forth existed in the President alone, it would seem that the other subordinate, but necessary ancillary powers to which this act has relation, must have existed in him also, and could be exercised by him, or under his authority only. Under this view of the subject, I am of \*opinion that a court-martial constituted [**\*44** under this act of April 18th, 1814, could not legally have tried this individual, because he was not drafted and detached under the meaning of that act, taken in connection with the act of 1795. Neither, in my opinion, was the calling forth such as was in the contemplation of that act. In addition to the reasons already given for this opinion, exists this obvious consideration. The calling forth authorized by that act is to be expressed by an order from the President. It is disobedience to such an order alone that is made punishable by that act. Now, though it be unquestionable that this order may be communicated through any proper organ, yet it must be communicated to the individual as an order from the President, or he is not brought within the enactment of the law, nor put on his guard against incurring the penalty. But, from first to last, the whole case makes out an offense against the orders of the Governor of Pennsylvania. It does not appear that the order communicated to the individual was made to assume the form of an order from the President; and how, in that case, he could have been held guilty of having violated an order from the President, it is not easy to conceive.

For these reasons I am very clearly of opinion that neither the United States nor the plaintiff in error can complain of the infraction of any constitutional right, if the state did constitute a court for trying offenses against the laws of the United States, or ingraft those laws into its own code, and make offenses against the United States punishable in its courts; that if the individual has any cause of complaint, \*it is between him and his [**\*45** own state government. And that even were it otherwise, the plaintiff in error does not make out such a case here; inasmuch as the general government could not have had it in contemplation to bring into operation the penal provisions of the act of 1795, and if they had, that they did not pursue the steps indispensable for that purpose; therefore, that the court-martial by which the plaintiff in error was tried, was really acting wholly under the authority of state laws, punishing state offenses.

But it is contended, that if the states do possess this power over the militia, they may abuse it. This is a branch of the exploded doctrine that within the scope in which Congress may legislate the states shall not legislate. That they cannot, when legislating within that ceded region of power, run counter to the laws of Congress, is denied by no one; but, as I before observed, to reason against the exercise of this power from the possible abuse of it, is not for a court of justice. When instances of this opposition occur, it will be time enough to meet them. The present was an instance of the most honorable and zealous co-operation with the general government. The legislature of Pennsylvania, influenced, no doubt, by views similar to those in which I have presented the subject, saw the defects in the means of coercing her citizens into the service; and, unwilling to bear the imputation of lukewarmness in the common cause, legislated on the occasion just as far as the laws of the United States were defective, or not brought into operation. And to vindicate her disinterestedness, she even **46\***] gratuitously \*surrenders to the United States the fines to be inflicted. To have paused on legal subtleties with the enemy at her door, or to have shrunk from duty under shelter of pretexts which she could remove, would have been equally inconsistent with her character for wisdom and for candor.

I will make one further observation in order to prevent myself from being misunderstood. I have observed that the governors of states, as military commanders, must be considered as subordinate to the President. I do not mean to intimate, nor have I the least idea, that the act of 1795 gives authority to the President to issue an order to a governor in that capacity. I hold the opinion to be absurd; for he comes not within the idea of a militia officer in the language of that act. If he is so, what is his grade? He will not be included under any title of rank, known to the laws of the United States, from the highest to the lowest. And how is he to be tried? What is his pay? what his punishment? An act which authorizes an order for militia, obviously authorizes a requisition. And if the purposes of the general government could as well be subserved by depending on the state authority for calling out the militia, there was no reason against resorting to that authority for the purpose. But the power of ordering out the militia is an alternative given to the President when the other is too circuitous or likely to fail. In that case, the President may address himself to the executive; and having obtained through him the necessary information relative to the distribution and organization of the militia, may pro- **47\***] ceed, \*under his own immediate orders, to draft and detach the numbers wanted. And thus everything in the act become sensible, consistent, and adequate to the purposes in view, with the sole defect intended to have been remedied by the 1st section of the act of 1814.

In this case, it will be observed that there is no point whatever decided, except that the fine was constitutionally imposed upon the plaintiff in error. The course of reasoning by which the judges have reached this conclusion are various, coinciding in but one thing, viz., that

there is no error in the judgment of the state court of Pennsylvania.

Mr. Justice STORY. The only question which is cognizable by this court upon this voluminous record, arises from a very short paragraph in the close of the bill of exceptions. It there appears that the plaintiff prayed the State Court of Common Pleas to instruct the jury, that the first, second and third paragraphs of the 21st section of the statute of Pennsylvania of the 28th of March, 1814, "so far as they related to the militia called into the service of the United States, under the laws of Congress, and who failed to obey the orders of the President of the United States, are contrary to the constitution of the United States and the laws of Congress made in pursuance thereof, and, are, therefore, null and void." The court instructed the jury that these paragraphs were not contrary to the constitution or laws of the United States, and were, therefore, not null and void. This opinion has been \*affirmed [**48** by the highest state tribunal of Pennsylvania, and judgment has been there pronounced in pursuance of it in favor of the defendant. The cause stands before us upon a writ of error from this last judgment; and the naked question for us to decide is, whether the paragraphs alluded to are repugnant to the constitution or laws of the United States; if so, the judgment must be reversed; if otherwise, it ought to be affirmed.

Questions of this nature are always of great importance and delicacy. They involve interests of so much magnitude, and of such deep and permanent public concern, that they cannot but be approached with uncommon anxiety. The sovereignty of a state in the exercise of its legislation is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the national government beyond what the people have granted by the constitution; and, on the other hand, we are bound to support that constitution as it stands, and to give a fair and rational scope to all the powers which it clearly contains.

The constitution containing a grant of powers in many instances similar to those already existing in the state governments, and some of these being of vital importance also to state authority and state legislation, it is not to be admitted that a mere grant of such powers in affirmative terms to Congress, does, \**per se*, [**49** transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the states, unless where the constitution has expressly, in terms, given an exclusive power to Congress, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states. The example of the first class is to be found in the exclusive legislation delegated to Congress over places purchased by the consent of the legislature of the state in which the same shall be, for forts, ar-



senals, dock-yards, &c.; of the second class, the prohibition of a state to coin money or emit bills of credit; of the third class, as this court have already held, the power to establish an uniform rule of naturalization,<sup>1</sup> and the delegation of admiralty and maritime jurisdiction.<sup>2</sup> In all other cases not falling within the classes already mentioned, it seems unquestionable that the states retain concurrent authority with Congress, not only upon the letter and spirit of the eleventh amendment of the constitution, but upon the soundest principles of general reasoning. There is this reserve, however, that in cases of concurrent authority, where the laws of the states and of the Union are in direct and manifest collision on the same subject, those of the Union being "the supreme law of the land," are of paramount authority, and the state laws, so far, and so far only, as such incompatibility exists, must necessarily yield.

Such are the general principles by which my judgment is guided in every investigation on constitutional points. I do not know that they have ever been seriously doubted. They commend themselves by their intrinsic equity, and have been amply justified by the opinions of the great men under whose guidance the constitution was framed, as well as by the practice of the government of the Union. To desert them would be to deliver ourselves over to endless doubts and difficulties; and probably to hazard the existence of the constitution itself. With these principles in view, let the question now before the court be examined.

The constitution declares that Congress shall have power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;" and "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

It is almost too plain for argument, that the power here given to Congress over the militia is of a limited nature, and confined to the objects specified in these clauses; and that in all other respects, and for all other purposes, the militia are subject to the control and government of the state authorities. Nor can the reservation to the states of the appointment of the officers and authority of the training the militia according to the discipline prescribed by Congress, be justly considered as weakening this conclusion. That reservation constitutes an exception merely from the power given to Congress "to provide for organizing, arming, and disciplining the militia"; and is a limitation upon the authority, which would otherwise have devolved upon it as to the appointment of officers. But the exception from a given power cannot, upon any fair reasoning, be considered as an enumeration of all the powers which belong to the states over the militia. What those powers are must depend upon their own constitution; and what is not

taken away by the constitution of the United States, must be considered as retained by the states or the people. The exception, then, ascertains only that Congress have not, and that the states have, the power to appoint the officers of the militia, and to train them according to the discipline prescribed by Congress. Nor does it seem necessary to contend that the power "to provide for organizing, arming, and disciplining the militia" is exclusively vested in Congress. It is merely an affirmative power, and if not in its own nature incompatible with the existence of a like power in the states, it may well leave a concurrent power in the latter. But when once Congress has carried this power into effect, its laws for the organization, arming, and discipline of the militia, are the supreme law of the land; and all interfering state regulations must necessarily be suspended in their operation. It would certainly seem reasonable, that in the absence of all interfering provisions by Congress on the subject, the states should have authority to organize, arm, and discipline their own militia. The general authority retained by them over the militia would seem to draw after it these, as necessary incidents. If Congress should not have exercised its own power, how, upon any other construction than that of a concurrent power, could the states sufficiently provide for their own safety against domestic insurrections, or the sudden invasion of a foreign enemy? They are expressly prohibited from keeping troops or ships of war in time of peace; and this, undoubtedly, upon the supposition, that in such cases the militia would be their natural and sufficient defense. Yet what would the militia be without organization, arms, and discipline? It is certainly not compulsory upon Congress to exercise its own authority upon this subject. The time, the mode, and the extent, must rest upon its means and sound discretion. If, therefore, the present case turned upon the question, whether a state might organize, arm, and discipline its own militia in the absence of, or subordinate to, the regulations of Congress, I am certainly not prepared to deny the legitimacy of such an exercise of authority. It does not seem repugnant in its nature to the grant of a like paramount authority to Congress; and if not, then it is retained by the states. The fifth amendment to the constitution, declaring that "a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed," may not, perhaps, be thought to have any important bearing on this point. If it have, it confirms and illustrates, rather than impugns, the reasoning already suggested.

But Congress have also the power to provide "for governing such part of the militia as may be employed in the service of the United States." It has not been attempted in argument to establish that this power is not exclusively in Congress, or that the states have a concurrent power of governing their own militia when in the service of the Union. On the contrary, the reverse has been conceded both here and before the other tribunals, in which this cause has been so ably and learnedly discussed. And there certainly are the strongest reasons for this construction. When

1.—*Chirac v. Chirac*, 2 Wheat. 259, 269.

2.—*Martin v. Hunter*, 1 Wheat. 304, 337; and see *The Federalist*, No. 32.

Wheat. 5.

the militia is called into the actual service of the United States, by which I understand actual employment in service, the constitution declares that the President shall be the commander-in-chief. The militia of several states may, at the same time, be called out for the public defense; and to suppose each state could have an authority to govern its own militia in such cases, even subordinate to the regulations of Congress, seems utterly inconsistent with that unity of command and action on which the success of all military operations must essentially depend. There never could be a stronger case put from the argument of public inconvenience, against the adoption of such a doctrine. It is scarcely possible that any interference, however small, of a state under such circumstances in the government of the militia, would not materially embarrass, and directly, or indirectly, impugn the authority of the Union. In most cases there would be an utter **54\*** repugnancy. \*It would seem, therefore, that a rational interpretation must construe this power as exclusive in its own nature, and belonging solely to Congress.

The remaining clause gives Congress power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." Does this clause vest in Congress an exclusive power, or leave to the states a concurrent power to enact laws for the same purposes? This is an important question, bearing directly on the case before us, and deserves serious deliberation. The plaintiff contends that the power is exclusive in Congress; the defendant, that it is not.

In considering this question, it is always to be kept in view that the case is not of a new power granted to Congress where no similar power already existed in the states. On the contrary, the states, in virtue of their sovereignty, possessed general authority over their own militia; and the constitution carved out of that a specific power in certain enumerated cases. But the grant of such a power is not necessarily exclusive, unless the retaining of a concurrent power by the states be clearly repugnant to the grant. It does not strike me that there is any repugnancy in such concurrent power in the states. Why may not a state call forth its own militia in aid of the United States, to execute the laws of the Union, or suppress insurrections, or repel invasions? It would certainly seem fit that a state might so do, where the insurrection or invasion is within its own territory, and directed against its own existence or authority; and yet these are cases to which the **55\*** power of Congress pointedly applies. And the execution of the laws of the Union within its territory may not be less vital to its rights and authority than the suppression of a rebellion, or the repulse of an enemy. I do not say that a state may call forth, or claim under its own command, that portion of its militia which the United States have already called forth, and hold employed in actual service. There would be a repugnancy in the exercise of such an authority under such circumstances. But why may it not call forth, and employ the rest of its militia in aid of the United States, for the constitutional purposes? It could not clash with the exercise of the authority confided to Congress; and yet that it

must necessarily clash with it in all cases, is the sole ground upon which the authority of Congress can be deemed exclusive. I am not prepared to assert that a concurrent power is not retained by the states to provide for the calling forth its own militia as auxiliary to the power of Congress in the enumerated cases. The argument of the plaintiff is, that when a power is granted to Congress to legislate in specific cases, for purposes growing out of the Union, the natural conclusion is, that the power is designed to be exclusive; that the power is to be exercised for the good of the whole, by the will of the whole, and consistent with the interests of the whole; and that these objects can nowhere be so clearly seen, or so thoroughly weighed as in Congress, where the whole nation is represented. But the argument proves too much; and pursued to its full extent, it would establish that all the powers granted to Congress are \*exclusive, un- **[\*56]** less where concurrent authority is expressly reserved to the states. But assuming the states to possess a concurrent power on this subject, still the principal difficulty remains to be considered. It is conceded on all sides, and is, indeed, beyond all reasonable doubt, that all state laws on this subject are subordinate to those constitutionally enacted by Congress, and that if there be any conflict or repugnancy between them, the state laws to that extent are inoperative and void. And this brings us to a consideration of the actual legislation of Congress, and of Pennsylvania, as to the point in controversy.

In the execution of the power to provide for the calling forth of the militia, it cannot well be denied that Congress may pass laws to make its call effectual, to punish disobedience to its call, to erect tribunals for the trial of offenders, and to direct the modes of proceeding to enforce the penalties attached to such disobedience. In its very essence, too, the offense created by such laws must be an offense exclusively against the United States, since it grows solely out of the breach of duties due to the United States, in virtue of its positive legislation. To deny the authority of Congress to legislate to this extent, would be to deny that it had authority to make all laws necessary and proper to carry a given power into execution; to require the end, and yet deny the only means adequate to attain that end. Such a construction of the constitution is wholly inadmissible.

The authority of Congress being then unquestionable, let us see to what extent and in what \*manner it has been exercised. By **[\*57]** the act of the 28th of February, 1795, ch. 101, Congress have provided for the calling forth of the militia in the cases enumerated in the constitution. The first section provides, "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation, or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the state or states, most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his orders for that purpose to such officer or officers of the militia as he shall think proper." It then proceeds to make a provision, substantially the same, in cases of domestic insurrec-



tions; and in like manner, the second section proceeds to provide for cases where the execution of the laws is opposed or obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings. The fourth section provides, that "the militia employed in the service of the United States shall be subject to the same rules and articles of war as the troops of the United States." The fifth section (which is very material to our present purpose) provides, "that every officer, non-commissioned officer, or private of the militia, who shall fail to obey any of the orders of the President of the United States, in the cases before recited, shall forfeit a sum not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court-martial; and such officer shall, moreover, be liable to be cashiered by a sentence of a court-martial, and be incapacitated from holding a commission in the militia for a term not exceeding twelve months, at the discretion of the said court; and such non-commissioned officers and privates shall be liable to be imprisoned by a like sentence, on failure of payment of the fines adjudged against them, for one calendar month for every five dollars of such fine." The sixth section declares, "that courts-martial for the trial of militia, shall be composed of militia officers only." The seventh and eighth sections provide for the collection of the fines by the marshal and deputies, and for the payment of them when collected into the treasury of the United States.

The 2d section of the militia act of Pennsylvania, passed the 28th of March, 1814, provides, "that if any commissioned officer of the militia shall have neglected, or refused to serve, when called into actual service in pursuance of any order or requisition of the President of the United States, he shall be liable to the penalties defined in the act of Congress of the United States, passed on the 28th of February, 1795," and then proceeds to enumerate them; and then declares, "that each and every non-commissioned officer and private, who shall have neglected or refused to serve when called into actual service in pursuance of an order or requisition of the President of the United States, shall be liable to the penalties defined in the same act," and then proceeds to enumerate them. And to each clause is added, "or shall be liable to any penalty which may have been prescribed since the date of the passage of the said act, or which may hereafter be prescribed by any law of the United States." It then further provides, that "within one month after the expiration of the time for which any detachment of militia shall have been called into the service of the United States, by, or in pursuance of orders from the President of the United States, the proper brigade inspector shall summon a general, or a regimental court-martial, as the case may be, for the trial of such person or persons belonging to the detachment called out, who shall have refused or neglected to march therewith, or to furnish a sufficient substitute, or who, after having marched therewith, shall have returned without leave from his commanding officer, of which delinquents, the proper brigade inspector shall furnish to the said court-martial an accurate list. And as soon as the said court-martial

shall have decided in each of the cases which shall be submitted to their consideration, the president thereof shall furnish to the marshal of the United States, or to his deputy, and also to the comptroller of the treasury of the United States, a list of the delinquents fined, in order that the further proceedings directed to be had thereon by the laws of the United States may be completed."

It is apparent, from this summary, that each of the acts in question has in view the same objects—the punishment of any persons belonging to the militia of the state, who shall be called forth into the service of the United States by the President, and refuse to perform their duty. Both inflict the same penalties for the same acts of disobedience. In the act of 1795, it is the failure "to obey the orders of the President in any of the cases before recited;" and those orders are such as he is authorized to give by the first and second sections of the act, viz., to "call forth" the militia to execute the laws, to suppress insurrections and repel invasions. In the act of Pennsylvania, it is the neglect or refusal "to serve when called into actual service, in pursuance of any orders of the President," which orders can only be under the act of 1795. And to demonstrate this construction more fully, the delinquent is made liable to the penalties defined in the same act; and this, again, is followed by a clause varying the penalties so as to conform to those which from time to time may be inflicted by the laws of the United States for the same offense. So that there can be no reasonable doubt that the legislature of Pennsylvania meant to punish by its own courts-martial an offense against the United States created by their laws, by a substantial re-enactment of those laws in its own militia code.

No doubt has been here breathed of the constitutionality of the provisions of the act of 1795, and they are believed to be, in all respects, within the legitimate authority of Congress. In the construction, however, of this act, the parties are at variance. The plaintiff contends, that from the time of the calling forth of the militia by the President, it is to be considered as *ipso facto* "employed in the service of the United States," within the meaning of the constitution, and the act of 1795; and, therefore, to be exclusively governed by Congress. On the other hand, the defendant contends, that there is no distinction between the "calling forth," and the "employment in service" of the militia, in the act of 1795, both meaning actual mustering in service, or an effectual calling into service; that the states retain complete authority over the militia, notwithstanding the call of the President, until it is obeyed by going into service; that the exclusive authority of the United States does not commence until the drafted troops are mustered, and in the actual pay and service of the Union; and further, that the act of 1795 was never intended, by its language, to apply its penalties, except to militia in the latter predicament, leaving disobedience to the President's call to be punished by the states as an offense against state authority.

Upon the most mature reflection, it is my opinion that there is a sound distinction between the "calling forth" of the militia,

and their being in the "actual service" or "employment" of the United States, contemplated both in the constitution and acts of Congress. The constitution, in the clause already adverted to, enables Congress to provide for the government of such part of the militia "as may be employed in the service of the United States," and makes the President commander-in-chief of the militia, "when called into the actual service of the United States." If the former clause included the authority in Congress to call forth the militia, as being in virtue of the call of the President in actual service, there would certainly be no necessity for a distinct clause, authorizing it to provide for the calling forth of the militia; and the President would be commander-in-chief, not merely of the militia in actual service, but of the militia ordered **62\*** into service. \*The acts of Congress, also, aid the construction already asserted. The 4th section of the act of 1795 makes the militia "employed in the service of the United States" subject to the rules and articles of war; and these articles include capital punishments by courts-martial. Yet one of the amendments (art. 5) to "the constitution prohibits such punishments, "unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces," or in "the militia when in actual service, in time of war, or public danger." To prevent, therefore, a manifest breach of the constitution, we cannot but suppose that Congress meant (what, indeed, its language clearly imports), in the 4th section, to provide only for cases of actual employment. The act of the 2d of January, 1795, ch. 74, provides for the pay of the militia "when called into actual service," commencing it on the day of their appearance at the place of rendezvous, and allowing a certain pay for every fifteen miles travel from their homes to that place. The 97th article of the rules and articles of war (act of 10th of April, 1806, ch. 20) declares, that the officers and soldiers of any troops, whether militia or others, being mustered, and in the pay of the United States, shall, at all times, and in all places, "when joined, or acting in conjunction with the regular forces" of the United States, be governed by these articles, and shall be subject to be tried by courts-martial, in like manner with the officers and soldiers in the regular forces, save only that such courts-martial shall be composed entirely of militia officers. And the act of the **63\*** 18th of \*April, 1814, ch. 141, supplementary to that of 1795, provides for like courts-martial for the trial of militia, drafted, detached, and called forth for the service of the United States, "whether acting in conjunction with the regular forces or otherwise." All these provisions for the government, payment, and trial of the militia, manifestly contemplate that the militia are in actual employment and service, and not merely that they have been "called forth," or ordered forth, and had failed to obey the orders of the President. It would seem almost absurd to say that these men who have performed no actual service are yet to receive pay; that they are "employed" when they refuse to be employed in the public service; that they are "acting" in conjunction with the regular forces or otherwise, when they are not embodied to act at all; or that they are

subject to the rules and articles of war as troops organized and employed in the public service, when they have utterly disclaimed all military organization and obedience. In my judgment, there are the strongest reasons to believe, that by employment "in the service," or, as it is sometimes expressed, "in the actual service" of the United States, something more must be meant than a mere calling forth of the militia. That it includes some acts of organization, mustering, or marching done or recognized, in obedience to the call in the public service. The act of 1795 is not in its terms compulsive upon any militia to serve, but contemplates an option in the person drafted, to serve or not to serve; and if he pay the penalty inflicted \*by the [**64** law, he does not seem bound to perform any military duties.

Besides, the terms "call forth" and "employed in service," cannot, in any appropriate sense, be said to be synonymous. To suppose them used to signify the same thing in the constitution, and acts of Congress, would be to defeat the obvious purposes of both. The constitution, in providing for the calling forth of the militia, necessarily supposes some act to be done before the actual employment of the militia; a requisition to perform service, a call to engage in a public duty. From the very nature of things, the call must precede the service; and to confound them is to break down the established meaning of language, and to render nugatory a power without which the militia can never be compelled to serve in defense of the Union. For of what constitutional validity can the act of 1795 be, if the sense be not what I have stated? If Congress cannot provide for a preliminary call, authorizing and requiring the service, how can it punish disobedience to that call? The argument that endeavors to establish such a proposition is utterly without any solid foundation. We do not sit here to fritter away the constitution upon metaphysical subtleties.

Nor is it true that the act of 1795 confines its penalties to such of the militia as are in actual service, leaving those who refuse to comply with the orders of the President to the punishment that the state may choose to inflict for disobedience. On the contrary, if there be any certainty in language, the 5th section applies exclusively to those of the militia \*who [**65** are "called forth" by the President, and fail to obey his orders, or, in other words, who refuse to go into the actual service of the United States. It inflicts no penalty in any other case; and it supposes, and justly, that all the cases of disobedience of the militia, while in actual service, were sufficiently provided for by the 4th section of the act, they being thereby subjected to the rules and articles of war. It inflicts the penalty, too, as we have already seen, in the identical cases, and none other, to which the paragraphs of the militia act of Pennsylvania now in question pointedly address themselves; and in the identical case for which the present plaintiff was tried, convicted and punished, by the state court-martial. So that if the defendant's construction of the act of 1795 could prevail, it would not help his case. All the difficulties as to the repugnancy between the act of Congress and of Pennsylvania, would still remain, with the additional difficulty, that

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the court would be driven to say, that the mere act of calling forth put the militia, *ipso facto*, into actual service, and so placed them exclusively under the government of Congress.

In the remarks which have already been made, the answer to another proposition stated by the defendant is necessarily included. The offense to which the penalties are annexed in the 4th section of the act of 1795, is not an offense against state authority, but against the United States, created by a law of Congress, in virtue of a constitutional authority, and punishable by a tribunal which it has selected, and which it can change at its pleasure.

**66\*]** \*That tribunal is a court-martial; and the defendant contends, that as no explanatory terms are added, a state court-martial is necessarily intended, because the laws of the Union have not effectually created any court-martial, which, sitting under the authority of the United States, can in all cases try the offense. It will at once be seen that the act of 1795 has not expressly delegated cognizance of the offense to a state court-martial, and the question naturally arises, in what manner, then, can it be claimed? When a military offense is created by an act of Congress to be punished by a court-martial, how is such an act to be interpreted? If a similar clause were in a state law, we should be at no loss to give an immediate and definite construction to it, viz., that it pointed to a state court-martial—and why? Because the offense being created by state legislation, to be executed for state purposes, must be supposed to contemplate in its execution such tribunals as the state may erect, and control, and confer jurisdiction upon. A state legislature cannot be presumed to legislate as to foreign tribunals; but must be supposed to speak in reference to those which may be reached by its own sovereignty. Precisely the same reason must apply to the construction of a law of the United States. The object of the law being to provide for the exercise of a power vested in Congress by the constitution, whatever is directed to be done must be supposed to be done, unless the contrary be expressed, under the authority of the Union. When, then, a court-martial is spoken of in general terms in the act of 1795, **67\*]** the reasonable interpretation \*is, that it is a court-martial to be organized under the authority of the United States—a court-martial whom Congress may convene and regulate. There is no pretense to say that Congress can compel a state court martial to convene and sit in judgment on such offense. Such an authority is nowhere confided to it by the constitution. Its power is limited to the few cases already specified, and these most assuredly do not embrace it; for it is not an implied power necessary or proper to carry into effect the given powers. The nation may organize its own tribunals for this purpose; and it has no necessity to resort to other tribunals to enforce its rights. If it do not choose to organize such tribunals, it is its own fault; but it is not, therefore, imperative upon a state tribunal to volunteer in its service. The 6th section of the same act comes in aid of this most reasonable construction. It declares that courts-martial for the trial of militia shall be composed of militia officers only, which plainly shows that it supposed that regular troops and officers were in Wheat. 5.

the same service; and yet, it is as plain that this provision would be superfluous, if state courts-martial were solely intended, since the states do not keep, and ordinarily have no authority to keep, regular troops, but are bound to confine themselves to militia. It might with as much propriety be contended that the courts-martial for the trial of militia under the 97th article of the rules and articles of war, are to be state courts-martial. The language of that article, so far as respects this point, is \*almost the [**68** same with the clause now under consideration.

As to the argument itself, upon which the defendant erects his construction of this part of the act, its solidity is not admitted. It does not follow, because Congress have neglected to provide adequate means to enforce their laws, that a resulting trust is reposed in the state tribunals to enforce them. If an offense be created of which no court of the United States has a vested cognizance, the state court may not, therefore, assume jurisdiction, and punish it. It cannot be pretended that the states have retained any power to enforce fines and penalties created by the laws of the United States in virtue of their general sovereignty, for that sovereignty did not originally attach on such subjects. They sprung from the Union, and had no previous existence. It would be a strange anomaly in our national jurisprudence to hold the doctrine, that because a new power created by the constitution of the United States was not exercised to its full extent, therefore the states might exercise it by a sort of process in aid. For instance, because Congress decline “to borrow money on the credit of the United States,” or “to constitute tribunals inferior to the Supreme Court,” or “to make rules for the government and regulation of the land and naval forces,” or exercise either of them defectively, that a state might step in, and by its legislation supply those defects, or assume a general jurisdiction on these subjects. If, therefore, it be conceded, that Congress have not as yet legislated to the extent of organizing courts-martial for the trial of offenses created by the act of 1795, it is not conceded that \*there- [**69** fore state courts-martial may, in virtue of state laws, exercise the authority, and punish offenders. Congress may hereafter supply such defects, and cure all inconveniences.

It is a general principle, too, in the policy, if not the customary law of nations, that no nation is bound to enforce the penal laws of another within its own dominions. The authority naturally belongs, and is confided, to the tribunals of the nation creating the offenses. In a government formed like ours, where there is a division of sovereignty, and, of course, where there is a danger of collision from the near approach of powers to a conflict with each other, it would seem a peculiarly safe and salutary rule, that each government should be left to enforce its own penal laws in its own tribunals. It has been expressly held, by this court, that no part of the criminal jurisdiction of the United States can consistently with the constitution be delegated by Congress to state tribunals;<sup>1</sup> and there is not the slightest inclination to retract that opinion. The judicial power of the Union clearly extends to all such cases. No concur-

1.—Martin v. Hunter, 1 Wheat, Rep. 304, 237; S. P. United States v. Lathrop, 17 Johns. Rep. 4.

rent power is retained by the states, because the subject-matter derives its existence from the constitution; and the authority of Congress to delegate it cannot be implied, for it is not necessary or proper in any constitutional sense. But even if Congress could delegate it, it would still remain to be shown that it had so done. **70\***] We have seen that this cannot be correctly deduced from the act of 1795; and we are, therefore, driven to decide, whether a state can, without such delegation, constitutionally assume and exercise it.

It is not, however, admitted, that the laws of the United States have not enabled courts-martial to be held under their own authority for the trial of these offenses, at least when there are militia officers acting in service in conjunction with regular troops. The 97th article of war gives an authority for the trial of militia in many cases; and the act of the 18th of April, 1814, ch. 141 (which has now expired), provided, as we have already seen, for cases where the militia was acting alone. To what extent these laws applied is not now necessary to be determined. The subject is introduced solely to prevent any conclusion that they are deemed to be wholly inapplicable. Upon the whole, I am of opinion that the courts-martial intended by the act of 1795 are not state courts-martial, but those of the United States; and this is the same construction which has been already put upon the same act by the Supreme Court of Pennsylvania.<sup>1</sup>

What, then, is the state of the case before the court? Congress, by a law, declare that the officers and privates of the militia who shall, when called forth by the President, fail to obey his orders, shall be liable to certain penalties, to be adjudged by a court-martial convened under its own authority. The legislature of Pennsylvania inflict the same penalties **71\***] for the same disobedience, and direct these penalties to be adjudged by a state court-martial called exclusively under its own authority. The offense is created by a law of the United States, and is solely against their authority, and made punishable in a specific manner; the legislature of Pennsylvania, without the assent of the United States, insist upon being an auxiliary, nay, as the defendant contends, a principal, if not a paramount, sovereign, in its execution. This is the real state of the case; and it is said, without the slightest disrespect for the legislature of Pennsylvania, who, in passing this act, were, without question, governed by the highest motives of patriotism, public honor, and fidelity to the Union. If it has transcended its legitimate authority, it has committed an unintentional error, which it will be the first to repair, and the last to vindicate. Our duty compels us, however, to compare the legislation, and not the intention, with the standard of the constitution.

It has not been denied that Congress may constitutionally delegate to its own courts exclusive jurisdiction over cases arising under its own laws. It is, too, a general principle in the construction of statutes, that where a penalty is prescribed to be recovered in a special manner, in a special court, it excludes a recovery in any other mode or court. The language is

deemed expressive of the sense of the legislature, that the jurisdiction shall be exclusive. In such a case, it is a violation of the statute for any other tribunal to assume jurisdiction. If, then, we strip the case before the court of all unnecessary appendages, it presents [**\*72**] this point, that Congress had declared that its own courts-martial shall have exclusive jurisdiction of the offense; and the state of Pennsylvania claims a right to interfere with that exclusive jurisdiction, and to decide in its own courts upon the merits of every case of alleged delinquency. Can a more direct collision with the authority of the United States be imagined? It is an exercise of concurrent authority where the laws of Congress have constitutionally denied it. If an act of Congress be the supreme law of the land, it cannot be made more binding by an affirmative re-enactment of the same act by a state legislature. The latter must be merely inoperative and void, for it seeks to give sanction to that which already possesses the highest sanction.

What are the consequences, if the state legislation in the present case be constitutional? In the first place, if the trial in the state court-martial be on the merits, and end in a condemnation or acquittal, one of two things must follow, either that the United States court-martial are thereby divested of their authority to try the same case, in violation of the jurisdiction confided to them by Congress; or that the delinquents are liable to be twice tried and punished for the same offense, against the manifest intent of the act of Congress, the principles of the common law, and the genius of our free government. In the next place, it is not perceived how the right of the President to pardon the offense can be effectually exerted; for if the state legislature can, as the defendant contends, by its own enactment, make it a state offense, the pardoning power of the state **\*can** alone purge away such an offense. [**\*73**] The President has no authority to interfere in such a case. In the next place, if the state can re-enact the same penalties, it may enact penalties substantially different for the same offense, to be adjudged in its own courts. If it possess a concurrent power of legislation, so as to make it a distinct state offense, what punishments it shall impose must depend upon its own discretion. In the exercise of that discretion, it is not liable to the control of the United States. It may enact more severe or more mild punishments than those declared by Congress. And thus an offense originally created by the laws of the United States, and growing out of their authority, may be visited with penalties utterly incompatible with the intent of the national legislature. It may be said that state legislation cannot be thus exercised, because its concurrent power must be in subordination to that of the United States. If this be true (and it is believed to be so), then it must be upon the ground that the offense cannot be made a distinct state offense, but is exclusively created by the laws of the United States, and is to be tried and punished as Congress has directed, and not in any other manner or to any other extent. Yet the argument of the defendant's counsel might be here urged, that the state law was merely auxiliary to that of the United States; and that it sought only to enforce a

1.—*Ex-parte* Bolson, 5 Hall's Amer. Law Journal, 476.



public duty more effectually by other penalties, in aid of those prescribed by Congress. The repugnancy of such a state law to the national authority would, nevertheless, be manifest, **74\***] since it would seek **\*to** punish an offense created by Congress, differently from the declared will of Congress. And the repugnancy is not, in my judgment, less manifest where the state law undertakes to punish an offense by a state court-martial, which the law of the United States confines to the jurisdiction of a national court-martial.

The present case has been illustrated in the argument of the defendant's counsel, by a reference to cases in which state courts under state laws exercise a concurrent jurisdiction over offenses created and punished by the laws of the United States. The only case of this description which has been cited at the bar, is the forgery of notes of the Bank of the United States, which by an act of Congress was punished by fine and imprisonment, and which under state laws has also been punished in some state courts, and particularly in Pennsylvania.<sup>1</sup> In respect to this case, it is to be recollected that there is an express proviso in the act of Congress, that nothing in that act should be construed to deprive the state courts of their jurisdiction under the state laws over the offenses declared punishable by that act. There is no such proviso in the act of 1795, and, therefore, there is no complete analogy to support the illustration.

That there are cases in which an offense particularly aimed against the laws or authority of the United States may, at the same time, be directed against state authority also, and thus **75\***] be within the **\*legitimate** reach of state legislation, in the absence of national legislation on the same subject, I pretend not to affirm, or to deny. It will be sufficient to meet such a case when it shall arise. But that an offense against the constitutional authority of the United States can, after the national legislature has provided for its trial and punishment, be cognizable in a state court, in virtue of a state law creating a like offense, and defining its punishment, without the consent of Congress, I am very far from being ready to admit. It seems to me that such an exercise of state authority is completely open to the great objections which are presented in the case before us. Take the case of a capital offense, as, for instance, treason against the United States: can a state legislature vest its own courts with jurisdiction over such an offense, and punish it either capitally or otherwise? Can the national courts be ousted of their jurisdiction by a trial of the offender in a state court? Would an acquittal in a state court be a good bar upon an indictment for the offense in the national courts? Can the offender, against the letter of the constitution of the United States, "be subject for the same offense, to be twice put in jeopardy of life or limb?" These are questions which, it seems to me, are exceedingly difficult to answer in the affirmative. The case, then, put by the defendant's counsel, clears away none of the embarrassments which surround their construction of the case at the bar of the court.

1.—See *White v. Commonwealth*, 4 Binn. Rep. 418; *Livingston v. Van Ingen*, 9 Johns. Rep. 507, 567. Wheat. 5.

Upon the whole, with whatever reluctance, I feel myself bound to declare that the clauses of the militia **\*act** of Pennsylvania now [**\*76** in question, are repugnant to the constitutional laws of Congress on the same subject and are utterly void; and that, therefore, the judgment of the state court ought to be reversed. In this opinion I have the concurrence of one of my brethren.

### *Judgment affirmed.*

Cited—12 Wheat. 33; 11 Pet. 150; 12 Pet. 645; 14 Pet. 578, 592, 593; 16 Pet. 618, 654; 5 How. 313, 584, 607, 625; 7 How. 60, 77, 394, 498, 555, 556; 12 How. 319; 17 How. 515; 3 Wall. 730; 3 Otto, 141; 1 Wood. & M. 70, 373, 430, 4 2, 439; 2 Story, 466; 1 Abb. U. S. 45; Blatchf. & H. 251; 5 Blatchf. 79; 7 Bank. Reg. 425, 499; 17 Bank. Reg. 197; 2 Paine, 308; 3 Cliff. 386, 560.

### [CONSTITUTIONAL LAW.]

### THE UNITED STATES v. WILTBERGER.

The courts of the United States have no jurisdiction, under the act of April 30th, 1790, c. 36, of the crime of manslaughter, committed by the master upon one of the seamen on board a merchant vessel of the United States, lying in the River Tigris, in the empire of China, 35 miles above its mouth, off Wampoa, about 100 yards from the shore, in four and a half fathoms water, and below low water-mark.

Though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal, as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature.

In the act of April 30th, 1790, c. 36, the description of places contained in the 8th section, within which the offenses therein enumerated must be committed, in order to give the courts of the Union jurisdiction over them, cannot be transferred to the 12th section, so as to give those courts jurisdiction over a manslaughter committed in the river of a foreign country, and not on the high seas.

**T**HIS was an indictment for manslaughter, in the Circuit Court of Pennsylvania. The jury found the defendant guilty of the offense with which he **\*stood** indicted, subject [**\*77** to the opinion of the court, whether this court has jurisdiction of the case, which was as follows:

The manslaughter charged in the indictment was committed by the defendant on board of the American ship the Benjamin Rush, on a seaman belonging to the said ship, whereof the defendant was master, in the River Tigris, in the empire of China, off Wampoa, and about 100 yards from the shore, in four and a half fathoms water, and below the low water-mark, thirty-five miles above the mouth of the river. The water at the said place where the offense was committed is fresh, except in very dry seasons, and the tide ebbs and flows at, and

NOTE.—See notes to *U. S. v. Bevan*, 3 Wheat. 336; *U. S. v. Palmer*, 3 Wheat. 610; and *Rev. Stat. of U. S. s. 730*, and cases cited.

Under the United States statute of 30th April, 1790, c. 9, s. 8, the "high seas" mean any waters on the sea-coast which are without the boundaries of low water-mark. *U. S. v. Ross*, 1 Gallis. 624; *U. S. v. Hamilton*, 1 Mason, 152. A vessel lying outside of the bar of a harbor of the United States, within three miles of shore, is on the high seas. *U. S. v. Smith*, 1 Mason, 147. So, a foreign open roadstead is upon the "high seas," within the above section.

above the said place. At the mouth of the Tigris, the government of China has forts on each side of the river, where custom-house officers are taken in by foreign vessels to prevent smuggling. The river at the mouth, and at Wampoa, is about half a mile in breadth.

And thereupon, the opinions of the judges of the Circuit Court, being opposed as to the jurisdiction of the court, the question was by them stated, and directed to be certified to this court.

*Mr. C. J. Ingersoll*, for the United States, argued, that by the constitution the judicial power extends to all cases of admiralty and maritime jurisdiction, and Congress is invested with authority to define and punish piracies and other felonies committed on the high seas. The judiciary act of 1789, c. 20, s. 11, gives jurisdiction over these offenses to the Circuit Court. **78\*** The act of April 30th, 1790, c. 36, for \*the punishment of certain crimes against the United States, s. 12, provides for the punishment of manslaughter committed on the high seas.<sup>1</sup>

1.—The sections of this act commented on in the argument, are as follows:

SEC. I. That if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States, or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death.

SEC. II. And be it enacted, That if any person or persons, having knowledge of the commission of any of the treasons aforesaid, shall conceal, and not, as soon as may be, disclose and make known the same to the President of the United States, or some of the judges thereof, or to the President or Governor of a particular state, or some one of the judges or justices thereof, such person or persons, on conviction, shall be adjudged guilty of misprision of treason, and shall be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars.

SEC. III. And be it enacted, That if any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of willful murder, such person or persons, on being thereof convicted, shall suffer death.

SEC. VI. And be it enacted, That if any person or persons, having knowledge of the actual com-

mission of the crime of willful murder, or other felony, upon the high seas, or within any fort, arsenal, dock-yard, magazine, or other place or district of country, under the sole and exclusive jurisdiction of the United States, shall conceal, and not, as soon as may be, disclose and make known the same to some one of the judges, or other persons in civil or military authority under the United States, on conviction thereof, such person or persons shall be adjudged guilty of misprision of felony, and shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars.

SEC. VII. And be it enacted, That if any person or persons shall, within any fort, arsenal, dock-yard, magazine, or other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of manslaughter, and shall be thereof convicted, such person or persons shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars.

SEC. VIII. And be it enacted, That if any person or persons shall commit, upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offense, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death; or, if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise, to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to

2.—1 Bro. Civ. and Adm. Law, 422; 2 Bro. 460.

3.—The United States v. Palmer, 3 Wheat. 626.

4.—The United States v. McGill, 4 Dall. 426, 429.

*U. S. v. Pirates*, *post*. 184. To give jurisdiction to the United States courts, it is the river, haven, bay, &c., and not the offense, which must be out of the jurisdiction of the state. *U. S. v. Bevans*, 3 Wheat. 336. The words "out of the jurisdiction of any particular state" refer to the states of the Union. *U. S. v. Pirates*, *post*. 184.

The courts of the United States have jurisdiction under the act of April 30, 1790, of a murder committed on the high seas, although not committed on board a vessel of the United States, but a vessel held by pirates or persons not sailing under the flag of any nation. *U. S. v. Holmes*, *post*. 412; *U. S. v. Klintonck*, *post*. 144; 1 Wash. C. C. 463; 5 Mason, 23; 4 Mason, 505; 1 Gallis. 62.

Under the statute of 1790, ch. 36, to give the United States courts jurisdiction of the crime of murder, not only the stroke, but the death must happen on the high seas. *U. S. v. McGill*, 1 Wash. C. C. 463; 4 Dall. 426.

The state courts have jurisdiction of offenses committed on the arms of the sea, creeks, havens, basins and bays, within the ebb and flow of the tide, when those places are within the body of a county, in such cases the circuit courts of the United States have no jurisdiction under the act of 1825. *U. S. v. Grash*, 5 Mason, 290.

An offense committed within the mouth of a

foreign river, a mile and a half wide, is within the act of Congress. *U. S. v. Smith*, 3 Wash. C. C. 78; *note*.

The act of 1790 does not authorize the United States courts to convict for larceny committed on a vessel lying in a foreign harbor, although where the tide ebbs and flows. *U. S. v. Jackson*, 2 N. Y. Leg. Obs. 3.

Nor for larceny committed on ship lying in a port of one of the United States, although the property was carried on the high seas to another port. *U. S. v. Davis*, 2 N. Y. Leg. Obs. 35.

The act of 1835 differs from the crimes act of 1790. Under the act of 1835, if the offense is committed on the high seas, or any other waters within the admiralty and maritime jurisdiction of the United States, the court has jurisdiction. In the act of 1790, the offense must have been committed in a place under the sole and exclusive jurisdiction of the United States, out of the jurisdiction of any particular state. *U. S. v. Lynch*, 2 N. Y. Leg. Obs. 51.

Penal statutes to be strictly construed; never extended by implication.

*Andrews v. U. S.*, 2 Story, C. C. 202; *Ferret v. Atwill*, 1 Blatchf. 151; *S. C.* 4 N. Y. Leg. Obs. 215; *U. S. v. Starr*, *Hempst.* 469; *The Enterprise*, 1 Paine, 32; 4 Am. Law Journ. 115.

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2. That the local jurisdiction of the Chinese empire over the offense charged by the indictment, if found by the jury to have been committed within its territorial limits, necessarily excludes the jurisdiction of the courts of this 82\*] country over the offense. \*To this objection, it is answered, that by the principles of universal law, a qualified national jurisdiction and immunity extends to the ships of the nation, public and private, wherever they may be. As to public vessels, this immunity is unquestionable.<sup>1</sup> And even private vessels, though from the necessity of the case, subject to the

revenue laws of the country where they may be, are yet in many respects exempted from the local jurisdiction. Minor crimes, which do not offend the safety or dignity of the local sovereignty, are usually left to the cognizance of the government to whose subjects the vessel belongs. Nor does this, in the slightest degree, affect the eminent domain and sovereignty of the foreign nation over its harbors and rivers.<sup>2</sup> But China herself disclaims jurisdiction in such cases, and *renvoys* them to the forum of the offending party.<sup>3</sup> The offense here, being \*committed by a citizen of the United [\*83

hinder and prevent his fighting in defense of his ship, or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed taken, and adjudged to be, a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought.

SEC. IX. And be it enacted, That if any citizen shall commit any piracy or robbery, aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high seas, under color of any commission from any foreign prince or state, or on pretense of authority from any person, such offender shall, notwithstanding the pretense of authority, be deemed, adjudged, and taken to be, a pirate, felon, and robber, and on being thereof convicted, shall suffer death.

SEC. X. And be it enacted, That every person who shall, either upon the land or seas, knowingly and wittingly aid and assist, procure, command, counsel or advise, any person or persons to do or commit any murder or robbery, or other piracy aforesaid, upon the high seas, which shall affect the life of such person, and such person or persons shall thereupon do or commit any such piracy or robbery, then all and every such person, so aforesaid, aiding, assisting, procuring, commanding, counseling, or advising the same, either upon the land or the sea, shall be and they are hereby declared, deemed, and adjudged to be, accessory to such piracies before the fact, and every such person, being thereof convicted, shall suffer death.

SEC. XI. And be it enacted, That after any murder, felony, robbery, or other piracy whatsoever, aforesaid, is or shall be committed by any pirate or robber, every person who, knowing that such pirate or robber has done or committed any such piracy or robbery, shall, on the land or at sea, receive, entertain, or conceal, any such pirate or robber, or receive or take into his custody any ship, vessel, goods, or chattels, which have been, by any such pirate or robber, piratically and feloniously taken, shall be, and are hereby declared, deemed and adjudged, to be accessory to such piracy or robbery, after the fact; and on conviction thereof, shall be imprisoned, not exceeding three years, and fined, not exceeding five hundred dollars.

SEC. XII. And be it enacted, That if any seaman or other person shall commit manslaughter upon the high seas, or confederate, or attempt or endeavor to corrupt any commander, master, officer or mariner, to yield up or to run away with any ship or vessel, or with any goods, wares, or merchandise, or to turn pirate, or to go over to or confederate with pirates, or in any wise trade with any pirate, knowing him to be such, or shall furnish such pirate with any ammunition, stores, or provisions of any kind; or shall fit out any vessel, knowingly, and with a design to trade with or supply or correspond with any pirate or robber upon the seas; or if any persons shall any ways consult, combine, confederate, or correspond with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery; or if any seaman shall confine the master of any ship or other vessel, or endeavor to make revolt in such ship; such person or persons, so offending, and being thereof convicted, shall be imprisoned, not exceeding three years, and fined, not exceeding one thousand dollars.

1.—Vattel, L. 1, c. 19, s. 216; The Exchange, 7 Cranch, 116; Case of Nash *alias* Robbins, Bee's Adm. Rep. 266; *vide* Appendix, Note 1.

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2.—2 Bro. Civ. & Adm. Law, 468, 484; M'Gill's Case, 4 Dall. 427; United States v. Ross, 1 Gallis. 627; United States v. Smith, 1 Mason, 147; United States v. Hamilton, 1 Mason, 152.

3.—Sir George Staunton's Translation of the Laws of China, 36, 523. The following extracts from this work were read at the argument, and it is thought their insertion here will not be unacceptable to the learned reader:

"Offenses committed by foreigners. (\*) In general all foreigners who come to submit themselves to the government of the empire, shall, when guilty of offenses, be tried and sentenced according to the established laws. The particular decisions, however, of the tribunal Lee-Fan-Yuen. (+) shall be guided according to regulations framed for the government of the Mongol tribes.

Note (\*)—"This section of the code has been expressly quoted by the provincial government of Canton, and applied to the case of foreigners residing there and at Macao for the purposes of trade. The laws of China have never, however, been attempted to be enforced against those foreigners, except with considerable allowances in their favor, although, on the other hand, they are restricted and circumscribed in such a manner that a transgression on their part of any specific article of the laws can scarcely occur; at least, not without at the same time implicating and involving in their guilt some of the natives, who thus in most cases become the principal victims of offended justice. The situation of Europeans in China is certainly by no means so satisfactory on the whole as might be desired, or even as it may be reasonably expected to become in the progress of time, unless some untoward circumstance should occur to check the gradual course of improvement. It must be admitted, however, that the extreme contrariety of manners, habits, and language, renders some such arrangement, as that now subsisting for the regulation of the intercourse between the Europeans and the natives, absolutely indispensable, as well as conducive to the interests of both parties.

Note (+)—This tribunal might be styled the office or department for foreign affairs, but its chief concern is with the tributary and the subject states of Tartary." P. 36.

"The foregoing being the substance of the report of the viceroy to his imperial majesty, we have deliberated thereon, and have ascertained that, according to the preliminary book of the penal code, all persons from foreign parts committing offenses, shall undergo trial, and receive sentence according to the laws of the empire. Moreover, we find it declared in the same code, that any person accidentally killing another, shall be allowed to redeem himself from punishment, by the payment of a fine; lastly, we find, that on the eighth year of Kien-Lung (1743), it was ordered, in reply to the address of the viceroy of Canton, then in office, that thenceforward, in all cases of offenses by contrivance, design, or in affrays happening between foreigners and natives, whereby such foreigners are liable, according to law, to suffer death by being strangled or beheaded, the magistrate of the district shall receive the proofs and evidence thereof, at the period of the preliminary investigation, and after having fully and distinctly inquired into the reality of the circumstances, report the result to the viceroy and sub-viceroy, who are thereupon strictly to repeat and revise the investigation. If the determination of the inferior courts, upon the alleged facts, and upon the application of the laws, is found to have been just and accurate, the



States upon another citizen, on board a merchant vessel of this country, lying in the waters of a foreign country, which expressly disclaims jurisdiction of the case, it is punishable, unless it be punishable in the courts of this country; and it appears at least questionable whether there is any constitutional power in Congress to punish it, except in the mode already provided for, as an offense committed on the high seas. This brings us to the 3d objection, which is, that the offense was not committed "on the high seas," within the true intent and meaning of the act of April, 1790, c. 36, s. 12. In answer to this objection, it is insisted, that before the adoption of the present constitution, the admiralty and maritime jurisdiction extended everywhere on tide waters below low water-mark.<sup>1</sup> The same extension has been given to the admiralty jurisdiction under the constitution.<sup>2</sup> The opposite argument is founded on the expression "high seas," as contradistinguished from that portion of the sea where the tide ebbs and flows, but which is inclosed by head lands, or forms parts of rivers above their mouths. But the celebrated statutes of Richard II., regulating the admiralty jurisdiction, allow the admiral to have cognizance of things done on the sea, "*sur le meer*," without the addition of *high*. The stat. 27 Eliz. uses the expression "main sea." The 28 Hen. VIII., c. 15, concerning the trial of crimes committed within the admiralty jurisdiction, uses the terms, "in and upon the sea, or in any other haven, creek, river, or place, where the admiral hath, or pretends to have, power, authority, or jurisdiction."<sup>3</sup> The act of Congress of 1790, c. 9, uses the terms promiscuously, "high seas" (s. 8, s. 9), "the seas" (s. 10), "the sea" (s. 11), "high seas and seas" (s. 12). The term "sea" is water, as contradistinguished from land. The term "high sea" does not necessarily import deep sea; although the classical writers frequently use the correspondent Latin word in that figurative sense; as *altum æquor*, *altissimum flumen*, &c. It is a common expletive applied, in both languages, to "sea," "road," "crime," and many other things. The contrary acceptation of the term "high sea," would exclude bays, arms of the sea, coves, belts, straits, estuaries, great rivers, and lakes. There is no other limit to the sea, but that where the tide ceases to ebb and flow, whether on the sea-coast or in bays and rivers. Even the English statutes of Richard II., made to restrict the admiralty jurisdiction, and in derogation of its ancient authority, give it cognizance of murders, &c., committed on board great ships in the streams of great rivers below the first bridges. So the French law gives the admiralty the same jurisdiction,

as to rivers, for which we contend.<sup>4</sup> The case of the *United States v. Bevens*<sup>5</sup> does not stand in our way, for the point now in question was not determined in that case.

Mr. Sergeant, contra, stated, that the indictment in this case, pursuing the words of the act, charges the offense to have been committed upon the "high seas." It is of no consequence what may be the extent of the power given by the constitution to the government of the Union. The question is, to what extent has the power so given been exercised? It is not necessary, therefore, to enquire whether this was an offense within the admiralty jurisdiction. The only question is, whether it is within the true meaning of the act of Congress.<sup>6</sup> The offense in question, if committed at all, was not committed upon the high seas; whether these terms be considered in their ordinary sense, as used in foreign authorities of the law; as employed in acts of Congress; as used in the act in question; or as expounded by our own judicial decisions. 1. The national character of the ship or vessel in which the offense was committed makes no difference in this case. A public armed vessel is a part of the national sovereign force, clothed with the sovereign character, and, wherever she goes, entitled to immunity. She is subject only to the jurisdiction of her sovereign, and is a part of his territory;<sup>7</sup> is exempt from visitation and search, and governed by such laws as her sovereign may choose to give her. The immunity she enjoys does not depend upon the civil or admiralty law; but, like the privilege of an ambassador, or the immunity of troops on their passage, depends upon the law of nations. Every sovereign may refuse admission, but having admitted, is bound to respect. Still, it does not follow that the courts of her own country have jurisdiction on board of her. Be this as it may, a private ship has no such immunity. On the ocean she is bound to submit to visitation and search. In port she is bound to submit to the local jurisdiction, and entitled to the benefit of the laws of the place. Those who are on board of her incur the obligation of a temporary allegiance, and are, in all respects, amenable to the laws of the country in which they are found; to its penal laws especially. The ocean, the high seas, are a common domain; and every ship, private as well as public, is there upon the territory of her sovereign, and amenable to no laws but the laws of her sovereign and the law of nations. It is from this principle that every nation derives its jurisdiction over the persons on board its ships; the spot they occupy in the common domain is its own territory, and it has a right to give the law to it.<sup>8</sup> 2. The na-

magistrate of the district shall, lastly, receive orders to proceed, in conjunction with the chief of the nation, to take the offender to execution, according to his sentence.

In all other instances of offenses committed under what the laws declare to be palliating circumstances, and which are, therefore, not capitally punishable, the offender shall be sent away to be punished in his own country. February, 1808." P. 523.

1.—See authorities cited, 3 Wheat. 357, note 4, to *United States v. Bevens*; *De Lovio v. Boit*, 2 Gallis. 470, note 47.

2.—*United States v. La Vengeance*, 3 Dall. 297;

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The *Sally*, 2 Cranch, 406; The *Betsey* and *Charlotte*, 4 Cranch, 443; The *Samuel*, 1 Wheat. 9; The *Octavia*, Ib. 20.

3.—See *The King v. Bruce*, cited 3 Wheat. 371, note 1.

4.—1 Valin, Com. sur l'Ordon., liv. 1, tit. 2; *De la Compétence*, art. 5.

5.—3 Wheat. 336.

6.—*The United States v. Bevens*, 3 Wheat. 336, 386.

7.—*The Exchange*, 7 Cranch, 116; Speech of Mr. (now Chief Justice) Marshall, in the case of *Nash alias Robbins*, Appendix, note 1.

8.—1 Sir L. Jenkins's Works, 91.

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tional character of the offender, or of the person offended, makes no difference; if the crew had all shipped in England, and been English subjects, they would have been equally entitled to protection, and equally amenable to our laws. If, upon the ocean, or high seas, a foreigner had been murdered, his death would have been equally avenged by our laws. If a foreigner on board this ship had committed an offense, he would equally have been liable. It is not correct, then, to say that personal jurisdiction is universal as to citizens; nor that it does in no case extend to foreigners. 3. In the next place, the extent or true nature of the constitutional power is wholly immaterial in this case. That instrument had in view, 1st. To partition powers between the Union and the states. 2d. To distribute powers among the different branches of the national government. The judicial power, in its exercise, is subordinate and auxiliary to the power of Congress. 89\*] The whole \*jurisdiction has never been exercised. But the principle, in its application to the very case, has been decided in the case of *The United States v. Bevan*.<sup>1</sup> It follows, therefore, that the judicial authority is of no avail, unless there be a corresponding power in Congress; that as the judicial authority is unavailing without a legislative act, it is to the act of Congress alone we must look for the extent of the jurisdiction. When, therefore, the authority of the judiciary is declared to extend to all cases of "admiralty and maritime jurisdiction," it is to be extended only to such cases as Congress have power to provide for. The same power might be exercised through the medium of the state courts, or omitted altogether. It follows, also, most indubitably, that the powers exercised by Congress can receive no illustration from the powers given to the judiciary by the constitution; and we are thus happily relieved from the necessity of exploring the distant speculation of the ancient jurisdiction of the admiralty. 4. What, then, is the true meaning of the terms, on the "high seas," as used in the act of Congress? In their ordinary sense, they mean the open ocean, as distinguished from creeks, rivers, ports, and other bodies of water, inclosed and infraterritorial. The flow of the tide cannot be the true test; for then the sea would flow to the falls of Schuylkill and Delaware, and would comprehend a vessel moored at the wharf. If we refer to the authorities \*of the English law, they are clear and uniform. The common lawyers never at any period denied the admiralty jurisdiction upon the "high seas." The civilians claimed a jurisdiction beyond what was conceded to them by the common lawyers, beyond the "high seas;" in rivers, bays, &c. Thus, the very contest, in its origin, admitted that the "high seas" were distinguishable from other waters. The statute 13 Richard II. confined the admiralty to things done upon the "sea."<sup>2</sup> The 15 Richard II. gave it criminal jurisdiction in homicide and mayhem on great rivers, &c.<sup>3</sup> The 27 Eliz. c. 11, is conclusive of the question.<sup>4</sup> Sir Leoline Jenkies makes the

distinction expressly.<sup>5</sup> So, also, we have the authority of Lord Hale in many places;<sup>6</sup> and all the authorities agree that the *divisum imperium* is only upon the sea-coast. The distinction is also perfectly understood and maintained in our own legislation; and the act now in question furnishes the clearest recognition of it, as will appear by a comparison of the 8th with the 12th section. In the 8th section, the distinction is made between the "high seas" and "a river, haven, basin, or bay." The latter expressions can never, by any fair rule of construction applied to penal statutes, be transferred from the 8th to the 12th section. In criminal cases, a strict construction is always to be preferred; and if there be \*doubt, that is of itself [\*91 conclusive. In *Bevan's* case, the distinction between the high seas and other inclosed parts of the sea was not denied by the counsel for the United States, and the court do not even mention it as at all doubtful.<sup>7</sup> But it is asked, whether the criminal jurisdiction of the admiralty is not as extensive as the civil? To which it is answered, that the criminal jurisdiction depends upon the place where the offense is committed; the civil, upon the nature of the subject; and there can, therefore, be no comparison of their extent.

The *Attorney-General*, in reply, insisted, that although penal laws are to be construed strictly, the intention of the Legislature must govern in their construction. If a case be within the intention and reason, it must be considered as within the letter of the statute. This act having been passed by Congress on the first organization of the government, it must have been their intention to make the exercise of their power co-extensive with their jurisdiction; and to punish all the crimes enumerated, in every place within their jurisdiction. The act must, therefore, be construed so as to engraft the words of the 8th section, descriptive of the place in which murder may be committed, on the 12th section, which describes the place in which manslaughter may be committed. After expressing themselves fully in the previous section as to the places in which one of the crimes intended to be punished by the act must be committed, it was natural that the Legislature \*should suppose the language en- [\*92 grafted into a subsequent section on a subject of the same class. Thus, the 1st section of the act defines the crime of treason, and provides, "that if any person or persons owing allegiance to the United States of America, shall levy war," &c., "such person or persons shall be adjudged guilty of treason," &c. The second section defines misprision of treason, and in specifying the persons who may commit the crime, omits the words "owing allegiance to the United States," and uses without limitation or restriction the general terms "any person or persons." Yet these general terms were obviously intended to be restrained by the words "owing allegiance to the United States," which are used in the preceding section. The crimes of murder and manslaughter are kindred offenses, and are parts of the same general of-

1.—3 Wheat. 336, 386.

2.—4 Inst. 136.

3.—4 Inst. 137.

4.—4 Inst. 137.

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5.—1 Life of Sir L. J. 77.

6.—Hale, *De Jure Maris*, c. 4; 2 East's C. L., 304; 2 Hale's P. C. ch. 3.

7.—3 Wheat. 336.



fense of homicide. Congress must have intended to make the same provision for their punishment, as to the places within which they must be committed in order to give jurisdiction to the courts of the Union. Thus, the 3d section of the act describes the places on land in which murder must be committed in order to give those courts jurisdiction of the offense; and the 7th section describes in the very same terms the places on land in which manslaughter must be committed in order to give them jurisdiction. Observe the consequences of a contrary construction as to murder alone. The 9th section extends the guilt of the offenses enumerated in it to a citizen of the United States committing them under color of a foreign commission. But this section, in describing **93\*** the place where the offense may be committed, omits the words "in any river, haven, basin, or bay," and uses the words "high seas" only. It is incredible that it was the legislative intention to distinguish between the same crime, committed under the pretext of authority by a foreign commission, on the high seas, and on the waters of a foreign state, or of the United States. So, also, the 10th section provides, "that every person who shall, either upon the land or the seas, knowingly and wittingly aid and assist, procure, command, counsel, or advise, any person or persons to do or commit any murder or robbery, or other piracy, aforesaid, upon the seas, which shall affect the life of such person, shall," &c. Here Congress cannot have intended to exempt from punishment those persons who shall be accessories before the fact to a murder or robbery committed "in a river, haven, basin, or bay," &c. A similar argument is applicable to the 11th section. As to the 12th section, beside the offense of manslaughter, the other offenses which it enumerates are all accessory to those mentioned in the 8th. It is, therefore, evidently connected with the 8th.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court: The indictment in this case is founded on the 12th section of the act, entitled, "an act for the punishment of certain crimes against the United States." That section is in these words: "And be it enacted, that if any seaman, or other person, shall commit manslaughter on the high seas, or confederate," &c., "such person or persons so offending, **94\*** and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars."

The jurisdiction of the court depends on the place in which the fact was committed. Manslaughter is not punishable in the courts of the United States, according to the words which have been cited, unless it be committed on the high seas. Is the place described in the special verdict a part of the high seas?

If the words be taken according to the common understanding of mankind—if they be taken in their popular and received sense—the "high seas," if not in all instances confined to the ocean which washes a coast, can never extend to a river about half a mile wide, and in the interior of a country. This extended construction of the words, it has been insisted, is still farther opposed by a comparison of the

12th with the 8th section of the act. In the 8th section, Congress has shown its attention to the distinction between the "high seas" and "a river, haven, basin, or bay." The well-known rule that this is a penal statute, and is to be construed strictly, is also urged upon us.

On the part of the United States, the jurisdiction of the court is sustained, not so much on the extension of the words "high seas," as on that construction of the whole act which would engraft the words of the 8th section, descriptive of the place in which murder may be committed, on the 12th section, which describes the place in which manslaughter may be committed. This transfer of the words of one section to the other is, it has been contended, in pursuance of the obvious intent of the legislature; and in support of the authority of the court so to do, certain maxims, or rules for the construction of statutes have been quoted and relied on. It has been said, that although penal laws are to be construed strictly, the intention of the legislature must govern in their construction. That if a case be within the intention, it must be considered as if within the letter of the statute. So if it be within the reason of the statute.

The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.

It is said, that notwithstanding this rule, the intention of the law-maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in **the** **96** words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases.

Having premised these general observations,

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the court will proceed to the examination of the act, in order to determine whether the intention to incorporate the description of place contained in the 8th section, into the 12th, be so apparent as to justify the court in so doing. It is contended, that throughout the act the description of one section is full, and is necessarily to be carried into all the other sections which relate to place, or to crime.

The 1st section defines the crime of treason, and declares, "that if any person or persons owing allegiance to the United States of America shall levy war," &c., "such person or persons shall be adjudged guilty of treason," &c. The second section defines misprision of **97** treason; and in the description of the \*persons who may commit it, omits the words "owing allegiance to the United States," and uses without limitation, the general terms "any person or persons." Yet, it has been said, these general terms were obviously intended to be limited, and must be limited, by the words "owing allegiance to the United States," which are used in the preceding section.

It is admitted that the general terms of the 2d section must be so limited; but it is not admitted that the inference drawn from this circumstance, in favor of incorporating the words of one section of this act into another, is a fair one. Treason is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary. The words, therefore, "owing allegiance to the United States," in the first section, are entirely surplus words, which do not, in the slightest degree affect its sense. The construction would be precisely the same were they omitted. When, therefore, we give the same construction to the second section, we do not carry those words into it, but construe it as it would be construed independent of the first. There is, too, in a penal statute, a difference between restraining general words and enlarging particular words.

The crimes of murder and of manslaughter, it has been truly said, are kindred crimes; and there is much reason for supposing that the legislature intended to make the same provision for the jurisdiction of its courts, as to the place in which either might be committed. In illustration of this position, the 3d and 7th sections **98** of the act have been cited. \*The 3d section describes the places in which murder on land may be committed, of which the courts of the United States may take cognizance; and the 7th section describes, in precisely the same terms, the places on land, if manslaughter be committed, in which the offender may be prosecuted in the federal courts.

It is true, that so far as respects place, the words of the 3d section concerning murder are repeated in the 7th, and applied to manslaughter; but this circumstance suggests a very different inference from that which has been drawn from it. When the legislature is about to describe the places in which manslaughter, cognizable in the courts of the United States, may be committed, no reference whatsoever is made to a prior section respecting murder; but the description is as full and ample as if the prior section had not been in the act. This would rather justify the opinion, that in proceeding to manslaughter, the legislature did not

mean to refer us to the section on murder for a description of the place in which the crime might be committed, but did mean to give us a full description in the section on that subject.

So, the 6th section, which punishes those who have knowledge of the commission of murder, or other felony, describes the places on land in which the murder is to be committed, to constitute the crime, with the same minuteness which had been before employed in the 3d, and was, afterwards, employed in the 7th section.

In the 8th section, the legislature takes up the subject \*of murder, and other felonies, committed on the water, and is full in the description of place. "If any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder," &c.

The 9th section of the act applies to a citizen who shall commit any of the offenses described in the 8th section, against the United States, or a citizen thereof, under color of a commission from any foreign prince or state.

It is observable, that this section, in its description of place, omits the words, "in any river, haven, basin, or bay," and uses the words "high seas" only. It has been argued, and, we admit, with great force, that in this section the legislature intended to take from a citizen offending against the United States, under color of a commission from a foreign power, any pretense to protection from that commission; and it is almost impossible to believe that there could have been a deliberate intention to distinguish between the same offense, committed under color of such commission, on the high seas, and on the waters of a foreign state, or of the United States, out of the jurisdiction of any particular state. This would unquestionably have been the operation of the section, had the words, "on the high seas," been omitted. Yet it would be carrying construction very far to strike out those words. Their whole effect is to limit the operation which the sentence would have without them; and it is making very free with legislative language, to declare them totally useless, when they are sensible, and are calculated to have a decided \*influence **[\*100]** on the meaning of the clause. That case is not directly before us, and we may perhaps be relieved from ever deciding it. For the present purpose, it will be sufficient to say, that the determination of that question in the affirmative would not, we think, be conclusive with respect to that now under consideration. The 9th section refers expressly, so far at least as respects piracy or robbery, to the 8th; and its whole language shows that its sole object is to render a citizen who offends against the United States or their citizens, under color of a foreign commission, punishable in the same degree as if no such commission existed. The clearness with which this intent is manifested by the language of the whole section, might perhaps justify a latitude of construction which would not be allowable where the intent is less clearly manifested; where we are to be guided, not so much by the words in which the provision is made as by our opinion of the reasonableness of making it.

But here, too, it cannot escape notice, that

the legislature has not referred for a description of the place to the preceding section, but has inserted a description, and by that insertion has created the whole difficulty of the case.

The 10th section declares the punishment of accessories before the fact. It enacts, "that every person who shall, either upon the land or the seas, knowingly and wittingly, aid and assist, procure, command, counsel, or advise any person or persons to do or commit any murder **101\*** or robbery, or other piracy, \*aforesaid, upon the seas, which shall affect the life of such persons, shall," &c.

Upon this section, also, as on the preceding, it has been argued, that the legislature cannot have intended to exclude from punishment those who shall be accessories before the fact to a murder or robbery committed "in a river, haven, basin, or bay, out of the jurisdiction of any state;" and now, as then, the argument has great weight. But it is again to be observed, that the legislature has not referred for a description of place to any previous parts of the law, but has inserted a description, and by so doing, has materially varied the obvious sense of the section. "Every person who shall, either upon the land or the seas, knowingly and wittingly aid," &c. The probability is, that the legislature designed to punish all persons amenable to their laws, who should, in any place, aid and assist, procure, command, counsel, or advise, any person or persons to commit any murder or piracy punishable under the act. And such would have been the operation of the sentence, had the words, "upon the land or the seas" been omitted. But the legislature has chosen to describe the place where the accessorial offense is to be committed, and has not referred to a description contained in any other part of the act. The words are, "upon the land or the seas." The court cannot reject this description. If we might supply the words "river, haven," &c., because they are stated in the 8th section, must we supply "fort, arsenal," &c., which are used in the 3d section, describing the place in which murder may be committed on land? In doing so, we should **102\*** probably defeat the will of the legislature. Yet if we depart from the description of place given in the section, in which Congress has obviously intended to describe it, for the purpose of annexing to the word "seas" the words "river, haven, basin, or bay," found in the 8th section, there would be at least some appearance of reason in the argument, which would require us to annex also to the word "land" the words "fort, arsenal," &c., found in the 3d section.

After describing the place in which the "aid, assistance, procurement, command, counsel, or advice" must be given, in order to give to the courts of the United States jurisdiction over the offense, the legislature proceeds to describe the crime so to be commanded or procured, and the place in which such crime must be committed. The crime is, "any murder or robbery, or other piracy, aforesaid." The place is "upon the seas."

In this section, as in the preceding, had the words "upon the seas" been omitted, the construction would have been that which, according to the argument on the part of the United States, it ought now to be. But these words

are sensible and are material. They constitute the description of place which the legislature has chosen to give us; and courts cannot safely vary that description without some sure guide to direct their way.

The observations made on this section apply so precisely to the 11th that they need not be repeated.

The legal construction of those sections is doubtful, and the court is not now, and may perhaps never \*be, required to make it. [**\*103** It is sufficient to say, that should it even be such as the Attorney-General contends it ought to be, the reasons in favor of that construction do not apply conclusively to the 12th section. They both contain a direct reference to the 8th section. They describe accessorial offenses, which from their nature are more intimately connected with the principal offense than distinct crimes are with each other.

The 12th section takes up the crime of manslaughter, which is not mentioned in the 8th, and, without any reference to the 8th, describes the place in which it must be committed, in order to give jurisdiction to the courts of the United States. That place is "on the high seas." There is nothing in this section which can authorize the court to take jurisdiction of manslaughter committed elsewhere.

To prove the connection between this section and the 8th, the attention of the court has been directed to the other offenses it recapitulates, which are said to be accessorial to those enumerated in the 8th. They are admitted to be accessorial; but the court draws a different inference from this circumstance. Manslaughter is an independent crime, distinct from murder, and the legislature annexes to the offense a description of the place in which it must be committed in order to give the court jurisdiction. The same section then proceeds to enumerate certain other crimes which are accessorial in their nature, without any description of places. To manslaughter, the principal crime, the right to punish which depends on the place in which it is committed, Congress has annexed a description of place. To the other crimes enumerated \*in the same [**\*104** section, which are accessorial in their nature, and some of which at least may be committed anywhere, Congress has annexed no description of place. The conclusion seems irresistible, that Congress has not in this section inserted the limitation of place inadvertently; and the distinction which the legislature has taken must, of course, be respected by the court.

It is the object of the law, among other things, to punish murder and manslaughter, on land, in places within the jurisdiction of the United States; and also to punish murder and manslaughter committed on the ocean. The two crimes of murder and manslaughter, when committed on land, are described in two distinct sections, as two distinct offenses; and the description of the place in one section is complete in itself, and makes no reference to the description of place in the other. The crimes of murder and manslaughter, when committed on water, are also described as two distinct offenses, in two sections, each containing a description of the place in which the offense may be committed, without any reference in the one section to the other. That section which af-



fixes the punishment to manslaughter on the seas, proceeds to describe other offenses which are accessorial in their nature, without any limitation of place. In every section throughout the act, describing a crime, the right to punish which depends on place, and in some instances where the right of punishment does not depend upon place, the legislature has, without any reference to a preceding section, described the place in which it must be committed, in order to bring the offender within **105\*** the act. This characteristic feature \*of the law now to be expounded, deserves great consideration, and affords a powerful reason for restraining the court from annexing to the description contained in one section, parts of the description contained in another. From this review of the examination made of the act at the bar, it appears that the argument chiefly relied on, to prove that the words of one section descriptive of the place ought to be incorporated into another, is the extreme improbability that Congress could have intended to make those differences with respect to place, which their words import. We admit that it is extremely improbable. But probability is not a guide which a court, in construing a penal statute, can safely take. We can conceive no reason why other crimes which are not comprehended in this act should not be punished. But Congress has not made them punishable, and this court cannot enlarge the statute.

After giving the subject an attentive consideration, we are unanimously of opinion that the offense charged in this indictment is not cognizable in the courts of the United States; which opinion is to be certified to the Circuit Court for the District of Pennsylvania.

CERTIFICATE.—This cause came on to be heard on the transcript of the record of the Circuit Court for the District of Pennsylvania, and on the question on which the judges of that court were divided, and was argued by counsel; on consideration whereof, the court is of opinion, that manslaughter committed in a river such as the river Tigris is described \*to **[\*106]** be, is not punishable by the laws of the United States, and that the Circuit Court of the United States, for the District of Pennsylvania, has no jurisdiction over the offense. All which is ordered to be certified to the Circuit Court of the United States for the District of Pennsylvania.<sup>1</sup>

See S. C. 3 Wash. C. C. 515.

Cited—2 Pet. 367; 14 Pet. 475; 5 How. 481; 9 How. 572; 6 Wall. 396; 11 Wall. 620; 21 Wall. 491; 2 Otto, 219, 621; 7 Otto, 62; 10 Otto, 276, 279; Blatchf. & H. 249, 252; 1 Biss. 312; 2 Sawy. 151; 1 Abb. U. S. 37; 2 Abb. U. S. 461; 5 Ben. 227; Hemp. 501; 1 Story, 260; 5 Mason, 298; 1 Wood. & M. 438, 448, 458, 463, 466, 472, 483, 484; 2 Dill. 226, 228; 3 Dill. 123; 5 Dill. 39, 413; 2 Paine, 143; 3 Blatchf. 438; 16 Blatchf. 19; 1 Brown, 157; 14 Bank. Reg. 67, 68.

1.—The constitution of the United States declares, that the judicial power of the Union shall extend (among other things) "to all cases of admiralty and maritime jurisdiction;" and this court has determined, that the power thus granted belongs exclusively to the courts of the United States. *Martin v. Hunter, ante*, Vol. I., p. 333, 337. It is not the purpose of this note to consider what cases of a civil nature are properly included within the terms, "cases of admiralty and maritime jurisdiction." As to the criminal jurisdiction of the admiralty, there is no doubt that it is defined by local limits; and in order to ascertain these, it becomes necessary to inquire into the extent of the admiralty jurisdiction of England, from which ours was derived, as that was from the maritime states on the continent of Europe.

Both in England and the other countries of Europe, the Court of Admiralty is a branch which has sprung from that ancient and venerable stock, the office of admiral. The etymology of the word serves to indicate the origin of the office, and the time when it was introduced, at least under that name, into Europe. The word *admiral* or *ammiral*, is doubtless derived from the Arabic word *emir* or *amir*, signifying a general officer or commander-in-chief, *dominus vel prefectum*. Du Cange. Glossary. *Verbo Admiratus*. In the time of the crusades, by means of which so many oriental usages were brought into the west of Europe, it was introduced into France as the title of a commander-in-chief, either of land or sea forces. Accordingly, we find that the office, with that title, was unknown until the third race of French kings, under Charles IV., about the end of the thirteenth century, and it appeared in England about the same period in the reign of Edward I. After the term thus came to be exclusively applied to the commander-in-**107\*** chief of naval forces in France, the station was filled with several illustrious characters, and in the scale of civil and military dignities ranked immediately after the office of constable. The person who filled this high station had jurisdiction, by himself or his deputies, of all crimes and offenses committed on the sea, its ports, harbors, and shores. Valin. *Com. sur l'Ordon.*, l. 1, tit. 2, art. 10, De la Compétence.

In England, the office subsisted with the same title of High Admiral, until the reign of Charles II., when it was filled by his brother, the Duke of York (afterwards James II.), who, being excluded from office as a Catholic by the test act in 1673, it was ex-  
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ecuted by commissioners, with the same power and authority as belonged to the Lord High Admiral; and since the accession of the house of Hanover, the office has also been vested in commissioners, who are styled the Lords Commissioners of the Admiralty. But the King is said still to hold, for certain purposes, the office of Lord High Admiral, though in a capacity distinguishable from his regal character; a distinction of practical importance in the law of prize, but immaterial to the present purpose. The judge of the High Court of Admiralty in England formerly held his place by patent from the Lord High Admiral, but since that office has only existed in contemplation of law, he holds it by direct commission from the crown. The ancient criminal jurisdiction of the court was modified by the statute of the 28th of Henry VIII., ch. 15, which enacted, that offenses upon the seas, and in havens, rivers, &c., should be tried by the admiral or his deputy, and three or four more, among whom two common law judges are usually appointed, the judge of the High Court of Admiralty presiding. 2 Bro. Civ. and Adm. Law, 458. In Scotland, the court is held before the delegate of the High Admiral, who may also name other inferior local deputies, and who is declared to be the King's Justice-General upon the seas, or fresh water within flood and mark, and in all harbors and creeks. 2 Bro. Civ. and Adm. Law, 30.

This remarkable conformity between the origin, history, and nature of the courts of admiralty in France and Great Britain, renders it highly probable that their jurisdiction, both civil and criminal, however it may have been shifted from its ancient \*foundations, was originally the same; and **[\*108]** this supposition derives additional strength from the manner in which the history of the two countries is blended together during the middle ages, and from the circumstance of both having derived their maritime institutions from the shores of the Mediterranean.

There appears to be no question that the admiralty jurisdiction of England originally extended to all crimes and offenses committed upon the sea, and in all ports, rivers, and arms of the sea, as far as the tide ebbs and flows. This is established by the ancient inquisitions, the record of which still remain in the black book of the admiralty, and by the articles given in charge at the admiralty sessions, as early as the reign of Edward III. Clerk's Praxis; Roughton's articles, passim; Extton, ch. 11, 12, 13. Selden, de Dom. Mar., l. 2, ch. 24, p. 209. But



## [LOCAL LAW.]

## M'CLUNG v. ROSS.

Under the laws of Tennessee, where lands are sold by a summary proceeding for the payment of taxes, it is essential to the validity of the sale, and of the deed made thereon, that every fact necessary to give the court jurisdiction should appear upon the record.

Under the statute of limitations of Tennessee, the running of the statute can only be stopped by actual suit, if the party claiming under it has peaceable possession for seven years. But such a possession cannot exist if the party having the better right takes actual possession in pursuance of his right.

One tenant in common may oust his co-tenant, and hold in severalty; but a silent possession, unaccompanied with any act amounting to an ouster, or giving notice to the co-tenant that his possession is

adverse, cannot be construed into an adverse possession.

THIS cause was argued by *Mr. Williams*<sup>1</sup> for the plaintiff in error, and by the *Attorney-General* and *Mr. F. Jones*<sup>2</sup> for the defendant.

\**Mr. Chief Justice MARSHALL* delivered [\*117] the opinion of the court: This is an action of ejectment brought by the lessee of David Ross

1.—He cited 2 Tenn. Rep. 44, 218, 186, 365, 358, 242; 1 Tenn. Rep. 362, 467, 545; 1 Hayw. Rep. 24, 62, 65, 95; 2 Hayw. Rep. 80; 3 Mass. Rep. 379; 2 Tidd's Pract. 936; 2 Binney, 223, 329; 1 Binney, 40; 4 Dall. 226; 1 Wash. Rep. 313; 9 Johns. Rep. 58, 179.

2.—They cited 1 Tenu. Rep. 119, 126, 436; 2 Tenu. Rep. 40; 5 Hayw. Rep. 294; 1 Hayw. 176; 4 Wheat. 77.

Lord Coke, in 4 Inst. 135, *et seq.*, after admitting that the admiralty had jurisdiction of all things done upon the sea, endeavors to establish the doctrine, that the sea, *ex vi termini*, did not include any navigable waters within the body of any county of the realm; and for proof of this, he mainly relies on certain authorities in Fitzherbert's Abridgment (Avovery, 192; Corone, 399), which, when carefully considered, will not support his position. The hostility of Lord Coke to the admiralty, and indeed to every other jurisdiction rivaling the common law courts, is well known; and Mr. Justice Buller has observed, that "with respect to what is said relative to the admiralty jurisdiction in 4 Inst. 135, that part of Lord Coke's work has been always received with great caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an enmity against that jurisdiction." All the authorities cited by Lord Coke will be satisfactorily disposed of upon the supposition (which Lord Hale asserts to be the fact) that before the thirty-fifth year of Edward III., the common law exercised, even upon the narrow seas, as well as in ports and havens within the ebb and flow of the tide, a concurrent jurisdiction with the admiralty. 2 Hale's P. C. 13 *et seq.* Neither does the case itself in Fitz. Abr. Corone, 399, 8 Edw. II., warrant Lord Coke's assertion. Stanton, J., is there reported to have said, that it is not an arm of the sea where a [109\*] man can see \*what is done on the one side of the water and the other; and that the coroner, in such cases, shall exercise his jurisdiction there. This *dictum*, taken literally, cannot be considered as law, for in the year books (22 Assisarum, 93) it is expressly held, that every water which flows and reflows, is called an arm of the sea, so far as it flows. "*Que chescun ewe, que flow et reflow, est appelle bras de mer cy tantant come el flowe.*" The same doctrine is quoted and confirmed by Lord Hale, who states, that the sea is either that which lies within the body of a county or without; and that an arm or branch of the sea which lies within the *faucibus terre*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county. Hale, De Jure Mar., ch. 4, p. 10. So that there is the strongest reason to question Lord Coke's authority in this respect, and to adhere to the evidence furnished by the records of the admiralty, of its ancient jurisdiction in ports and havens within the ebb and flow of the tide.

How far this ancient jurisdiction has been altered by statutes, is another question. The statute 13 Richard II., ch. 5, enacts, "that the admirals, and their deputies, shall not meddle henceforth of anything done within the realm, but only of a thing done upon the sea, according as it hath been duly used in the time of the noble King Edward (III.), grandfather of our Lord the King that now is." The statute 15 Richard II., ch. 3, enacts, "that of all manner of contracts, pleas and queables, and of all other things done, or arising within the bodies of counties, as well by land as by water, and also of wreck of the sea, the Admiral's Court shall have no manner of cognizance, power, nor jurisdiction; but all manner of contracts, pleas, and queables, and all other things rising within the bodies of counties, as well by land as by water, as afore, and also wreck of the sea, shall be tried, determined, discussed, and remedied by the laws of the land, and not before, or by the admiral, nor his lieutenants,

in any wise. Nevertheless, of the death of a man, and of a mayhem done in great ships, being hovering on the main streams of great rivers, only, beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers, the admiral shall have cognizance; and also, to arrest \*ships in the great flotes for the great voy- [\*110] ages of the King, and of the realm; saving always to the King all manner of forfeitures and profits thereof coming; and he shall also have jurisdiction upon the said flotes during the said voyages, only saving always to the lords, cities, and boroughs, their liberties and franchises." The true limit of the admiralty jurisdiction under these statutes was long a subject of angry contention between the civilians and the common lawyers. But it is admitted on all sides, that on the main or high seas (which, as Blackstone states, begin at the low water-mark, 1 Bl. Comm. 110), the admiralty has jurisdiction exclusive of the common law; and that, between high water-mark and low water-mark, where the sea ebbs and flows (which is technically the shore of the sea, or *littus maris*, Hale de Jure Mar. ch. 4, p. 12), the common law and the admiralty have a divided empire (*divisum imperium*) or alternate jurisdiction, one upon the water when it is full sea, the other upon the land, when it is an ebb. 1 Bl. Comm. 110; Constable's case, 5 Co. Rep. 106, 107; Barber v. Whanton, 2 Lord Raym. 1452; 2 East's P. C. 803; 4 Bl. Comm. 268. Upon the sea-coast, therefore, it is incontestible that the body of every county bordering on such coast, is bounded by the shore of the sea, and at no time extends below low water-mark.

But what constitutes the boundary of counties bordering on arms of the sea, and navigable rivers, is a question concerning which great differences of opinion have been expressed. It has been strenuously insisted by the judges of the admiralty, that, notwithstanding the statutes of Richard, the admiralty still continues to possess jurisdiction in all ports, havens, and rivers, where the sea ebbs and flows, below the first bridges. 1 Sir L. Jenkins's Life, xcii; Exton, b. 2, ch. 3 *et seq.*; Zouch, 92. And Sir Henry Spelman adopts the same opinion. Spelm. Reliq. 226. The ground of this opinion is, that the same rule exists at the common law in respect to the bounds of counties on navigable waters and arms of the sea as is applied by the same law to the sea-coast, viz., that they are limited by the ebb and flow of the tide; and that the statute of Richard was intended \*no further to restrict the ad- [\*111] miralty than as to crimes committed above the first bridges. 1 Sir L. Jenkins's Life, xcii; Exton, ch. 10 to 20; Zouch, 92. And it cannot be denied, that the agreement of the twelve judges in 1632, cited at large (*ante*, Vol. III., p. 365, note 4), strongly countenances this pretension. In Rex v. Soleguard (Andrew's Rep. 231), also, Sir Edmund Isham cited an opinion delivered as recently as 1713, on a reference to all the judges, in which ten of them (against Ward, C. B., and Gould, J.,) held, "that the admiralty hath a jurisdiction in all great navigable rivers from the bridges to the sea." And in that case the court did not deny the jurisdiction, but founded their judgment upon a supposed concurrent jurisdiction of the common law. On the other hand, Lord Coke, principally on the authority of the two cases before cited (4 Inst. 140; Fitz. Abr. Avovery, 192, and Corone, 399), maintains that the bodies of counties comprehend all

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against Charles M'Clung, for 5,000 acres of land, lying in the District of East Tennessee.

At the trial of the cause, the plaintiff in the court below gave in evidence two grants from the state of North Carolina, for the land in controversy, to Stockly Donalson and John Hackett, the one dated the 20th of September, 1787, and the other dated the 22d of February, 1795. He also gave in evidence a deed of conveyance of the said land, purporting to be from Stockly Donalson and John Hackett, dated the 29th of September, 1793, and registered in Hawkins county, Tennessee, on the 27th of December, 1793. The regular registration of this deed, so far as respected Stockly Donalson, was admitted by the defendant. Its registration as to John Hackett was not admitted,

and was proved only by the following indorsements:

"December Session, 1793.

This deed was proved in open court, and ordered to record. Test.

RICHARD MITCHELL, C. H. C.

This conveyance was registered 27th of December, 1793, in liber G., p. 127, in the register's office of Hawkins county.

THOMAS JACKSON, C. R."

It is stated in the bill of exceptions, that the execution of the deed on the part of Hackett was not proved.

The defendant also claimed under Stockly Donalson; but his deeds being of subsequent date, could confer no title while the deed to Ross remained in force. \*For the pur- [\*118

navigable waters where persons can see from one side to the other; or rather, as other authorities, with more accuracy, state it, the point, where a man standing on one side of the land, may see what is done on the other side. Hawkins's P. C. ch. 9, sec. 14; 2 East, P. C. 804. Lord Hale appears to speak with great doubt and hesitation on this subject, merely asserting that "an arm or branch of the sea, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county." And it may fairly be inferred as well from this cautious expression as from his commentary on the statute of the 28th Hen. VIII., ch. 15 (2 Hale's P. C. 16, 17), that Lord Hale was not satisfied with Lord Coke's exposition of the common law boundary of counties. The whole question, however, became in a great degree unimportant in England after the enactment of the statute of the 28 Hen. VIII., ch. 15, which gave to the High Commission Court (of which the admiral or his deputy is the presiding judge), cognizance of "all treasons, felonies, robberies, murders and confederacies committed in or upon the sea, or in any other haven, river, creek, or place, where the admiral or admirals have, or pretend to have jurisdiction." In the exposition of this statute, Lord Hale says: "This seems to me to extend to great rivers where the sea flows and reflows below the [112\*] first bridges, and also in creeks of the sea at full water, where the sea flows and reflows, and upon high water upon the shore, though these possibly be within the body of the country, for there at least by the statute of 15 Rich. II., they (the admirals) have a jurisdiction; and thus, accordingly, it has been held, at all times even when the judges of the common law have been named, and sat in the commission; but we are not to extend the words (pretend to have) to such a pretence as is without any right at all; and, therefore, although the admiral pretend to have jurisdiction upon the shore, when the tide is reflowed, yet he hath no cognizance of a felony committed there." 2 Hale's P. C. 16, 17. This construction of the statute, in opposition to Lord Coke's, was solemnly adopted in a very recent case by the twelve judges; and sentence of death accordingly passed upon the prisoner upon a conviction under the statute. *Rex v. Bruce*, 2 Leach's C. C. 1093; 4th Ed. cited at large, *ante*, Vol. III., p. 371, note 1. Sir Leoline Jenkins, in his charge given at the Admiralty Sessions at the Old Bailey, speaking of the commission given to the judges under the statute, says: "But the commission itself explains the word (pretend) in a more particular manner in directing the inquiry to be of things done, not only upon the sea, and in havens, creeks, and rivers, as in the statute, but also in all places whatsoever within the flowing of the water, to the full sea mark; and in all great rivers from those bridges downwards that are next the sea; which words, being in the commission, are the best comment upon the statute, it having so often passed the great seal in these last seven score years, under the view and approbation of so many Lords Chancellors and Keepers, and of so many Attorney-Generals, men of the greatest eminency in the laws of the land, so that the words of the statute, and the commission, being taken together, do not only ascertain the power of this court to hear and determine offenses done in all, or any of those places, but do also declare all and every of

the places themselves to be within the jurisdiction of the admiralty; for otherwise, the jurisdiction of the commissioners since the statute would be of larger extent, and in more places than the jurisdiction of the admiral was before the statute, which it is clear was not intended by the law-makers." [\*113 1 Sir L. Jenkins, xci. But where such havens, creeks, and rivers, &c., are within the body of a county, it seems now generally agreed that the courts of common law have a concurrent jurisdiction over the same offenses. 2 Hale's P. C. 15, 16; *Rex v. Bruce*, 2 Leach's C. C. 1093, 4th ed.

Supposing, however, Lord Coke's view of this matter to be correct, the limits of a county will still be confined to places in rivers, creeks, and arms of the sea, which are so narrow as that a person on one side can reasonably discern and attest upon oath anything done on the other side; for the reason assigned for this rule of limitation is, that the *pais* may there come and take inquisition of the facts. 4 Inst. 140; 2 East's P. C. 804. And, in England the admiralty hath by the express provisions of the statute 15 Rich. II., ch. 3, cognizance of every description of homicide and mayhem, "happening in great ships being and hovering in the main stream of great rivers below the bridges of the same rivers, which (as Blackstone observes), are then a sort of port or haven; such (to use his own illustration), as are the ports of London and Gloucester, though they lie at a great distance from the sea, 4 Bl. Comm. 268, and though they be within the body of a county, 2 Hale's P. C. 16.

But it is certainly very questionable how far the statutes of Richard II. are to be considered as restrictive of the grant of admiralty and maritime jurisdiction contained in the constitution of the United States. These statutes were never designed to apply to the colonies, for at that time the colonies did not exist; and in point of fact, the admiralty jurisdiction in the colonies has always depended entirely upon the royal commission, and upon acts of Parliament expressly extending to them. Hence, the colonial vice-admiralty courts have constantly exercised jurisdiction in many cases, such as revenue cases, of which the High Court of Admiralty in England has not recently taken jurisdiction. I say recently, because it seems that formerly the admiralty in England did take jurisdiction of the breaches of the navigation laws, and other laws of trade; either by the express provisions of those statutes or in virtue of its original maritime jurisdiction. 1 Sir L. Jenkins's Life, lxxii., [\*114 xcv., *et seq.*; 2 Sir L. J., p. 745, 746. But it appears that the colonial vice-admiralty courts have uniformly exercised a jurisdiction over revenue cases upon their original inherent powers by virtue of their commissions, independent of any statute. See a case cited in *The Fabius*, 6 Rob. 245. Beside, the restrictions contained in the statutes of 13 and 15 Rich. II., as to criminal jurisdiction, are purely arbitrary, and cannot be considered as declaratory of the pre-existing law. What reason is there why the admiralty should have jurisdiction of homicide and mayhem in rivers, ports, and creeks of the sea, and not of other crimes in the same places? Such a limitation has no foundation in the ancient constitution of the court, and never at any time existed independent of the statute. It is also a well-established rule in the construction of English statutes, that they are not to be considered as ex-



pose of invalidating this deed, he offered in evidence certain records of the County Court of Rhea, showing that the land had been sold for the non-payment of taxes, had been conveyed by the sheriff to the purchaser, and by the purchaser to the defendant. The regularity of this sale, and the validity of the deeds made in consequence of it, were contested, and the court determined against their validity; to which opinion of the court the counsel for the defendant excepted.

In the year 1803, the legislature of Tennessee passed an act, subjecting all lands to which the Indian claim was extinguished, held by deed, &c., to taxes. The 13th section of the act provides, that "in case there shall not be any goods or chattels on which the sheriff can distress for public taxes, &c., he shall report the same to the court of this county." The court is then directed to make out certain lists, and to direct certain publications, after which the court may enter up judgment, on which execution may issue, and the lands be sold. In 1807 the legislature passed a supplementary act, the 3d section of which enacts, that it shall be the duty of the collector of taxes in each county, after the first day of January in each year, to make report to the court in writing, "of all such tracts or parts of tracts of land as have, from his own knowledge, or from the information of others, not been returned for taxation for the said preceding year; and it shall be the duty of the said court to cause said report to be recorded in books to be kept for that purpose, and to cause judgment to be entered up for double the tax due on the **119**"] \*said land, not returned for taxation, and so unpaid, and shall order the same to be sold," &c.

In January, 1810, Miller Francis, collector of taxes in Rhea county, for the year 1809, re-

tending to the colonies, unless included by express words, or by inevitable implication (1 Bl. Comm. 107, 108); and it cannot be pretended that the colonies are within the purview or the words of the statutes of the 13 and 15 Richard II. Why, then, should they be considered as extending to the colonies, which did not then exist, any more than to Scotland, which was not then united to the crown, but in which country the admiralty still retains its ancient jurisdiction undiminished?

The commissions issued by the crown to the vice-admiralty courts in the colonies were entirely inconsistent with the limitations imposed upon the admiralty in England. One of the latest, which is probably copied from the others, is that issued to the Governor of New Hampshire, in 6 Geo. III. It empowers him "to take cognizance of, and proceed in all causes, civil and maritime, and in complaints, contracts, offenses or suspected offenses, crimes, pleas, debts, exchanges, accounts, charter-parties, agreements, suits, trespasses, inquiries, extortions, and demands, and all business, civil and maritime, whatsoever, &c., throughout all and every the sea-shores, public streams, ports, fresh waters, rivers, creeks, and arms, as well of the sea as of the rivers and coasts, whatsoever, of the province, &c., and territories dependent thereon, and maritime ports, whatsoever of the same, and thereto adjacent;" and in this commission **115**"] \*those places are referred to as within "our maritime jurisdiction." De Lovio v. Boit, 2 Gallis. 470, note 47. It seems highly probable that the expression "maritime jurisdiction;" in the constitution, was borrowed from the language of those commissions, and was introduced *ex abundanti cautela*, and superadded to the term "admiralty," in order to obviate any doubt as to the full extent of the authority meant to be conferred.

Indeed, it has already been, in effect, decided by this court, that the statutes of Richard are not in

ported to the court, that the following lands were not listed for taxation for the year 1809, to wit, &c. Then follows a list of several tracts of land, among which is the tract in question, reported three several times in the following terms:

Reputed owners.	Quantity.	No. of title.	Date of title.	Location. Tax.
S. Donalson,	5,000	209	20 Sept. 1787.	Pleasant, &c.
S. Donalson,	5,000	1347	22 Feb. 1795.	
John Hackett,				
David Ross,	5,000	209	20 Sept. 1787.	

Upon the return of which report the court entered up a judgment for the sale of the said lands, and after the publication required by law, an execution was directed, under which the said land was sold as being three distinct tracts; when Robert Farquharson became the purchaser of the tracts reported to belong to Stockly Donalson, and to Stockly Donalson and John Hackett; and the agent of David Ross became the purchaser of the tract reported to belong to David Ross.

A question of considerable difficulty arises on the validity of these sales. Under the act of 1803, the power of the court to render judgment in such cases for the sale of land is founded on there being no personal property from which the tax might be made. The jurisdiction of the court depends on that fact. Whether it is necessary that its existence should be shown in the judgment of the court, is a question on which the state courts appear to have decided differently at different times. But the last, and, we \*believe, the correct opin- [\***120** ion, reported in 5 Haywood, 394, establishes

force in the United States, as limitations of the admiralty and maritime jurisdiction granted in the constitution. By the judiciary act of 1789, ch. 20, sec. 9, seizures under laws of impost, navigation, and trade, on waters navigable from the sea by vessels of ten or more tons burthen, as well as seizures on the high seas, are expressly included in the admiralty and maritime jurisdiction of the district courts. It is evident that Congress could not give the district courts, acting as courts of admiralty, cognizance of any causes which were not "of admiralty and maritime jurisdiction," within the true meaning of the constitution; because, it would deprive the parties of their constitutional right of trial by jury. The objection was, therefore, very early taken, that seizures in ports, and in such navigable waters as above stated, were not causes of admiralty and maritime jurisdiction, because those places were not, according to the common law interpretation in England of the statutes of Richard II. within the jurisdiction of the admiralty. But this court has repeatedly overruled the objection (*La Vengeance*, 3 Dall. 297; *The Sally*, 2 Cranch, 406; *The Betsey* and *Charlotte*, 4 Cranch, 443; *The Samuel*, *ante*, Vol. I., p. 9; *The Octavia*, *Ib.* p. 20), and thereby established the doctrine that the constitutional admiralty jurisdiction includes ports, arms, and creeks of the sea, as far as the tide ebbs and flows.

The learned reader will observe that this position is not disturbed by the decision of this court in the case in the text (*The United States v. Wiltberger*), or by that of the United States v. Bevens (*ante*, Vol. III., p. 336, 337); the only question in those cases being, not what was the constitutional authority of Congress, but how far it had been exercised; not what was the \*extent of the [\***116** admiralty and maritime jurisdiction granted in the constitution, but how far it had been conferred by Congress upon any particular court of the Union.

the general principle, that in these summary proceedings, every fact which is necessary to give jurisdiction, ought to appear in the record of the court. The act of 1807 directs the court to proceed on the return of the collector, that the taxes of the preceeding year are unpaid, or that the land has not been returned for taxation. Whether this act, which is supplemental to that of 1803, authorizes the court to give judgment for the sale of land, although there may be personal property in the county sufficient to pay the tax, or only varies the mode of proceedings against the land, without varying the circumstances under which it may become liable, is a question which does not appear to have been decided in Tennessee, and which it is unnecessary to decide in this case, because we are all of opinion, that if the sale was valid, Ross is to be considered as the purchaser of his own title, and Farquharson as the purchaser of the title of Donalson and Hackett. The objection to this is, that the agent of Ross stood by and permitted Farquharson to bid. But this objection implies a knowledge on the part of Ross, or his agent, that the land sold in the name of Donalson and Hackett was his land. There is no evidence that either of them possessed this knowledge; nor are the circumstances such as would justify its being presumed. Were the court required to presume fraud on this occasion, it is not to Ross, or to his agent, that the evidence on this particular part of the transaction would justify us in ascribing it. We think, then, that the defendant **121\***] ants in the court below \*acquired no title to Ross's land by the sheriff's sale or deeds. We think, then, that there was no error in rejecting these deeds.

The defendant also claimed the benefit of the act of limitations, which makes seven years' peaceable and adverse possession a complete bar to the action.<sup>1</sup>

In support of this claim, he relied on the testimony of John Meriott, who swore, that in pursuance of an agreement between him and John Hackett, who informed him that the land **122\***] belonged to him (Hackett) \*and the defendant, M'Clung; he took possession of the land in March, 1807, built a house, and cleared seven or eight acres, and retained possession of the land until the contract was rescinded. By a contract with M'Clung, he agreed to hold possession for M'Clung and Hackett. It also appeared in evidence that Meriott remained in possession until the autumn of 1808, when he surrendered it to Hackett, who, in the succeeding spring, moved with his family into the house Meriott had built, where he resided until his death, since which event it has been occupied by his widow and family.

The plaintiff then proved, that in 1795 John

Hackett showed this agent of Ross the land in controversy as the land sold to him; that in the year 1813 the same agent agreed to lease a part of the land to one Cox, who, in pursuance of the said agreement, entered thereon, and built a small house, but being threatened by M'Clung with a suit, he abandoned it.

Upon this testimony, the defendant in the Circuit Court moved the court to charge the jury, 1st. That if they believed the possession taken by Meriott to have been on behalf of Hackett and M'Clung, and that Hackett continued said possession for himself and M'Clung, for seven years before suit, it was adverse, and would bar the claim of the lessor of the plaintiff. And farther, that the possession of the land taken by Cox, as tenant of Ross, would not suspend the statute of limitations, and that the effect of the said statute could be defeated only by suit at law.

This instruction the judge refused to give, but did \*charge the jury that Hackett **\*123** was by law a tenant in common with Ross, of which character he could not discharge himself by agreement with a younger purchaser from Donalson, and that the statute would not bar his right. With respect to the occupancy of Cox, the judge said, that merely going upon the land would not stop the running of the statute, but that if an older adverse claimant took actual possession by building houses, clearing land, &c., the operation of the statute of limitations might be thereby suspended. To this opinion, also, the counsel for the defendant excepted.

On examining the whole testimony stated in the bill of exceptions, it appears that the contract with Hackett, which is stated by Meriott in his deposition, was a contract for the sale and purchase of a part of the tract of 5,000 acres sold by Donalson to Ross, and that his contract with M'Clung was a sale of M'Clung's part of the same land, on condition that he would hold the whole tract for M'Clung and Hackett. The actual possession of Meriott, then, does not appear to have extended beyond his purchase. He does not allege that Hackett put him in possession of more land than was sold to him; nor does it appear that M'Clung put him in possession of any land farther than the virtual possession which was to be implied from the agreement which has been stated. The possession of Meriott, then, was an actual possession of a part of the land under a purchase. It was his own possession, in his own right, and not the possession of Hackett and M'Clung. His agreement with M'Clung to hold \*the residue of the land for Hackett **\*124** and M'Clung, never having been followed, so far as is shown to the court, by actual occupation of any part of that residue, cannot, we

1.—The statute of Tennessee of 1797, c. 47, made to settle the true construction of the statute of limitations of North Carolina of 1715, provides, "that in all cases, whenever any person or persons shall have had seven years' peaceable possession of any land, by virtue of a grant, or deed of conveyance founded upon a grant, and no legal claim by suit in law, by such, set up to said land, within the above term, that then and in that case the person or persons so holding possession as aforesaid shall be entitled to hold possession, in preference to all other claimants, such quantity of land as shall be specified in his, or their said grant, or deed of conveyance founded on a grant as aforesaid." The act

then proceeds to bar the claim of those who shall neglect, for the term of seven years, to avail themselves of any title they may have.

Under the statute of North Carolina, it had been determined by the courts of that state, that it afforded protection to those only who held by color of title. And under the act of Tennessee, it is settled by the decisions of the local courts, and of this court, that it does not like other statutes of limitation, protect a mere naked possession, but that its operation is to be limited to a possession of seven years, acquired and held under a grant or a deed founded on a grant. *Patton's Lessee v. Easton, ante*. Vol. I., p. 476.



think, be construed into such a possession by Hackett and M'Clung as to affect the title of Ross. If the defendant cannot avail himself of the possession of Meriott, then it is not shown that the bar was complete when this suit was brought. The contract of sale with Meriott was rescinded in the autumn or winter of 1808, and Hackett entered into the land in the spring of 1809. This suit was instituted on the 27th of March, 1816. The testimony does not show that the entry of Hackett was anterior to the 27th of March, 1809. This, however, ought to be left to the jury. But the judge was of opinion that the possession of Hackett was not adverse to that of Ross, because they were tenants in common.

That one tenant in common may oust his co-tenant and hold in severalty, is not to be questioned. But a silent possession, accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his possession is adverse, ought not, we think, to be construed into an adverse possession. The principles laid down in *Barr v. Gratz* (4 Wheat., 213) apply to this case.

Neither does it appear to this court that there is error in that part of the charge which respects the occupation of Cox on the part of Ross. It is, that merely going upon the land will not stop the running of the statute, but that if an older adverse claimant took actual possession by building houses, clearing **125\*** land, &c., the operation of the statute of limitations might be thereby suspended. It has been contended that the statute of Tennessee can be stopped only by actual suit. This is true, when the possession is such as by its continuance to constitute a bar. But to make it such, it must be peaceable for seven years. This is the fact which creates the bar. This fact cannot exist if the person having the better title takes actual possession in pursuance of his right. It is unnecessary to inquire whether the subsequent abandonment of this possession rendered it in this case a nullity, because the point is rendered unimportant by the circumstances that Ross and Hackett were tenants in common. There is, then, no error in the charge so far as respects the statute of limitations.

But the counsel also requested the judge to charge the jury, that the name of Hackett being signed to the deed from Stockly and Donalson to Ross, since the delivery of said deed, amounts to such an alteration or addition as will vitiate such deed, unless accounted for by the plaintiff. This charge, also, the judge refused to give, but did instruct the jury that the title was vested in Ross by the deed from Donalson, and could not be divested, although there might be an alteration or addition in a material part of the said deed, such as the name of Hackett being put to the deed and not proved.

There is some ambiguity in this instruction, and there is some doubt in the state of the fact. The counsel for the defendant assumes the fact that the signature of Hackett was affixed to the **126\*** deed after its delivery. This does not appear in the evidence as stated. Nor does it appear whether the signature of Hackett was affixed before or after the deed was registered. It was not proved or registered as to Hackett, and is void as to him. The court is not, however, prepared to say, that it is void as to Don-

alson. But the instruction given by the judge is in terms which might mislead the jury, and which appear in fact to have misled them. He says that the title was vested in Ross by the deed from Donalson, and could not be divested by the addition of the name of Hackett. Now, this suit was instituted for the whole tract, and the title asserted by Ross was a title to the whole tract. The instruction of the judge might have been understood as informing the jury that the title vested by the deed conformed to the title claimed by Ross. In fact, it was so understood: for the jury found a verdict for the whole tract, and the court gave its judgment for the whole. Now, Ross had no title to more than a moiety, and the judge ought so to have instructed the jury. For this reason, the judgment is to be reversed, and the cause remanded for a new trial.

*Judgment reversed.*

JUDGMENT.—This cause came on to be heard on the transcript of the record of the Circuit Court for East Tennessee, and was argued by counsel. On consideration whereof, it is the opinion of this court that the Circuit Court erred in instructing the jury that the title to the whole tract of land in the proceedings mentioned, and for which judgment was *\*rendered* in the said Circuit Court, was vested in David Ross, whereas the said court ought to have instructed the jury that only a moiety of the said land was vested in him. It is therefore adjudged and ordered, that the judgment of the said Circuit Court in this case be, and the same is hereby reversed and annulled. And it is further ordered, that the said cause be remanded to the said Circuit Court with directions to issue a *venire facias de novo*.

Cited—9 Wheat. 288; 5 Pet. 440; 3 How. 690; 16 How. 618, 619; 1 McLean, 328; 3 Cranch, C. C. 130; 3 Cliff. 53.

[PRIZE.]

## THE VENUS.

JADEMEROWSKY, *Claimant*.

A question of proprietary interest, on further proof. Restitution decreed.

Captors' costs and expenses ordered to be paid by the claimant, it being his fault that defective documents were put on board.

On further proof, the affidavit of the claimant is indispensably necessary.

**A**PPEAL from the Circuit Court of Georgia.

This cause was continued for further proof at February term, 1816, (*Vide ante*, Vol. I., p. 112). Owing to various accidents, the further proof was not received until the last term, and the cause was now argued upon the further proof then produced and filed. It consisted of invoices of the cargo, bills of lading, accounts of sale, accounts of disbursements, the original correspondence between the *\*claimant* and Mr. Jones, his agent in London, and the original procuration from the claimant to Mr. Jones, recited in the power given from the latter to Diamond, the supercargo, one of the

Wheat. 5.



original papers found on board; to which was added the affidavit of Mr. Jademerowsky, the claimant, verifying the correspondence, and explaining the circumstances of doubt and suspicion which appeared upon the original evidence.

*Mr. Harper*, for the claimant, recapitulated the facts of the original case, stating that this ship sailed from London under Russian colors in April, 1814, joined a British convoy at Portsmouth, and sailed for Barbadoes, where she arrived, and having again sailed bound to the Havanna, was captured on the latter voyage by a British cruiser, carried in for adjudication, and acquitted. She changed her destination for Amelia Islands, and was captured by an American cruiser. At the hearing in the District Court, the ship was restored by consent, and the cargo acquitted; but the latter was condemned on appeal to the Circuit Court, the origin of the adventure not being traced further than London, and it being supposed to be enemy's property concealed under a Russian garb. He argued, from the further proof, that all the circumstances of suspicion arising from the original evidence were now satisfactorily explained, and that consequently the claimant was entitled to restitution.

The *Attorney-General*, contra, insisted that the farther proof now produced was insufficient to satisfy the doubts originally existing in the cause. The ship was captured in the same year with the *St. Nicholas*<sup>1</sup> and the *Fortuna*,<sup>2</sup> and under circumstances strikingly similar. They were all sailing under Russian colors, and documented as Russian vessels; but exclusively directed by British merchants, professing to be the mere agents of the neutral claimants. Even some of the same parties also appear in this case; and the captors have a right to look into these other cases in order to bring this circumstance to the notice of the court.<sup>3</sup> The documents now produced are not such, nor verified in such a manner, as the court had a right to expect. It is not difficult to conceive what fate such documents would have experienced had they been offered in a similar case to Sir W. Scott, after the eloquent description he has given, in the case last cited,<sup>4</sup> of the inexhaustible ingenuity with which new arts are invented to cover enemy's property under a neutral garb; and the jealous rigor with which, in very suspicious cases, he examines the documents offered to his inspection. In another case, he says, "goods shipped in the enemy's country are to be considered *prima facie* as the property of the enemy, and can only be taken out of that presumption by fair and unbiassed evidence, and not from evidence supplied only from the enemy."<sup>5</sup> But the greater part of the evidence in the present case comes from that source, and is liable to that objection.

*Mr. D. B. Ogden*, for the claimant, in reply, argued, that as this court, in granting the order for further proof, had not stated what were the doubts to be explained by the claimant, it was sufficient if he had satisfactorily answered those

suggested in the opinion of the Circuit Court. The claimant has given such an answer to those doubts, both by the production of documentary evidence, and by his own affidavit, which, it is admitted, is indispensably necessary in order to guard against the inferences that might otherwise fairly be drawn from his silence. The documents are duly verified; and that not merely by his agents in the enemy's country, but by his own oath, and by other testimony.

*Mr. Justice JOHNSON* delivered the opinion of the court: When this case was first brought to the view of this court, it was accompanied by some others, in which Russian claimants presented themselves under circumstances which satisfied this court that their claims were false and fraudulent. On comparing those cases with this, there was such a striking similitude in their machinery that it was impossible not to suspect that they were all fashioned upon the same model, and adapted to the same end. With *The St. Nicholas*<sup>6</sup> and *The Fortuna*,<sup>7</sup> full in view, this court could not adjudge the case of this vessel to be a case of restitution. Still, however, there was a possibility that those may have been the forged copies, and \*this the genuine prototype. This [\*131 court, therefore, trusting that a Russian character of high standing could not have pledged himself for the fairness of the transaction, but without better evidence than was then presented to our view, gave the most liberal indulgence for procuring evidence to support the claim. We now express our satisfaction in having done so, inasmuch as it has enabled an honest man both to save his property, and vindicate his reputation. And we cannot omit this opportunity to remark, how much it becomes the interest, as well as principles of the fair neutral, to discountenance the conduct of him who indulges himself in fraudulent practices. The claimant in this case had nearly fallen a sacrifice to the bad faith of some of his countrymen; a great loss from it he must unavoidably incur. For, this is one of those cases in which, by the course of the admiralty, we shall be obliged to throw the costs and expenses upon the claimant, although we decree restitution. It is altogether upon the evidence of Jones, and the test-affidavit of the claimant, introducing and verifying their original correspondence, that restitution is now decreed. Unsupported, and unexplained by the evidence introduced as further proof, the condemnation was unavoidable. It is, therefore, the claimant's misfortune, not that of the captors, that the agent Jones had furnished the vessel with the defective documents which accompanied her.

*Decree reversed.*

DECREE.—This cause came on to be heard on the transcript of the record of the Circuit Court for the District of Georgia, and [\*132 on the further proof exhibited in this cause, and was argued by counsel. On consideration whereof, it is decreed and ordered, that the decree of the Circuit Court for the District of

1.—1 Wheat. 417.

2.—2 Wheat. 161.

3.—The *Rosalie* and *Betsy*, 2 Rob. 281.

4.—*Ib.*

5.—The *Juno*, 1 Rob. 100.

6.—1 Wheat. 417.

7.—2 Wheat. 161.

Georgia in this case, condemning the cargo of the ship *Venus*, be, and the same is hereby reversed and annulled. And this court, proceeding to pass such decree as the said Circuit Court should have passed, it is further decreed and ordered, that the said cargo of the ship *Venus* be restored to the claimant; and it is further decreed, that the said claimant pay to the libelants the costs and expenses incurred in the prosecution of this suit.

Cited—2 Mason, 122.

[PRIZE.]

THE LONDON PACKET.

MERINO, Claimant.

A question of proprietary interest on farther proof. Restitution decreed, with costs and expenses to be paid by the claimant.

In general, the circumstance of goods being found on board an enemy's ship raises a legal presumption that they are enemy's property.

THIS was the claim of a Spanish subject to a parcel of hides laden on board of the *London Packet*, a British ship, at the port of Buenos Ayres, in South America, in the month of June, 1813. The *London Packet*, on her voyage to London, was captured by the private **133\*** armed brig the *Argus*, and carried \*into Boston for adjudication. On being libeled in the District Court as a prize of war, the consul of His Catholic Majesty filed a claim for the property in question in favor of Don Jeronimo Merino, a Spanish subject. The District Court condemned the vessel and the whole of the cargo, except these hides, which were restored to the claimant, the court being satisfied there was not such proof of enemy's property therein as to authorize a decree of condemnation. For the ship and residue of the cargo no claim was interposed. From this decree, as to the hides, there was an appeal by the captors to the Circuit Court, where the same was reversed. The court, although it reversed the sentence which had been pronounced below, expressed its entire satisfaction as to the national character and domicile of the claimant, and that the hides had been originally shipped by him; but condemned the property, because, on the order for farther proof, no affidavit had been offered, either of the claimant or his confidential agent, or clerk, of his interest in the cargo at the time of the shipment. It was considered, that the absence of such a document, so universally expected and required by prize tribunals, unavoidably threw a suspicion over the cause, and being wholly unaccounted for, it authorized a belief that there had been a voluntary, if not a studied omission on the claimant's part. At the same term in which the sentence of reversal was pronounced, but not until after such sentence was known, the affidavit of the claimant, which had been received since the last adjournment of the court, was produced by the **134\*** Spanish consul, with a petition \*that the decree might be rescinded, for the purpose of admitting it into the case, or that the same might be so far opened, for the consideration

of the court, as to make the affidavit of Merino a part of the evidence therein, so as to accompany the other testimony in the appeal to this court. Upon this application the Circuit Court ordered that the affidavit should be received by the clerk, and sent up with the other papers *de bene esse*, subject to the directions of this court. The affidavit had been taken on an order below for further proof, but had not been received, as has been stated, when the decree of condemnation was pronounced.<sup>1</sup>

Mr. Webster and Mr. Pitman, for the captors, argued, that it was a well-settled principle in the prize court that the *onus probandi* lies on the claimant. "In the prize court," says Sir Wm. Scott, "where special reasons for deception are perpetually occurring, and where the court exercises a much more unconfined jurisdiction on questions of property than it exercises in its civil forum, proof of property lies generally on the claimant, and he may be called upon to support the *prima facie* evidence of a good title which is already exhibited."<sup>2</sup>

This burden would have rested on the claimant in the present case if the goods in question had been found on board of a neutral ship; but it is increased by the fact that the property was found on board an enemy's ship, and an enemy's \*armed ship. The maxim as **[\*135]** laid down by Grotius, is: "*Res hostium navibus presumuntur esse hostium, donec contrarium probetur.*" A presumption which, nevertheless, may be destroyed by strong proofs to the contrary.<sup>3</sup> In this case, the property was not only found on board an enemy's armed ship, but was unaccompanied by the documentary evidence required to prove its neutrality. No papers were found at the time of capture relating to the cargo, except the bills of lading; and all the letters and invoices were sunk by the order of the master of the *London Packet*, in the letter-bag, as sworn by two of the crew upon their examination on the standing interrogatories. The spoliation of papers is therefore superadded to the fact of the property being found on board a ship of the enemy, destined to an enemy's port; and the claimant is called upon to produce the strongest and most satisfactory proof to destroy the many presumptions arising from these facts, that, in truth, the property belongs to the enemy. The claimant has had abundant opportunity afforded him to produce this proof. The first order for further proof was made in the District Court the 26th of November, 1813, and the claimant was indulged until nearly the close of the year 1815, in the courts below, to establish the verity of his claim. Having failed so to do, this court afforded him further time, and he has had from February, 1816, until this term, a period of four years, to produce plenary proof in reference \*to a claim so much indulged, **[\*136]** and surrounded with so many circumstances of suspicion. If the claimant has failed to produce this proof, the presumption is irresistible that his claim must be false. In such a suspicious case, too, something more is to be expected

1.—Vide S. C. 1 Mason's Rep. 14; ante, Vol. II., 371.

2.—The Countess of Lauderdale, 4 Rob. 234.

3.—De Jure Belli ac Pac., b. 3, c. 6, s. 6; Bynk. Q. J. Pub., l. 1, c. 13; Loccenius, l. 2, c. 4, n. 11.



from the claimant himself than a mere test affidavit,<sup>1</sup> which is all the evidence (coming from himself) which the claimant has yet furnished.

*Mr. D. B. Ogden* and *Mr. Winder*, contra, admitted the rule of the prize court, that property found on board an enemy's vessel is presumed to be enemy's property; but, for this very reason, they insisted, such a vessel would seldom be made the vehicle of enemy's property intended to be covered as neutral. The records of the court would show that in a great majority of the cases, where attempts have been made to disguise enemy's property, such attempts have been made by lading the goods on board a neutral vessel, in order to avoid that suspicion on which the rule of law is founded. But in this case, the presumption itself can have but little weight; because it appears in evidence that the claimant was compelled, by necessity, to lade his goods on board an enemy's vessel, there being at that time none but British ships at Buenos Ayres, destined for Europe, for which market his goods were intended. Some indulgence is due to the subjects of neutral states, who, not having sufficient shipping of their own to carry on their trade, are compelled to resort to the navigation of **137\*** other countries, \*which may happen to be belligerent. Nor can the circumstance of a spoliation of papers by the enemy master have any unfavorable effect upon the claim of a neutral shipper conducting *bona fide*.<sup>2</sup> Even the actual resistance of the enemy master will not preclude the neutral shipper from receiving restitution, unless he participates in such resistance, and thus forfeits the privileges of his neutral character.<sup>3</sup> The counsel on both sides also argued upon the facts with great minuteness and ability.

*Mr. Justice LIVINGSTON* delivered the opinion of the court: In the argument of this cause, the counsel have not confined themselves to the effect which the affidavit of the claimant ought of itself to have upon the decision of it, but have animadverted on all the testimony below. The court has, therefore, also extended its examination to all the proofs in the cause, and will now pronounce its judgment on them.

The captured vessel was confessedly British property, as well as a great part of its cargo, and its destination was to a port in the enemy's country, which raises a legal presumption that the property claimed was not neutral. It is not denied that a neutral may use the vessel of a belligerent, for the transportation of his goods, and whatever presumption may arise from the circumstance, that it is not of itself a cause of condemnation. In this case, it does not appear, nor was it probably the fact, that any **138\*** neutral vessel \*bound to London was then at Buenos Ayres, and, therefore, this presumption ought to have but little influence on the present decision. If the proprietary interest be satisfactorily made out, the claimant is entitled to restitution.

There was no letter found on board from Merino to his correspondent in London, nor

any invoice of this property. The only document relating to it was a bill of lading in Spanish, dated the 19th of June, 1813, purporting that 6,276 hides had been shipped on board the London Packet, by Jeronimo Merino, on his account and risk, to be delivered to Antonio Daubana, or in his absence to William Heiland, they paying the freight therein stipulated. This bill of lading was not signed by the master. To the omission of a signature to this bill of lading, much importance cannot be attached. It was found in possession of the master, and serving only as a memorandum for him of the cargo on board; and not being intended to pass into the hands of any other persons, it was a matter of indifference whether he put his name to it or not. Of seven bills of lading which were found on board, no less than three were without his signature. Those which were delivered to the shippers were, no doubt signed, which was all that was necessary for their security. If this bill of lading be compared with the one produced, and proved by Daubana, it is impossible not to be struck with the exact similarity between them. They correspond in all respects, excepting only that one has not the signature of the captain, and appears most manifestly to have been filled up with the same ink, and in the \*same handwriting, and at **\*139** the same time; which is no small proof of their being contemporaneous acts, and of the authenticity of the one which is now produced by the consignee. But no letter from Merino to his correspondent, nor any invoice, nor any bill of lading for the consignee, being found on board, it is urged that the proof of proprietary interest is defective, and that the sentence of condemnation ought therefore to be affirmed. Had no further proof been introduced, relieving the case from this difficulty, the argument would be entitled to great consideration. But the absence of those papers is now accounted for. It appears by the testimony of Stevenson, a passenger on board the London Packet, who was examined by the captors, that a large bag, containing a great number of private letters, and other papers, was sunk by order of the master of the London Packet, about half an hour before his vessel was taken. It is then but a fair presumption that the letter, invoice, and bill of lading transmitted by Merino to his correspondent in London, were among the papers thus destroyed. The loss of these papers being thus accounted for, and the master of the captured ship not being brought in as he ought to have been, there was a propriety under the peculiar circumstances of this case, in affording, as the court below did, an opportunity to the Spanish owner of offering subsidiary proof respecting the property mentioned in the bill of lading found on board, and which was claimed by him. This farther proof, which consists of documents from the custom-houses at Buenos Ayres, of the positive testimony \*of Mr. **\*140** Daubana, the consignee in London, and of the test-affidavit of Mr. Merino himself, is satisfactory that the proprietary interest of these hides was, at the time of shipment and of capture, in the claimant. That they belonged to Smith notwithstanding the mark of S. on some of them, as has been suggested, cannot be believed. On that supposition, his conduct is utterly inexplicable. If the adventure was on his

1.—The Magnus, 1 Rob. 31.

2.—The Friendschaft, 3 Wheat. 14, 48.

3.—The Nereide, 9 Cranch, 388, 423.

account, the disguise of the shipment could have been intended for no other purpose than to impose, as to them, on the courts of the United States; for this contrivance or cover could not protect his vessel from capture and condemnation. Yet, if we believe some of the witnesses, Smith declared that the whole of the cargo belonged to himself and some merchants in London. These declarations of Smith, as he was set at liberty by the captain of the *Argus*, and, of course, not examined on the standing interrogatories, ought not to militate against the integrity of the present claim; but if they were really made, they afford strong evidence, that if this bill of lading were designed as a cover for belligerent property, some other person, and not Smith, was to be benefited by it. For if he were the real owner, why, it may be asked, did he voluntarily abandon the property (for he was put on board of another vessel, at his own request) at the very moment when this fraud, if he ever intended to avail himself of it, was to be consummated? Why did he not remain in his vessel until her arrival in the United States, and apply to a Spanish Consul, or some other gentleman, to prefer a **141** claim in favor of the pretended Spanish owner? Why did he not support this claim with his own oath, as he must have intended to do if he ever intended to derive any advantage from a contrivance which must have had its inception at Buenos Ayres, at his instigation, and for his emolument? There is no accounting for his conduct on any other hypothesis than that he had no interest in this property, and was therefore willing to leave it to its fate.

The counsel for the captors, aware of the full and conclusive nature of the proof, so far as it establishes Merino's interest in the merchandise claimed by him, have endeavored to show that Merino was not at Buenos Ayres where this shipment took place, and if he was, that it is impossible that his letter, which bears date the 10th of July, 1813, could have been put on board of the *London Packet*, which had sailed on the 24th of June, fourteen days before. If this be so, a gross attempt has been made to impose on the court, which ought to be followed with consequences fatal to the present claim. But the court is not of opinion that either of these suppositions is supported by the evidence. Not a single witness, whose testimony is relied on to establish the fact of Merino's not being at Buenos Ayres at the time of the shipment, speaks with any certainty, or tells us affirmatively where he then was. This negative testimony, which, if it stood alone and uncontradicted, might excite a strong suspicion, is rendered of very little consequence, by much proof of a contrary character. The custom-house document which has already been referred to, establishes the residence of Merino at Buenos Ayres at the date of the shipment; so does the affidavit of Merino himself, who is proved to be a gentleman of character, of property, and respectability. Daubana also swears to the same fact, with as much certainty as one correspondent can establish the domicile of another residing at so great a distance from each other. He proves that Merino remained there until the 15th of August following, at least, that he received a letter from him, dated at Buenos Ayres

on that day. Another witness, who saw him at Rio Janeiro in the year 1814, says, that he did not leave Buenos Ayres until after the middle of the year 1813. The weight of testimony, therefore, may be considered as in favor of the claimant being at Buenos Ayres when this shipment was made. Nor is it so certain, as seemed to be taken for granted at the bar that the *London Packet* sailed on her voyage for Europe on the 24th of June, 1813. It is true, that the cook, and some others who were examined *in preparatorio*, fix the time of her departure to that day; but the second mate, and only officer of the captured vessel who was examined, and who was most likely to know, says that she sailed in the month of July. Under this uncertainty respecting a fact which is deemed so material, and to which the claimant's attention has never been called, it cannot be expected that the court should not only act upon it, as positively proved, but follow it up with the condemnation of property so clearly proved to belong to a neutral. It would be more charitable, and not unreasonable, even if the fact were proved, to presume that witnesses were speaking of the time of the *London Packet's* first weighing anchor at Buenos Ayres, and that she may for some reason or other have been detained in the river until the 10th of July, which is the date of Merino's first letter to his correspondent in London. It may be added that it is not easy to believe that if a fraud were intended, care would not have been taken to make the letter of advice, and all the other papers, correspond with the time of the departure of the vessel.

Upon the whole, a majority of the judges are of opinion, that upon the farther proof the sentence of the Circuit Court should be reversed, and the property restored to the claimant. But as the captors have been put to great expense in consequence of the imperfect documents found on board, and the great delay which has attended the production of the further proof, they are of opinion that their costs and expenses must be paid by the claimant.

*Decree reversed.*

DECREE.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Massachusetts, and the farther proof exhibited in this cause, and was argued by counsel. On consideration whereof, it is decreed and ordered, that the decree of the Circuit Court for the District of Massachusetts in this case, condemning six thousand two hundred and seventy-six ox hides, as good and lawful prize to the libellants, be, and the same is hereby reversed and annulled. And this court, proceeding to pass such decree as the said Circuit Court should have passed, it is further decreed and ordered, that the said six thousand two hundred and seventy-six ox hides be restored to the claimant. And it is further decreed that the said claimant pay to the libellants the costs and expenses incurred in the prosecution of this suit.

Rev'g—1 Mason, 14; 2 Wheat. 371.  
Cited—2 Mason, 122.



## THE UNITED STATES v. KLINTOCK.

A commission issued by Anry, as "Brigadier of the Mexican republic" (a republic whose existence is unknown and unacknowledged), or as Generalissimo of the Floridas" (a province in the possession of Spain), will not authorize armed vessels to make captures at sea.

*Quære*, Whether a person acting with good faith under such a commission may be guilty of piracy.

However, this may be, in general; under the particular circumstances of this case, showing that the seizure was made, not *jure belli*, but *animo furandi*, the commission was held not to exempt the prisoner from the charge of piracy.

The act of the 30th of April, 1790, c. 36, s. 8, extends to all persons, on board all vessels, which throw off their national character by cruising piratically, and committing piracy on other vessels.

THIS was an indictment in the Circuit Court of Virginia, against Ralph Klintock, a citizen of the United States, charging him with a piracy committed on the high seas, in April, 1818, on a vessel called the *Norberg*, belonging to persons to the jurors unknown. He was found guilty generally.

The facts stated were, that the prisoner is a citizen of the United States; that the vessel in which he sailed as first lieutenant was called **145\*** the *Young \*Spartan*; was owned without the United States, and cruised under a commission from Anry, styling himself Brigadier of the Mexican Republic and Generalissimo of the Floridas, granted at Fernandina, after the United States government took possession of it. That he was convicted of a piracy, committed on the *Norberg*, a Danish vessel, in consequence of practicing the following fraud upon her: The second officer of the privateer brought on board some Spanish papers, which he concealed in a locker, and then affected to have found them on board. The vessel was then taken possession of, the whole original ship's company left on an island on the coast of Cuba, and the second officer being put in command, took the name of the original captain, sailed for Savannah, and entered her there, personating the Danish captain and crew. The *Young Spartan* followed, and put into a port in the vicinity.

The counsel for the prisoner moved, that the judgment be arrested on the following grounds:

First. That Anry's commission exempts the prisoner from the charge of piracy.

Second. That the fraud practiced on the *Dane* does not support the charge of piracy, as an act piratically done, and not in the exercise of belligerent rights.

Third. That the prisoner is not punishable under the provisions of the 8th section of the act of 1790.<sup>1</sup>

**146\*** Fourth. That the act of the 30th of April, 1790, 8th section, entitled, "an act for the punishment of certain crimes against the United States," does not extend to an American

citizen entering on board of a foreign vessel, committing piracy upon a vessel exclusively owned by foreigners.

Upon these errors in arrest of judgment, the judges of the Circuit Court were divided in opinion, and directed the points, with their division thereon, to be certified to this court.

The *Attorney-General*, for the United States, argued, 1. That although the government and courts of the United States had acknowledged the fact of the existence of the new states in Spanish America, so as to legitimate the war between them and the parent \*country,<sup>2</sup> [\***147** yet Mexico was not among the provinces in actual revolt, nor was any such state, *de facto*, known to exist as the Mexican republic, under the authority of which the commission in question was issued. And even if there were such a power in existence exercising all the rights of war, Denmark is not at war with it, or with any other of the Spanish American provinces. 2. Although the fraud practiced on the *Dane* may not be in itself an act of piracy, yet the seizure was a piratical act, and the ingredient of fraud cannot change its character for the better. 3. Neither is the prisoner protected by the decision of this court in the case of *The United States v. Palmer*.<sup>3</sup> That case merely decides, that the crime of robbery committed on board a ship belonging to subjects of a foreign power, by a foreigner, is not piracy, within the act of the 30th of April, 1790, c. 36, s. 8. But it does not decide that the same offense, committed by a citizen on board of a vessel not belonging to the subjects of any foreign power, is not piracy. The vessel on board of which the crime was committed, does not belong to any particular nation. A pirate, being *hostis humani generis*, is of no nation or state. He, and his confederates, and the vessel on board of which they sail, are outcasts from the society of nations. All the states of the world are engaged in a tacit alliance against them. An offense committed by them against any \*individual nation is an offense against [\***148** all. It is punishable in the courts of all. So, in the present case, the offense committed on board a piratical vessel, by a pirate, against a subject of Denmark, is an offense against the United States, which the courts of this country are authorized and bound to punish.

*Mr. Winder*, contra, contended, that this case was decided by that of *The United States v. Palmer*. The only argument which can be urged for extracting this case out of that decision is, that the prisoner, in the present case, is a citizen of the United States, although the offense itself was committed on board of a foreign vessel. But the whole reasoning of the court in *Palmer's* case, as well as the certificate of the judgment, shows, that in order to constitute

1.—Which provides, "That if any person or persons shall commit, upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offense, which, if committed within the body of a county, would, by the laws of the United States, be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise, to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defense of his ship,

Wheat. 5.

or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may be first brought."

2.—The *Divina Pastora*, 4 Wheat. 53, 65, note 3, and the cases there collected; The *Estrella*, 1b. 298; The *Nuestra Senora de la Caridad*, 1b. 497.

3.—3 Wheat. 610, 630.

the offenses enumerated in the statute, it is indispensably necessary, not that the party should be a citizen, but that the vessel against which, and the vessel on board of which the offense is committed, should belong to citizens. It is insisted on the other side, that although the vessel now in question, does not belong to citizens of the United States, yet she does not belong to any particular foreign nation; and, therefore, does not fall within the letter of the authority referred to. But if by her not belonging to any particular foreign state, it be meant that she is a piratical vessel, then the case falls within the late act of 1819, providing for the punishment of piracy as defined by the law of nations, and **149\***] not within the act of 1790. If it \*falls within the act of 1790, then the act of 1819 is entirely superfluous. But that act was made to provide for the very defect in the former law which was for the first time discovered in the case of Palmer; and it is impossible, consistently with the authority of that case, to bring the present case within the statute, which was the only law in force, on the subject, at the time when this offense was committed.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court: The first and second points made by the counsel for the prisoner may be considered together.

As judgment can be arrested only for errors apparent on the record, we should feel no difficulty in certifying our opinion of the insufficiency of these on that ground, were we not persuaded that from some inattention, the questions which arise properly on a motion for a new trial, have been stated by the clerk as a motion in arrest of judgment, and that the same points, if undecided now, will recur when judgment is about to be pronounced. In a criminal case especially, we think it proper to decide the question on its real, as well as technical merits.

So far as this court can take any cognizance of that fact, Aury can have no power, either as Brigadier of the Mexican Republic, a republic of whose existence we know nothing, or as Generalissimo of the Floridas, a province in the possession of Spain, to issue commissions to authorize private or public vessels to make captures at sea. Whether a person acting with good faith under such commission, may or may not be guilty of piracy; we are all of opinion **150\***] \*that the commission can be no justification of the fact stated in this case. The whole transaction taken together, demonstrates that the Norberg was not captured *jure belli*, but seized and carried into Savannah *animo furandi*. It was not a belligerent capture, but a robbery on the high seas. And although the fraud practiced on the Dane may not of itself constitute piracy, yet it is an ingredient in the transaction which has no tendency to mitigate the character of the offense.

The third and fourth errors assigned in arrest of judgment may also be considered together. The questions they suggest arise properly on the indictment, and require a reconsideration of the opinion given by the court in Palmer's case.

The question propounded to the court in that case was in these words: "Whether the crime

of robbery, committed by persons who are not citizens of the United States, on the high seas, on board of any ship or vessel belonging exclusively to the subjects of any foreign state or sovereignty, or upon the person of any subject of any foreign state or sovereignty, not on board of any ship or vessel belonging to any subject or citizen of the United States, be a robbery or piracy within the true intent and meaning of the said 8th section of the act of Congress aforesaid, and of which the Circuit Court of the United States hath cognizance, to hear, try, determine, and punish the same."

The same question was again propounded, so varied only as to comprehend the offense if committed \*by American citizens in a [**\*151** vessel belonging to foreigners.

The court, in concluding its exposition of the act, thus sums up its opinion: "The court is of opinion that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not a piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States." The certificate of the court conforms entirely to this opinion.

This opinion and certificate apply exclusively to a robbery or murder committed by a person on board of any ship or vessel belonging exclusively to subjects of a foreign state. It is, we think, the obvious import of these words, that, to bring the person committing the murder or robbery within them, the vessel on board which he is, or to which he belongs, must be at the time, in point of fact, as well as right, the property of the subjects of a foreign state, who must have at the time, in virtue of this property, the control of the vessel. She must at the time be sailing under the flag of a foreign state, whose authority is acknowledged. This is the case which was presented to the court; and this is the case which was decided. We are satisfied that it was properly decided.

But the reasoning which conducted the court to this conclusion is founded on sections of the act, the general words of which ought to be restricted to offenses committed by persons who, at the time of \*committing them, [**\*152** were within the ordinary jurisdiction of the United States; and the language employed may well be understood to indicate an opinion that the whole act must be limited in its operation to offenses committed by, or upon, the citizens of the United States. Upon the most deliberate reconsideration of that subject, the court is satisfied that general piracy, or murder, or robbery, committed in the places described in the 8th section, by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this act, and is punishable in the courts of the United States. Persons of this description are proper objects for the penal code of all nations; and we think that the general words of the act of Congress applying to all persons whatsoever, though they ought not to be so construed as to extend to persons under the acknowledged authority of a



foreign state, ought to be so construed as to comprehend those who acknowledge the authority of no state. Those general terms ought not to be applied to offenses committed against the particular sovereignty of a foreign power; but we think they ought to be applied to offenses committed against all nations, including the United States, by persons who by common consent are equally amenable to the laws of all nations.

**CERTIFICATE.**—This cause came on to be heard on the transcript of the record from the **153** Circuit Court \*for the District of Georgia, and was argued by counsel. On consideration whereof, this court is of opinion:

1st. That Aury's commission does not exempt the prisoner from the charge of piracy.

2d. That although the fraud practiced on the Dane may not in itself support the charge of piracy, the whole transaction, as stated in the indictment and in the facts inserted in the record, does amount to piracy.

3d. That the prisoner is punishable under the provisions of the 8th section of the act of 1790.

4th. That the act of the 30th of April, 1790, does extend to all persons on board all vessels which throw off their national character by cruising piratically and committing piracy on other vessels.

Cited—5 Wheat. 192 (n), 416; 7 Otto, 617; Bald. 27, 29; 2 Sumn. 89, 485; 5 Blatchf. 85, 87; 2 Cliff. 419, 421; 1 Wood. & M. 485.

## THE UNITED STATES v. SMITH.

The act of the 3d of March, 1819, c. 76, s. 5, referring to the law of nations for a definition of the crime of piracy, is a constitutional exercise of the power of Congress to define and punish that crime.

The crime of piracy is defined by the law of nations with reasonable certainty.

Robbery, or forcible depredation, upon the sea, *animo furandi*, is piracy by the law of nations, and by the act of Congress.

**THIS** was an indictment for piracy against the prisoner, Thomas Smith, before the **154** Circuit Court of \*Virginia, on the act of Congress of the 3d of March, 1819, c. 76.<sup>1</sup>

The jury found a special verdict as follows: "We, of the jury, find, that the prisoner, Thomas Smith, in the month of March, 1819, and others were part of the crew of a private armed vessel, called the *Creollo* (commissioned by the government of Buenos Ayres, a colony then at war with Spain), and lying in the port of Margaritta; that in the month of March, 1819 the said prisoner and others of the crew mutinied, confined their officer, left the vessel, and in the said port of Margaritta, seized by violence a vessel called the *Irresistible*, a private armed vessel, lying in that port, commissioned by the gov-

ernment of Artigas, who was also at war with Spain; that the said prisoner and others, having so possessed themselves of the said vessel, the *Irresistible*, appointed their officers, proceeded to sea on a cruise, without any documents or commission whatever; and while on that cruise, in the month of April, 1819, on the high seas, committed the offense charged in the indictment, by the plunder and robbery of the Spanish vessel therein mentioned. If the plunder and robbery aforesaid be piracy under the act of the Congress of the United States, entitled, 'An act to protect the commerce of the \*United States, and punish the [**\*155** crime of piracy,' then we find the said prisoner guilty; if the plunder and robbery above stated be not piracy under the said act of Congress, then we find him not guilty."

The Circuit Court divided on the question whether this be piracy as defined by the law of nations, so as to be punishable under the act of Congress, of the 3d of March, 1819, and thereupon the question was certified to this court for its decision.

The *Attorney-General*, for the United States contended, that Congress, by referring to the law of nations for a definition of the crime of piracy, had duly exercised the power given them by the constitution, "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." By this reference they adopt the definition of the offense given by the writers on public law. All these writers concur in defining it to be depredation on the seas, without the authority of a commission, or beyond its authority.<sup>2</sup> If there be any defect of precision or slight uncertainty in the definitions of the crime of piracy given by different writers on the law of nations, it is no more than what is to be found in common law writers on the crime of murder. Yet we are constantly referred \*by [**\*156** the legislature to the common law for the definition of murder and other felonies which are mentioned in statutory provisions. But there is no defect in the definition of piracy by the authorities to which we are referred by this act. The definition given by them is certain, consistent, and unanimous; and pirates being *hostes humani generis*, are punishable in the tribunals of all nations. All nations are engaged in a league against them for the mutual defense and safety of all. This renders it the more fit and proper that there should be a uniform rule as to the definition of the crime, which can only be drawn from the law of nations, as the only code universally known and recognized by the people of all countries.

*Mr. Webster*, contra, argued, that the special verdict did not contain sufficient facts to enable the court to pronounce the prisoner guilty of the offense charged. The facts found do not necessarily infer his guilt, but, on the contrary, are consistent with his innocence; inasmuch as it appears that he was one of the crew of a vessel belonging to Buenos Ayres, although not

1.—Which provides (s. 5), "That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall afterwards be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, before the Circuit Court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death."

Wheat. 5.

2.—Grotius de J. B. ac. P., l. 2, c. 15, s. 5; Puffendorf, l. 2, c. 2, s. 10; Vattel, *Droit des Gens*, l. 3, c. 15, s. 226; Bynk. Q. J. Pub., l. 1; Duponceau's Trans. p. 127; Marten's Hist. of Privateers, p. 2; Horne's Trans. Molloy, b. 1, c. 4, s. 5; 2 Bro. Civ. and Adm. Law, 461; 2 Azuni, 351; Johns. Trans., and the authorities there cited.

acting at the time when the supposed offense was committed under the commission of that colony, but acting as a non-commissioned captor, and as such, seizing the property of Spanish subjects on the high seas. But even supposing the offense to be well found by the special verdict, it cannot be punished under this act, because the law is not a constitutional exercise of the power of Congress to define the crime of piracy. Congress is bound to define **157\*** it in terms, and is not at liberty to leave it to be ascertained by judicial interpretation. To refer to the law of nations for a definition of the crime, is not a definition; for the very thing to be ascertained by the definition, is the law of nations on the subject. The constitution evidently presupposes that this crime, and other offenses committed on the high seas, were not defined with sufficient precision by the law of nations, or any other law, to form a rule of conduct; or it would merely have given Congress the power of punishing these offenses, without also imposing upon it the duty of defining them. The writers on public law do not define the crime of piracy with precision and certainty. It was this very defect which rendered it necessary that Congress should define, in terms, before it proceeded to exercise the power of punishing the offense. Congress must define it as the constitution has defined treason, not by referring to the law of nations in one case, or to the common law in the other, but by giving a distinct, intelligible explanation of the nature of the offense in the act itself.

*Mr. Justice STORY* delivered the opinion of the court: The act of Congress upon which this indictment is founded provides, "that if any person or persons whatsoever, shall upon the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall be brought into, or found in the United States, every such offender or offenders shall, upon conviction thereof, &c., be punished with death."

**158\*** The first point made at the bar is, whether this enactment be a constitutional exercise of the authority delegated to Congress upon the subject of piracies. The constitution declares that Congress shall have power "to define and punish piracy and felonies committed on the high seas, and offenses against the law of nations." The argument which has been urged in behalf of the prisoner is, that Congress is bound to define, in terms, the offense of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation. If the argument be well founded, it seems admitted by the counsel that it equally applies to the 8th section of the act of Congress of 1790, ch. 9, which declares, that robbery and murder committed on the high seas shall be deemed piracy; and yet, notwithstanding a series of contested adjudications on this section, no doubt has hitherto been breathed of its conformity to the constitution.

In our judgment, the construction contended for proceeds upon too narrow a view of the language of the constitution. The power given to Congress is not merely "to define and punish piracy;" if it were, the words "to define" would seem almost superfluous, since the power to punish piracies would be held to include

the power of ascertaining and fixing the definition of the crime. And it has been very justly observed, in a celebrated commentary, that the definition of piracies might have been left without inconvenience to the law of nations, though a legislative definition of them is to be found in most municipal codes.<sup>1</sup> But **[\*159]** the power is also given "to define and punish felonies on the high seas, and offenses against the law of nations." The term "felonies" has been supposed, in the same work, not to have a very exact and determinate meaning in relation to offenses at the common law committed within the body of a county. However this may be, in relation to offenses on the high seas, it is necessarily somewhat indeterminate, since the term is not used in the criminal jurisprudence of the admiralty in the technical sense of the common law.<sup>2</sup> Offenses, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations. In respect, therefore, as well to felonies on the high seas as to offenses against the law of nations, there is a peculiar fitness in giving the power to define as well as to punish; and there is not the slightest reason to doubt that this consideration had very great weight in producing the phraseology in question.

But supposing Congress were bound in all the cases included in the clause under consideration to define the offense, still there is nothing which restricts it to a mere logical enumeration in detail of all the facts constituting the offense. Congress may as well define by using a term of a known and determinate meaning as by an express enumeration of all the particulars included in that term. That is certain which is by necessary reference **[\*160]** made certain. When the act of 1790 declares, that any person who shall commit the crime of robbery, or murder, on the high seas, shall be deemed a pirate, the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of the common law. In fact, by such a reference, the definitions are necessarily included, as much as if they stood in the text of the act. In respect to murder, where "malice aforethought" is of the essence of the offense, even if the common law definition were quoted in express terms, we should still be driven to deny that the definition was perfect, since the meaning of "malice aforethought" would remain to be gathered from the common law. There would then be no end to our difficulties, or our definitions, for each would involve some terms which might still require some new explanation. Such a construction of the constitution is, therefore, wholly inadmissible. To define piracies, in the sense of the constitution, is merely to enumerate the crimes which shall constitute piracy; and this may be done either by a reference to crimes having a technical name, and determinate extent, or by enumerating the acts in detail, upon which the punishment is inflicted.

It is next to be considered, whether the crime of piracy is defined by the law of nations

1.—The Federalist, No. 42, p. 276.

2.—See 3 Inst. 112; Hawk. P. C., ch. 37; Moore, 576.

Whcat. 5.



with reasonable certainty. What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage **161\***and practice of nations; or by judicial \*decisions recognizing and enforcing that law. There is scarcely a writer on the law of nations who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other respects, all writers concur in holding that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy. The same doctrine is held by all the great writers on maritime law, in terms that admit of no reasonable doubt.<sup>1</sup> The common law, too, recognizes and punishes piracy as an offense, not against its own municipal code, but as an offense against the law of nations (which is part of the common law), as an offense against the universal law of society, a pirate being deemed an enemy of the human race. Indeed, until the statute of 28th of Henry VIII., ch. 15, piracy was punishable in England only in the admiralty as a civil law offense; and that statute, in changing the jurisdiction, has been universally admitted not to have changed the nature of the offense.<sup>2</sup> Sir Charles Hedges, in his charge at the admiralty sessions, in the case of *Rex v. Dawson* (5 State Trials), declared in emphatic **162\***terms, that "piracy is \*only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the admiralty." Sir Leoline Jenkins, too, on a like occasion, declared that "a robbery, when committed upon the sea, is what we call piracy;" and he cited the civil law writers, in proof. And it is manifest from the language of Sir William Blackstone,<sup>3</sup> in his comments on piracy, that he considered the common law definition as distinguishable in no essential respect from that

of the law of nations. So that, whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offense against the law of nations, and that its true definition by that law is robbery upon the sea. And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offense against any persons whatsoever, with whom they are in amity, is a conclusive proof that the offense is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment. We have, therefore, no hesitation in declaring that piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined by the fifth section of the act of 1819.

Another point has been made in this case, which is, that the special verdict does not contain sufficient facts upon which the court can pronounce that the \*prisoner is guilty of [**163** piracy. We are of a different opinion. The special verdict finds that the prisoner is guilty of the plunder and robbery charged in the indictment; and finds certain additional facts from which it is most manifest that he and his associates were, at the time of committing the offense, freebooters upon the sea, not under the acknowledged authority, or deriving protection from the flag or commission of any government. If, under such circumstances, the offense be not piracy, it is difficult to conceive any which would more completely fit the definition.

It is to be certified to the Circuit Court, that upon the facts stated, the case is piracy, as defined by the law of nations, so as to be punishable under the act of Congress of the 3d of March. 1819.<sup>4</sup>

1.—Santerna (lib. 4, note 50), for instance, says, "Inter piratam et latronem, non sit alia differentia, nisi quia pirati depredator est in mari et potest dici fur et latro maris, quia latrocinium et furtum sicut fit in terra, sic fit in mari." And Emerigon (1 Emerig. Assur. ch. 12, s. 29, p. 523): "La piraterie est un brigandage sur mer. Le Brigandage, sur terre est appellé vol ou rapine." So Stræcha "Piratæ sunt latrones maritimi."

2.—Hawk. P. C. ch. 37, s. 2, 3 Inst. 112.

3.—4 Bl. Comm. 73.

4.—To show that piracy is defined by the law of nations, the following citations are believed to be sufficient.

Grotius (lib. 3, c. 3, s. 1.) says: "Supra dicere incipimus justum bellum apud probos auctores dici saepe, non ex causa unde oritur, neque ut alias ex rerum gestarum magnitudine, sed ob peculiare quosdam juris effectus. Quale autem sit hoc bellum optime intelligitur ex hostium definitione apud Romanos jurisconsultos: Hostes sunt, qui nobis, aut quibus nos publice bellum decernimus; cæteri latrones aut prædones sunt, ait Pomponius (Dig. Lib. 50, tit. 16, l. 118), nec aliter Ulpianus, (Dig. lib. 49, tit. 15, l. 24), hostes sunt, quibus bellum publice populus Romanus decrevit, vel ipsi populo Romano; cæteri latrunculi vel prædones appellantur. Et ideo, qui a latronibus captus est servus latronum non est, nec postliminium illi, necessarium est. Ab hostibus autem captus; puta a Germanis et Parthis et servus est hostium, et postliminio statum pristinum recuperat. Et Paulus (Dig. lib. 49, tit. 15, l. 19, s. 2). A piratis aut latronibus capti liberi permanent. Accedat illud Ulpiani; in civilibus dissentionibus quamvis sæpe per eas res publica lædatur, non tamen in exitium reipublicæ contenditur; qui in alterutras partes discedent, vice hostium non sunt eorum, inter quos jura captivitatum aut postliminiorum fuerint; et ideo captos, et

venundatos, posteaque manumissos placuit supervacuo repetere a principe ingenuitatem, quam nulla captivitate amiserant. (Dig. lib. 49, tit. 15, l. 321, s. 2.)"

Grotius adds (s. 2): "Illud tantum notandum, sub exemplo populi Romani quemvis intelligi, qui in civitate summum imperium habeat."

Again, he says (s. 2), "Non autem statim res publica aut civitas esse desinit, si quid admittat injustum, etiam communiter; nec coetus piratarum aut latronum civitas est, etiamsi forte aequalitatem quandam inter se servant, sine qua nullus coetus posset consistere. Nam hi criminis causa sociantur; illi etsi interdum delicto non vacant juris tamen fruendi causa sociati sunt, et exteris jus reddunt, si non per omnia secundum jus nature, quod multos apud populos ex-parte quasi oblitteratum alibi ostendimus, certe secundum pacta cum quibus que inita, aut secundum mores."

Again, he says (s. 2): "A latronibus captos capitentium non fieri, supra dicentem audivimus Ulpianum. Idem captos a Germanis ait libertatem amittere. Atqui apud Germanos latrocinia, quæ extra civitatis ejusque fines fiebant, nullam habebant infamiam, quæ verba sunt Caesaris, etc. Idem alibi Catts nobilem Germaniæ populum latrocinia agitasse dicit. Apud eundem Garamantes latrociniiis faunda gens; sed gens tamen, Illyrici sine discrimine maris proedae agere soliti; de his tamen triumphus fuit; Pompeio de piratis non fuit. Tantum discrimen est inter populum quantumvis sceleratum et inter eos, qui, cum populus non sint, sceleris causa coeunt."

Again, he says (lib. 3, c. 9, s. 16): "Eae vexo res quæ intra presidia perductæ nondum sunt, quantum ab hostibus occupatæ, ideo postliminii non egent, quia dominum novum mutarunt, ex gentium jure. Et quæ piratæ aut latrones nobis eripuerunt non opus habent postliminis, ut Ulpianus et Javolenus responderunt; quia jus gentium illis



**164\*]** \*Mr. Justice LIVINGSTON dissented. In a case affecting life, no apology can be necessary for expressing \*my dissent from the opinion which has just been delivered.

**166\*]** \*The only question of any importance in this case is, whether the act of the 3d of **167\*]** March, 1819, be a \*constitutional exercise of the power delegated to Congress of **168\*]** "defining and punishing piracies." \*The act declares, that any person who shall commit on the high seas the crime of piracy as defined **169\*]** by the \*law of nations, shall be punished with death. The special power here given

to define piracy can be attributed \*to [**\*170** no other cause than to the uncertainty which it was known existed on this subject in the \*law of nations, and which it must have [**\*171** been the intention of the framers of the constitution to remove, \*by conferring on [**\*172** the national legislature the power which has been mentioned. It was well known to the \*members of the Federal convention, [**\*173** that in treatises on the law of nations, or in some of them at \*least, definitions of [**\*174** piracy might be found; but it must have been as well known to them that there \*was [**\*175**

non concessit ut jus domini mutare possint, &c. Itaque res ab illis capte ubicunque reperirunt vindicari possunt, nisi quod ex naturali jure alibi censuimus ei qui suo sumtu possessionem rei adeptus est tantum esse reddendum, quantum dominus ipse ad rem recuperandam libenter impensurus fuerat."

And (Id. s. 17), "Potest tamen lege civili aliud constitui; sicuti lege Hispanica naves a piratis capte eorum fiunt, qui eas eripiunt piratis; neque enim iniquum est, ut privata res publicæ utilitati cedat, presertim in tanta recuperandi difficultate. Sed lex talis non obstat exteris, quo minus res suas vindicent."

Again, he says (lib. 2, c. 17, s. 20): "Ex neglectu tenentur reges ac magistratus, qui ad inhibenda latrocinia et piraticam non adhibent ea quæ possunt ac debent remedia; quo nomine damuati olim ab Amphictionibus Scyrii. Quæ potestatem prædæ in maris ex hoste agendarum per codicillos plurimis dedissent, et eorum nonnulli res amicorum rapuissent, desertaque patriæ mari vagarentur ac ne revocati quidem redirent an rectores eo nomine tenerentur, aut quod malorum hominum usiessent opera, aut quod cautionem non exigissent. Dixi eos in nihil amplius teneri, quam ut noxios, si reperiri possent, punirent, aut dederent; prætere a in bona raptorum jus reddi curarent."

Again, he says (Id. c. 18, s. 2, 3): "Piratae et latrones qui civitatem non faciunt, jure gentium niti non possunt, &c. Sed interdum tales qui sunt jns legationis nanciscuntur fide data, ut olim fugitivi in saltu Pyrenæo."

Again, (lib. 3, c. 13, s. 15): "Repudiandus ergo Cicero (De Offic. lib. 3, cap. 29), cum ait perjurium nullum esse predonibus pactum pro capite pretium non adservatur, nec si juratum quidem sit; quia pirata non sit ex perduellium numero desinitus, sed communis hostis omnium, eum quo nec fides esse debeat, nec jus jurandum commune, &c. Atque sicut in jure gentium constituto differe hostem a pirata verum est, et a nobis infra ostendetur; ita hic æ differentia locum habere non potest, ubi, etsi personæ jus deficiat cum Deo negotium est; qua de causa juramentum voti nomine noncupatur. Neque id quod sumit Cicero verum est, nullum esse cum prædone juris societatem. Nam depositum ex ipso gentium jure reddendum latroni, si dominus non apparet recte Tryphonino responsum est."

These passages abundantly show the opinion of Grotius, that piracy by the law of nations is the same thing as piracy by the civil law; and though he nowhere defines the crime, in precise terms, yet there seems to be no doubt as to what he understood to be comprehended in that crime. Piratae, latrones, prædones, are used to denote the same class of offenders; the first term being generally applied to robbers or plunderers on the sea, and the others to robbers or plunderers on land.

The terms are, indeed, convertible in many instances in the civil law. Thus, in the title, De Lege Rhodia de Jactu (Dig. lib. 14, tit. 2, s. 3), it is said, "Si navis a piratis redempta sit, Servius, Osilius, Labeo, omnes conferre debere aiunt. Quod vero prædones abstulerint, cum perdere ejus fuerit, nec conferendum ei qui suas merces redemerit."

Bynkershoek (Quæst. Jur. Pnb. lib. c. 17), treating on the subject of piracy, says, "interest scire qui piratae ac latrones sunt, nam ab his capta dominum non mutant neque adeo postliminio egent. Sic docet ratio; sic auctoritas juris in l. 19, s. 2, l. 24 and l. 27, de Capt. et Postlim. rev. (Dig. lib. 49, tit. 15), et sic ex pactis quarandam gentium supra probavi. Non est igitur ut addam auctoritates Grotii de Jure B. et. P. l. 3, c. 9, s. 16. Alberici Gentilis de jure belli lib. 1, c. 4. Zoucheii de Jure feci-

ali, p. 2, s. 8, qu. 15, aliorumque plurium in eandem sententiam. Qui autem nullius principis auctoritate sive mari sive terra, rapinunt, firatarum prædonumque vocabulo intelliguntur."

Azumí (Part 2, c. 5, s. 3) says: "A pirate is one who roves the sea in an armed vessel without any commission or passport from any prince or sovereign state, solely on his own authority, and for the purpose of seizing by force, and appropriating to himself without discrimination, every vessel he may meet. For this reason pirates have always been compared to robbers. The only difference between them is, that the sea is the theatre of action for the one, and the land for the other." Sec. 11. "Thus, as pirates are the enemies of the human race, piracy is justly regarded as a crime against the universal laws of society, and is everywhere punished with death. As they form no national body, as they have no right to arm, nor make war, and on account of their indiscriminate plunder of all vessels are considered only as public robbers, every nation has a right to pursue, and exterminate them, without any declaration of war. For these reasons it is lawful to arrest them, in order that they may undergo the punishment merited by their crimes." Sec. 12. "Pirates having no right to make conquests, cannot, therefore, acquire any lawful property in what they take; for the law of nations does not authorize them to deprive the true owner of his property, who always retains the right of reclaiming it wherever it may be found. Thus, by the principles of common law, as well as the law of nature, at whatever period, or in whatever manner, things taken by a pirate may be recovered, they return again to their former owners, who lose none of their rights by such unjust usurpation." See Azumí, part. 2, c. 5, art. 3, p. 351, 361, Mr. Johnson's translation.

Lord Bacon, in his dialogue De Bello Sacro, says: "Indubitatum semper fuit, bellum contra piratas juste geri posse per nationem quancunque, licet ab iis minime infestatum et læsam, &c., &c. Vera enim causa hujus rei hæc est, quod piratæ communes humani generis hostes sint; quos idcirco omnibus nationibus persequi incumbit, non tam propter metus proprios quam respectu fœderis inter homines sociales. Sicut enim quædam sunt fœdera inscriptis et in tractatus redacta contra hostes particulares inita; ita naturalis et tacita confœderatio inter omnes homines intercedit contra communes societatis humanæ hostes." (10 Bac. Works, 313, 314, edit. 1803.)

Martens, in his Essay on Privateers, Captures and Recaptures (c. 1, s. 1) says: "L'armateur diffère du Pirate (1), Le premier est muni d'une commission ou de lettres de marque du souverain, dont le pirate est destitué. (2.) L'armateur suppose le cas d'une guerre (ou du moins celui de représailles), le pirate pille au sein de la paix, comme au milieu de la guerre. (3.) L'armateur s'oblige d'observer les ordonnances et les instructions qui lui ont été données, et de n'attaquer qu'en conséquence de celles-ci de l'ennemi, et ceux des vaisseaux neutres qui fout un commerce illicite, le pirate pille indistinctement les vaisseaux de toutes les nations, sans observer même les loix de la guerre."

Rutherford (Inst. b. 2, c. 9, s. 9, p. 481), speaking with reference to the law of nations, says: "All wars of a nation against its external enemies are not public wars. To make a war a public one, both the contending parties must be public persons; that is, it must be a war of one nation against another, &c. Where a nation makes war upon pirates or other robbers, though these are external enemies, the war will be a mixed one; it is public on one side, because a nation or public person is one of the parties; but it is private on the other side,

Wheat. 5.



not such a coincidence on this subject as to render a reference to that code a desirable or **176\*** safe mode \*of proceedings in a criminal, and especially in a capital case. If it had been **177\*** intended to adopt the definition \*or definitions of this crime, so far as they were to be collected from the different commentators on **178\*** this code, with all the uncertainty and difficulty attending a research for that purpose, **179\*** it might as well \*at once have been adopted as a standard by the constitution itself. **180\*** The object, therefore, of referring \*its definition to Congress was, and could have

been no other than, to enable that body, to select from sources it might think proper, and then to declare, and with reasonable precision to define, what act or acts should constitute this crime; and having done \*so, to [**181** annex to it such punishment as might be thought proper. Such a mode of proceeding would be consonant with the universal practice in this country, and with those feelings of humanity which are ever opposed to the putting in jeopardy the life of a fellow-being, unless for the contravention of a rule which has been previously prescribed, and in language so

because the parties on this side are private persons, who act together occasionally, and are not united into a civil society. A band of robbers or a company of pirates may in fact be united to one another by compact, &c. But they are still, by the law of nature, only a number of unconnected individuals; and consequently, in the view of the law of nations they are not considered as a collective body or public person; for the compact by which they unite themselves is void, because the matter of it is unlawful, &c., &c. The common benefit which a band of robbers or a company of pirates propose to themselves consists in doing harm to the rest of mankind."

Woodeson (Lect. 34, vol. II, 422); treating on captures at sea, after stating that the law of nations is part of the laws of England, and that captures at sea may happen either by pirates, or by way of reprisal, or as prize of war, says: "Piracy, according to the law of nations, is incurred by depredations on or near the sea, without authority from any prince or state." He then quotes the opinion of Sir Leoline Jenkins with approbation, that it is piracy, not only when a man robs without any commission at all, but when, having a commission, he despoils those with whom he is not warranted to fight or meddle, such as are *de legantia vel amicitia* of the prince or state which hath given him his commission. He then adds: "But according to the judgments of our domestic tribunals, a bare assault without taking or pillaging something away does not constitute the crime, though Molloy pretends that by the law of nations it is otherwise. Yet it does not seem necessary that any person should be on board the pillaged vessel." "If these violations of property be perpetrated by any national authority, they are the commencement of a public war; if without that sanction, they are acts of piracy." He then proceeds to state several cases which had arisen in the admiralty of England, and sums up his remarks as follow: "The foregoing particulars are the more deserving of consideration, because it seems agreed that when a piratical taking is ascertained, it becomes a clear and indisputable consequence that there is no transmutation of property. No right to the spoil vests in the piratical captor; no right is derivable from them to any recaptors in prejudice of the original owners. These piratical seizures being wholly unauthorized, and highly criminal by the law of nations, is no pretense for divesting the dominion of the former proprietor. This principle, therefore, '*a piratis et latronibus capta dominium non mutant*,' is the received opinion of ancient civilians and more modern writers, on general jurisprudence. The same doctrine was maintained in our courts of common law long antecedent to the great cultivation and improvements made in the science of the law of nations. And he remarks in a note, p. 427, note n: "I have looked into the indictment against Luke Ryan, tried at the admiralty sessions, March, 1782, for piracy, and who is alleged to have had a Dutch commission. He was indicted not for piracy generally by the law of nations, but for that, being a natural born subject, he piratically, &c., against the form of the statute." From the whole scope of Mr. Woodeson's observations on the subject of piracy, it is very clear that he considered piracy, as punishable by the law of the admiralty, to be no other than piracy by the law of nations. The definition of piracy, and Mr. Woodeson's comments are cited with approbation by Mr. Gwillim in his late edition of Bacon's Abridgment. 5 Bac. Abr. 310, edit. 1807, London.

Burlamaqui (Part. 2, c. 7, s. 41) says: "Lastly, as to the wars of robbers and pirates, if they do not produce the effects above mentioned (transmuta-

tion of property on capture), nor give to those pirates a right of appropriating what they have taken, it is because they are robbers and enemies of mankind, and, consequently, persons whose acts of violence are manifestly unjust, which authorizes all nations to treat them as enemies."

Thus far, the authorities cited are such as profess to treat of piracy in terms according to the law of nations, the notion of which was manifestly derived from the civil law, "on which," as Sir William Scott observes (The Maria, 1 Rob. 340), "great part of the law of nations is founded." Indeed, in the law of England, it is treated altogether as a civil law offense, and referred to that law for its definition and punishment. Piracies and depredations at sea are capital offenses by the civil law. 5 Bac. Abr. Piracy, 311; Edit. *ubi supra*, 3 Inst. 112; Hawk. P. C., c. 37; 2 East., P. C. 796; 4 Bl. Comm. 72. The commentaries of the common law writers on the subject of piracy will be more fully considered hereafter.

Let us now advert to the definition of the civil law and maritime writers.

In the Novels (Nov. 134, tit. 17, c. 13), it is declared: "Pro furto autem nolumus omnino quolibet membrum abscondi, aut mori; sed aliter eum castigari. Fures autem vocamus qui occulte et sine armis hujusmodi delinquant. Eos vero, qui violententer aggreuntur aut cum armis aut sine armis in domibus aut itineribus aut in mari poenis eos legalibus subdi jubemus."

Calvinus, in his Lexicon Juridicum, says: "Piratae dicuntur praedatores marini; sic dicti vel a pirata, qui prius maria infestavit, vel a Graeco *περανω*, id est, transeo, quod conspecta insula in illam transirent, jam praedaturi. Hinc piratica ars est, quam exercent." In the French Code des Prises (Edition of M. Dufriehe Foulaines, Paris, 1804, tom. 1, p. 6), the editor says: "Le pirate est celui qui parcourt les mers avec une bâtiment armé sans commission ou patente d'aucune état, dans la vue exclusive de s'approprier tous les navires par la force. La piraterie est un assassinat; tout puissance doit faire arreter et juger des pareils brigands, et en purger la terre." Emerigon (Assur. tom. 1, c. 12, s. 28, p. 523), says: "Les Pirates sont ceux qui courent les mers sans commission d'aucun Prince ni Etat souverain pour depredre les vaisseaux qu'ils rencontrent." "Les Ennemis sont ceux, qui autorisés par un prince, ou état souverain font la guerre dans la forme établie par le droit des gens; au lieu que les Pirates sont de simples particuliers qui depredent le premier navire qu'ils rencontrent." "Les hostilités se commettent de nation à nation; au lieu que la piraterie est un brigandage qui s'exerce sur mer par gens sans aveu, et d'une manière furtive." "Les pirates sont ennemis du genre humain." "La piraterie, ou le brigandage sur mer, est un delit contre la loi universelle des sociétés." &c. And Emerigon fortifies his opinion on this subject, by citations from the civil law, from other maritime writers, and from Blackstone's Commentaries. It is plain, therefore, that he considered piracy as defined in the civil law, the maritime law, and the common law of England, as the same crime.

Bouchard (cited in 1 Emerigon, c. 12, s. 28, p. 527): "Les pirates n'ont pas le droit des armes. Ce sont des voleurs et assassins, qui ne forment pas un corps d'état. Ennemis des toutes les nations contre lesquelles ils exercent indistinctement leurs brigandages, toutes les nations sont en droit de courir sus et de les exterminer sans declaration de guerre."

M. Bonnemant, in his edition of the Chevalier De Habreu's treatise on maritime captures (edit. 1802, Paris, part. 1, c. 1, s. 5, p. 15, note), says: "Les pi-



plain and explicit as not to be misunderstood by anyone. Can this be the case, or can a crime be said to be defined, even to a common intent, when those who are desirous of information on the subject are referred to a code, without knowing with any certainty where it is to be found, and from which even those to whom it may be accessible, can with difficulty decide, in many cases, whether a particular act be piracy or not? Although it cannot be denied that some writers on the law of nations do declare what acts are deemed piratical, yet it is certain that they do not all agree; and if they

did, it would seem unreasonable to impose upon that class of men, who are the most liable to commit offenses of this description, the task of looking beyond the written law of their own country for a definition of them. If in criminal cases every thing is sufficiently certain, which by reference may be rendered so, which was an argument used at bar, it is not perceived why a reference to the laws of China, or to any other foreign code, would not have answered the purpose quite as well as the one which has been resorted to. It is not certain, that on examination, the crime would not be found to be

rates sont ceux dont la navigation, les actions et les entreprises ne sont autorisées ni avouées par aucune puissance, qui agissent sur la propriété publique et particulière contre le vœu de toutes les nations." And De Habreu himself (as translated by M. Bonnemant, part 2, c. 6, s. 1, p. 100, 101), says: "Selon la définition de la prise, il paroît que le droit d'armer en course n'appartient qu'à ceux qui sont ennemis autorisés, appelés, en Latin, *hostes*. D'où il s'ensuit que les brigande et les pirates sont exclus de ce droit; qu'ils ne peuvent prétendre aux privilèges que les loix de la guerre accorde aux ennemis, et qu'au contraire ils méritent d'être punis rigoureusement comme les malfaiteurs, et qu'on est autorisé à se saisir de tous leurs biens." "De tous les tems les pirates ont été regardés comme des voleurs publics et des perturbateurs de la paix. C'est pour cela qu'il est libre à quiconque s'en saisit de leur ôter la vie sans se rendre coupable d'injustice. La préjudice qu'ils causent à la tranquillité publique, à la liberté du commerce, et à la sûreté de la navigation, a fait que toutes les nations se sont accordées à les poursuivre et à les punir avec la plus grande rigueur."

Ferrière (Dict. du Droit. art. Pirates) says: "Pirates sont des corsaires, ecumeurs de mer, qui font des courses sur mer sans aveu ni autorité du Prince ou du Souverain."

In the Encyclopédie des Sciences, &c. (Edit. 1765, art. Pirate), it is said: "On donne ce nom (Pirate) à des bandits, qui maîtres d'une vaisseau vont sur mer attaquer les vaisseaux marchands pour les piller et les voler."

Valin (Traité des Prises, c. 3, s. 2, p. 29) says: "Or la peine des pirates ou forbans est celle du dernier supplice, suivant l'opinion commune; parceque ce sont des ennemis déclarés de la société, des violeurs de la loi publique et du droit des gens, des voleurs publics à main armée et à force ouverte."

Straccha (De Naut. Part. 3, u. 30) says: "Inter Piratam et Latronem nulla alia est differentia nisi quia Pirata depredator est in mari."

Casaregis (Disc. 64, n. 4) says: "Proprie pirata ille discitur qui sine patentibus alicujus principis ex propria tautum et privata auctoritate per mare discurret depredendi causa."

Dr. Brown (2 Civ. and Adm. Law, 461, 462) says: "Piracy is depredation without authority from any prince or state, or transgression of authority by despoiling beyond its warrant." "Unlawful depredation is of the essence of piracy."

Beaves (Lex Mercatoria art. Piracy, p. 250) says: "A pirate is a sea thief, or an enemy of human kind, also aims at enriching himself by marine robberies committed either by force, fraud, or surprise, on merchants or other traders at sea."

Molloy (b. 1, c. 4, s. 1) says: "A pirate is a sea thief, or *hostis humani generis*, who, for to enrich himself either by surprise or open force, sets upon merchants or others trading at sea, ever spoiling their lading, if by possibility they can get the mastery."

Marshall (Insur. c. 12, s. 11, p. 556) says: "The crime of piracy or robbery on the high seas, is an offence against the universal law of society."

It is also said in 16 Viner's Abridgment (art. Pirate and Piracy, A. p. 558), and in Cowell's Interpreter (Pirate): "A pirate is now taken for one who maintains himself by pillage and robbery at sea."

Comyns (Dig. Admiralty, E. 3) defines piracy thus: "Piracy is when a man commits robbery upon the sea;" and he cites as authority, 3 Inst. 113, and 1 Sir Leol. Jenk. 94.

Lord Coke (3 Inst. 113; Co. Litt. 391) says: "This word *pirate*, in Latin, *pirata*, from the Greek word

*πειρατης*, which again comes from *πειραν* as transcendo mare, of roving upon the sea; and therefore, in English, is called a rover and robber upon the sea."

Sir Leoline Jenkins, in his charge at the admiralty sessions in 1668, says: "You are, therefore, to inquire of all pirates and sea rovers, they are in the law *hostes humani generis*, enemies, not of one nation, or of one sort of people only, but of all mankind. They are outlawed as I may say, by the laws of all nations; that is, out of the protection of all princes, and of all laws whatsoever. Everybody is commissioned, and is to be armed against them as rebels and traitors to subdue and root them out. That which is called robbing upon the highway, the same being done upon the water, is called piracy. Now, robbery as it is distinguished from thieving or larceny, implies not only the actual taking away of my goods, while I am, as we say, in peace, but, also, the putting me in fear by taking them by force and arms, out of my hands, or in my sight and presence. When this is done upon the sea, without a lawful commission of war or reprisals, it is downright piracy." Vol. I., p. 86.

Again, in another charge, he says (Vol. I., p. 94): "The next sort of offenses pointed at in the statute 28 Hen. VIII., eh. 15, are robberies; and a robbery, when it is committed upon the sea, is what we call piracy. A robbery, when it is committed upon the land, does imply three things: 1. That there be a violent assault. 2. That a man's goods be actually taken from his person or possession. 3. That he who is despoiled be put in fear thereby. When this is done upon the sea, when one or more persons enter on board a ship with force and arms, and those in the ship have their ship carried away by violence, or their goods taken away out of their possession, and are put in fright by the assault, this is piracy; and he that does so is a pirate or a robber within the statute."

The statute of Henry VIII. here referred to, does not contain any description of piracy. Before that statute, piracy was only cognizable by the civil law in the Admiralty Court. But the statute gave the High Commission Court (created by that statute) jurisdiction of "all treasons, felonies, robberies, murder, and confederacies committed in, or on the sea," &c. The term *piracy* is not found in the statute, and it is only as a robbery upon the sea that the High Commission Court has jurisdiction of piracy. Sir Leoline Jenkins, therefore, refers to the civil law definition of the offense of piracy; for it is agreed on all sides that the statute of Henry VIII. has not altered the nature of the offense. (See 1 Hawk. P. C. b. 1, e. 37.)

Targa (as I find him quoted by his Spanish translator, Gison, Reflex., c. 61; *De los Corsarios o Pyratas*, for the original is not before me) says: "Esta (depredacion) se comete de dos modos, o por causa de guerra declarada entre dos naciones, &c., o por modo de hurto violento como Ladrones del Mar y como hacen los robos en terra los salteadores de caminos; y esto se compuela con la autentica del Derecho Civil, (\*) que distingue la pyrateria del robo," &c. Again: "A los pyratas como tambien a los salteadores de camino, enemigos comunes, opresores de la libertad y comercio, y como a violadores del derecho de las gentes, puede, qualquiera oponerse y los ministros y subditos del principe pueden perseguir los y prender los aunque sea fuera del dominio y se hayan refugiado a los estados confinantes, sin que por esso quede violada la jurisdiccion; y presas que sean, se pendran en poder de la justicia de aquel Principe en cuyo estado han

\*Dig. lib. 49, tit. 15, l. 19, s. 2.



more accurately defined in the code thus referred to than in any writer on the law of 182\*] \*nations; but the objection to the reference in both cases is the same; that it is the duty of Congress to incorporate into their own statutes a definition in terms, and not to refer the citizens of the United States for rules of conduct to the statutes or laws of any foreign country, with which it is not to be presumed that they are acquainted. Nor does it make any difference in this case that the law of nations forms part of the law of every civilized country. This may be the case to a certain

extent; but as to criminal cases, and as to the offense of piracy in particular, the law of nations could not be supposed of itself to form a rule of action; and, therefore, a reference to it in this instance, must be regarded in the same light as a reference to any other foreign code. But, it is said that murder and robbery have been declared to be punishable by the laws of the United States, without any definition of what act or acts shall constitute either of these offenses. This may be; but both murder and robbery, with arson, burglary, and some other crimes, are defined by writers on the common

sido cogidos." Again; "Y assi concluyo, diciendo, que deben todos guardarse en el mar de Pyratas, y en la tierra de Ladrones; y todo aquel, que en el mar, playa, puerto, o otro seno de mar, o rio navegable, roba o apresa, ya sea amigo, esto es, enemigo no declarado, y tambien los paysanos, o enemigos propriamente tales, o con patente, estandarte, o sin el, o con engano, o fuerza, siempre es pyrata."

Citations from civilians and maritime writers to the same effect might be multiplied; but they would unnecessarily swell this note. It remains only to notice the doctrines which have been held by the tribunals of Great Britain, and asserted by her common law writers on the subject of piracy.

Hawkins (P. C. b. 1, c. 37) says: "A pirate at the common law is a person who commits any of those acts of piracy, robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there."

From the terms of this definition (if it may be so called), it might be supposed, that by piracy at the common law, something was meant peculiar to that law, and not piracy by the civil law, or the law of nations. But that was certainly not the meaning of the writer. For it is perfectly well settled that piracy is no felony at common law, being out of its jurisdiction; and before the statute of 28 Henry VIII., c. 15, it was only punishable by the civil law. That statute, however, does not (as has been already stated) alter the nature of the offense in this respect; and, therefore, a pardon of all felonies generally does not extend to it. 2 East's P. C. 796; 1 Hawk. c. 37, s. 6, 8, 10; 1 Hale, 354; 2 Hale, 18; 3 Inst. 112. And it was also determined in *Rex v. Morphee* (Salk. 85), that "no attainder for piracy wrought corruption of blood, for it was no offense at common law." 2 East's P. C. 796; Co. Litt. 391, a. The intention of Hawkins must have been to use the phrase "at the common law" in its most comprehensive sense; in which sense the law of nations itself is a part of the common law; since all offenses against the law of nations are punishable by the criminal jurisprudence of England.

Blackstone, in the Commentaries (4 Comm. 71, 73), evidently proceeds upon this notion. He says: "The crime of piracy, or robbery and depredation upon the high seas, is an offense against the universal law of society, a pirate being, according to Sir Edward Coke, *hostis humani generis*." He goes on to remark, that every community hath a right to punish it, for it is a war against all mankind. He then gives the definition of piracy by Hawkins, as the definition of the common law; and then states the several statutes made in England on the subject of piracy, concluding thus: "These are the principal cases in which the statute law of England interposes to aid and enforce the law of nations as a part of the common law, by inflicting an adequate punishment for offenses against that universal law committed by private persons."

The state trials for piracy in the reign of William III. are entitled to the great consideration, both from the eminent talents of the judges who constituted the tribunal and the universal approbation of the legal principles asserted by them. It is also worthy of remark, that in none of these indictments was there any averment that the prisoners were British subjects; and most of them were for piracies committed on foreign subjects and vessels. They were all framed as indictments at common law, or for general piracy, without reference to any British statute.

In *Rex v. Dawson* and others (8 William III. 1696; 5 State Trials, 1 edit. 1742), the court was composed of Sir Charles Hedges, Judge of the High Court of Admiralty (as president), Lord Chief Justice Holt, Lord Chief Justice Treby, Lord Chief Baron Ward, Wheat. 5.

Mr. Justice Rookby, Mr. Justice Turton, Mr. Justice Eyre, Mr. Baron Powis, and Doctors Lane, King, and Cook (civilians). Sir Charles Hedges delivered the charge to the grand jury, and among other things, directed them as follows: "Now, piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the admiralty. If any man be assaulted within that jurisdiction, and his ship or goods violently taken away without legal authority, this is robbery and piracy. If the mariners of a ship shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, or tackle, apparel or furniture, with a felonious intention, in any place where the Lord Admiral hath, or pretends to have, jurisdiction, this is also robbery and piracy. The intention will, in these cases, appear, by considering the end for which the fact is committed, and the end will be known, if the evidence show you what hath been done. The King of England hath not only an empire or sovereignty over the British seas for the punishment of piracy, but in concurrence with other princes and states, an undoubted jurisdiction and power in the most remote parts of the world. If any person, therefore, native or foreigner, Christian or Infidel, Turk or Pagan, with whose country we are in amity, trade or correspondence, shall be robbed or spoiled, in the narrow or other seas, whether the Mediterranean, Atlantic, or Southern, or any branches thereof, either on this or the other side of the line, it is a PIRACY, within the limits of your inquiry, and cognizable by this court." It seems impossible to doubt that Sir Charles Hedges here understood piracy to be punishable by all nations, as a crime against the law of nations, and that its true definition is the same in the civil and common law as in the law of nations, viz., robbery upon the seas; and that, as such, it was punishable by the British courts in virtue of their general concurrent jurisdiction on the seas.

In *Rex v. Dawson* and others, there were several indictments. 1. The first was for piracy in robbing and plundering the ship *Gunswey*, belonging to the Great Mogul and his subjects, in the Indian seas. 2. The second for piracy, in forcibly seizing and feloniously taking, stealing, and carrying away a merchant ship called the *Charles II.*, belonging to certain of His Majesty's subjects unknown, on the high seas, about three leagues from the Groyne in Spain. 3. The third was for piracy on two Danish ships. 4. The fourth for piracy on a Moorish ship. Dawson pleaded guilty, and the other prisoners not guilty, and were upon trial convicted, and all sentenced to death accordingly. It appeared in evidence that the prisoners were part of the crew of the *Charles the II.*, and rose upon her near the Groyne, and afterwards ran away with her, and committed the piracies. The Solicitor-General, in stating the case to the jury, said: "They (the prisoners) are arraigned for a very high crime, a robbery upon the seas. These are crimes against the law of nations, and worse than robbery on land." Lord Chief Justice Holt, in delivering the charge to the jury, said: "That there was a piracy committed on the ship *Charles* is most apparent by the evidence that hath been given; that is, a force was put upon the master, and some of the seamen on board her, who, because they would not agree to go on a piratical expedition, had liberty to depart and be set ashore, &c. &c. So that I must tell you beyond all contradiction, the force put upon the captain, and taking away this ship, called the *Charles II.*, is piracy."

On the trial of Kidd and others for piracy, &c., in 13 of William III., 1713 (5 State Trials, edit. 1742), there were several indictments. 1. The first was against William Kidd for the murder of one W.



law, which is part of the law of every state in the Union, of which, for the most obvious reasons, no one is allowed to allege his ignorance in excuse for any crime he may commit. Nor is there any hardship in this, for the great body of the community have it in their power to become acquainted with the criminal code under which they live; not so when acts which constitute a crime are to be collected from a variety of writers, either in different languages or under the disadvantage of translations, and from a code with whose provisions even professional **183\*** men are not always acquainted. By the same clause of the constitution, Congress have power to punish offenses against the law of nations, and yet it would hardly be deemed a fair and legitimate execution of this authority to declare that all offenses against the law of nations, without defining any one of them, should be punished with death. Such mode of legislation is but badly calculated to furnish that precise and accurate information in criminal cases, which it is the duty, and ought to be the object, of every legislature to impart.

Upon the whole, my opinion is, that there is not to be found in the act that definition of piracy which the constitution requires, and that, therefore, judgment on the special verdict ought to be rendered for the prisoner.

**CERTIFICATE.**—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the district of Virginia, and on the question on which the judges of that court were divided in opinion, and was argued by counsel. On consideration whereof, this court is of opinion that the offense charged in the indictment in this case, and found by the jury to have been committed by the prisoner, amounts to the crime of piracy, as defined by the law of nations, so as to be punishable under the act of Congress, entitled, "an act to protect the commerce of the United States, and punish the crime of piracy." All which is ordered to be certified to the Circuit Court for the district of Virginia.<sup>1</sup>

Cited.—9 How. 572; 2 Cliff. 416, 420; 1 Wood. & M. 438, 446, 461, 474.

1.—*Vide* Appendix, Note IV., for the new act of Congress on the subject of piracy, passed May 15, 1820.

Moore, on the high seas, near the coast of Malabar, in a vessel called the Adventure Galley, of which Kidd was commander. 2. The second was against all the prisoners for piracy in seizing and running away with a certain merchant ship called the Quedash Merchant, then being a ship of certain persons to the jurors unknown (not stated to be British subjects), upon the high seas about ten leagues from Cutshwen in the East Indies. In fact, the vessel and cargo appeared by the evidence to belong to Armenian merchants, and then on a voyage from Bengal to Surat. Lord Chief Baron Ward, in charging the jury on this indictment, said, "the crime charged upon them (the prisoners) is piracy; that is, seizing and taking this ship and the goods in it piratically and feloniously. This ship belonged to people in amity with the King of England." "If this was a capture on the high seas, and these were the goods of persons in amity with the King, and had no FRENCH PASS, then it is a plain piracy; and if you believe the witnesses, here is the taking of the goods and ship of persons in amity, and converting them to their own use. Such a taking as this would be felony; and being at sea, it will be piracy." The prisoners were convicted and sentenced to death. There were four other indictments, three for piracy on Moorish ships, and one for piracy on a Portuguese ship; and all the prisoners were convicted and sentenced. Mr. Justice Turton, in

\*[CONSTITUTIONAL LAW, AND LAW OF [\*184 NATIONS.]

THE UNITED STATES *v.* FURLONG,  
*alias* HOBSON.

THE UNITED STATES *v.* THE SAME.

THE UNITED STATES *v.* THE SAME.

THE UNITED STATES *v.* THE SAME.

THE UNITED STATES *v.* GRIFFEN  
AND BRAILSFORD.

THE UNITED STATES *v.* BOWERS AND  
MATHEWS.

THE UNITED STATES *v.* THE SAME.

The 8th section of the act of the 30th of April, 1790, c. 36, for the punishment of certain crimes against the United States, is not repealed by the act of the 3d March, 1819, c. 76, to protect the commerce of the United States, and punish the crime of piracy.

In an indictment for a piratical murder, under the act of the 30th of April, 1790, c. 36, s. 8, it is not necessary that it should allege the prisoner to be a citizen of the United States, nor that the crime was committed on board a vessel belonging to citizens of the United States; but it is sufficient to charge it as committed from on board such a vessel, by a mariner sailing on board such a vessel.

A citizen of the United States, fitting out a vessel in a port of the United States, in order to cruise against a power in amity with the United States, is not protected, by a commission, from a belligerent, from punishment for any offense committed against vessels of the United States.

It is competent, in an indictment for piracy, for the jury to find, that a vessel within a marine league of the shore, at anchor, in an open roadstead, where vessels only ride under shelter of the land at a season when the course of the winds is invariable, is upon the high seas.

The words "out of the jurisdiction of any particular state," in the act of the 30th April, 1790, c. 36, s. 8, must be construed to mean out of the jurisdiction of any particular state of the Union.

The act of the 3d of March, 1819, c. 76, s. 5, furnishes a sufficient definition of piracy; and it is defined to be robbery on the seas.

\*A vessel loses her national character by [\*185 assuming a piratical character; and a piracy committed by a foreigner, from on board such a vessel upon any other vessel whatever, is punishable under the 8th section of the act of the 30th of April, 1790, c. 36.

charging the jury on one of these indictments, said, "pirates are called *hostes humani generis*, the enemies to all mankind."

The case of *Rex v. Green* (4 Anne, 1704; 5 State Trials, 573, edit. 1742) was a libel or indictment in the Court of Admiralty in Scotland for piracy, manifestly treated both in the libel and the arguments as a crime against the law of nations, and as such, also, against the law of Scotland.

In *Erskine's Institutes of the law of Scotland*, in treating of the crime of piracy, the author says, "piracy is that particular kind of robbery which is committed on the seas." *Ersk. Inst. b. 4, tit. 4, s. 65.* He had in the preceding section (64) declared that "robbery is truly a species of theft; for both are committed on the property of another, and with the same view of getting gain; but robbery is aggravated by the violence with which it is attended." The definition of both these crimes seems not at all different from that of the common law.

The foregoing collection of doctrines, extracted from writers on the civil law, the law of nations, the maritime law, and the common law, in the most ample manner confirms the opinion of the court in the case in the text; and it is with great diffidence submitted to the learned reader to aid his future researches in a path, which, fortunately for us, it has not been hitherto necessary to explore with minute accuracy.

On an indictment for piracy, the jury may find the national character of a vessel upon such evidence as will satisfy their minds, without the certificate of Registry, or other documentary evidence, being produced, and without proof of their having been seen on board.

On an indictment for piracy, the national character of a merchant vessel of the United States may be proved without evidence of her certificate of registry.

Each count in an indictment is a substantive charge; and if the finding of the jury conform to any one of the counts, which, in itself, will support the verdict, it is sufficient, and judgment may be given thereon.

**THESE** were several indictments in the Circuit Court of Georgia and South Carolina. The following are the cases as stated for the decision of this court:

**THE UNITED STATES v. JOHN FURLONG, *alias* HOBSON.**

The prisoner was indicted before the Circuit Court of Georgia, for the piratical murder of Thomas Sunley, on the act of Congress of the 30th April, 1790, c. 36. Verdict, guilty. The offense was committed on a vessel and crew, all English. The person murdered was an English subject. The piratical vessel was a vessel of the United States, and run away with by the captain and crew. The prisoner is an Irishman, and a subject of the King of Great Britain. It was moved by the prisoner's counsel that the judgment be arrested, on the following grounds, viz.:

**186\*]** \*1st. Because the indictment does not charge the prisoner as a citizen of the United States.

2d. Because the indictment does not charge the act as committed on board of an American vessel, but charges it as committed on board of a foreign vessel, or vessel of owners unknown.

3d. Because the 8th section of the act of 30th April, 1790, c. 36; is virtually repealed by the act of 3d March, 1819, c. 76, to protect the commerce of the United States, and punish the crime of piracy.

Upon which grounds, the judges being divided in opinion, at the request of the counsel for the prisoner, it was ordered, that the indictment and proceedings thereon, together with the grounds of the defendant's motion in arrest of judgment, be transcribed by the clerk of the Circuit Court, and certified by him, under the seal of the court, and sent to this court for their decision.

**THE UNITED STATES v. JOHN FURLONG, *alias* HOBSON.**

This was another indictment against the same prisoner before the same court, on the act of Congress of the 30th of April, 1790, c. 36, for the piratical murder of David May. Verdict, guilty. The same statement appears in the record, as in the case of the indictment of Furlong, for the murder of Thomas Sunley.

**187\*]** \*THE UNITED STATES v. JOHN FURLONG, *alias* HOBSON.

This was another indictment against the same prisoner, before the same court, on the act of the 3d of March, 1819, c. 76, for the piratical seizure of an unknown vessel. Verdict, guilty. U. S., Book 5.

dict, guilty. The offense was committed on a foreign vessel, by a foreigner, from a vessel of the United States, which had been run away with by the captain and crew. It was moved by the prisoner's counsel, that the judgment be arrested, on the ground that as the constitution of the United States gives the power to Congress to define and punish the crime of piracy, it is necessary that Congress define before it can punish, and that a reference to the law of nations is not such a definition as the constitution requires. Upon which ground, the judges being divided in opinion, upon request of counsel for prisoner, it was ordered, that the indictment and proceedings thereon, together with the ground of the defendant's motion in arrest of judgment, be transcribed by the clerk of the Circuit Court, and certified by him, under the seal of the court, and sent to this court for their decision.

**THE UNITED STATES v. JOHN FURLONG, *alias* HOBSON.**

This was another indictment against the same prisoner, before the same court, on the act of the 30th of April, 1790, c. 36, [\*188 for a piratical robbery, committed on an American ship. Verdict, guilty. The offense was committed on a vessel of the United States, from a vessel of the United States, which had been run away with by the captain and crew. The prisoner is an English subject. It was moved by the prisoner's counsel that the judgment be arrested, on the ground that the 8th section of the act of 30th of April, 1790, c. 36, on which the indictment is founded, is virtually repealed by the act of the 3d of March, 1819, c. 76, entitled, "an act to protect the commerce of the United States, and punish the crime of piracy." Upon which ground, the judges being divided in opinion, upon the request of the counsel for the prisoner, it was ordered, that the indictment and proceedings thereon, together with the grounds of the defendant's motion in arrest of judgment, be transcribed by the clerk of the Circuit Court, and certified by him, under the seal of the court, and sent to this court for their decision.

**THE UNITED STATES v. BENJAMIN BRAILSFORD AND JAMES GRIFFEN.**

The prisoners were indicted before the Circuit Court of South Carolina, for piracy on an American ship, under the act of Congress of the 30th of April, 1790, c. 36. The court divided on the following questions:

1st. Whether an American citizen, fitting out a vessel in an American port, really to cruise against a power at peace with the United States, is protected by a commission from a belligerent from punishment \*for any [\*189 offense committed by him against vessels of the United States.

2d. Whether it is competent for a jury to find, that a vessel within a marine league of the shore, at anchor in an open roadstead, where vessels only ride under shelter of the land at a season when the course of the winds is invariable, is upon the high seas.

3d. Whether the words, "out of the jurisdiction,"



tion of any particular state," in the 8th section of the act of Congress of the 30th of April, 1790, c. 36, entitled, "an act for the punishment of certain crimes against the United States," must be construed to mean, out of the jurisdiction of any particular state of the United States.

4th. Whether the said 8th section of the said act is virtually repealed by the 5th section of the act of Congress of March 3d, 1819, c. 76.

5th. Whether the said 5th section of the said act of March 3d, 1819, c. 76, furnishes any, and what definition of the crime of piracy.

THE UNITED STATES *v.* DAVID BOWERS AND HENRY MATHEWS.

The prisoners were indicted before the Circuit Court of Georgia, under the act of 30th of April, 1790, c. 36, for a piratical robbery committed on an American ship. Verdict, guilty. The prisoners were part of the crew of the *Louisa*, privateer, who rose upon their officers in October, 1818, and putting them out of the ship, proceeded on a piratical cruise. The *Louisa* was commissioned by the republic of **190\*** Buenos Ayres, and commanded by Captain Almeida. There is no proof of her being American owned. The prisoners are American citizens, and the piracy for which they are convicted was committed on the ship *Asia*, bearing the American flag. The captain asserted himself and vessel to be American; and on her stern was painted "New York." The ship *Asia*, at the time of the robbery, was at anchor in an open roadstead, at the Island of Bonavista. The register of the ship *Asia* was not produced in evidence. Verdict, guilty.

The prisoner's counsel moved that the judgment be arrested on the following grounds, viz.:

1st. That it is not competent to prove the national character of an American vessel, without evidence of her register.

2d. It is not competent for the jury to find that the piracy was committed on the high seas, when the evidence ascertained the *Asia*, at the time she was boarded, to have been at anchor in an open roadstead, at the Island of Bonavista.

3d. That the prisoners are not punishable under the 8th section of the act of 30th of April, 1890, c. 36, entitled, "an act for the punishment of certain crimes against the United States;" the same having been virtually repealed by the act of 1819, c. 76, to protect the commerce of the United States, and to punish the crime of piracy.

4th. That there are two counts in the indictment, the first charging the offense to have been committed on the high seas, out of the jurisdiction of any particular state; the second, **191\*** charging the offense to \*have been committed in a certain haven, near the Island of Bonavista, out of the jurisdiction of any particular state, and that it is not competent for a jury to find a general verdict of guilty on both counts.

Upon which grounds, the judges being divided in opinion, it was ordered, that the indictment and proceedings thereon, together with the grounds of the motion in arrest of judgment, be transcribed by the clerk of the Circuit

Court, and certified by him, under the seal of the court, and sent to this court for their decision.

THE UNITED STATES *v.* DAVID BOWERS AND HENRY MATHEWS.

The prisoners were indicted before the Circuit Court of Georgia, under the act of the 30th of April, 1790, c. 36, for a piratical robbery committed on a ship, the property of British subjects, and called the *Sir Thomas Hardy*, upon the high seas. The prisoners were citizens of the United States, and part of the crew of the *Louisa*, privateer, mentioned in the preceding case. The prisoners were found guilty, and their counsel moved that the judgment be arrested upon the following grounds, viz.:

1st. That the act of the 30th of April, 1790, c. 36, eighth section, does not extend to piracy committed by the crew of a foreign vessel on a vessel exclusively owned by persons not citizens of the United States.

2d. That the eighth section of the act of the 30th of April, 1790, c. 36, entitled, [**\*192** "an act for the punishment of certain crimes against the United States," has been virtually repealed by the act of the 3d of March, 1819, c. 76, entitled, "an act to protect the commerce of the United States, and to punish the crime of piracy."

Upon which grounds, the judges being divided in opinion, it was ordered, that the indictment and proceedings thereon, together with the grounds of the motion in arrest of judgment, be transcribed by the clerk of the Circuit Court, and certified by him, under the seal of the court, and sent to this court for their decision.

These causes were argued by the *Attorney-General* for the United States, and by *Mr. Webster* and *Mr. Winder* for the prisoners.<sup>1</sup>

Mr. Justice JOHNSON delivered the opinion of the court: A variety of questions have been referred to this court in these cases, and in the decisions to be certified to the Circuit Court, it will be necessary to notice each question in every case; but in the opinion now to be expressed, the whole may be considered in connection, as they all depend upon the construction of the same laws.

In the two cases of *Smith* and *Klintock*, it has been already adjudged, that the 8th section of the act of 1790 was not repealed by the 5th section of that of 1819, and that the decision in *Palmer's* case does not apply to the case of a crew, whose conduct \*is such as to set at [**\*193** naught the idea of thus acting under allegiance to any acknowledged power. From which it follows, that when embarked on a piratical cruise, every individual becomes equally punishable under the law of 1790, whatever may be his national character, or whatever may have been that of the vessel in which he sailed, or of the vessel attacked.

This decision furnishes an answer to all those questions made in the above cases, which

1.—The substance of their arguments will be found in the preceding cases of the United States *v.* *Klintock*, *ante*, p. 144, and the United States *v.* *Smith*, *ante*, p. 153.

are founded on distinctions in the national character of the prisoner, or in that of the vessels, in relation to the piracies committed by the crew of the *Louisa*. The moment that ship was taken from her officers, and proceeded on a piratical cruise, the crew lost all claim to national character, and whether citizens or foreigners, became equally punishable under the act of 1790. It also furnishes an answer to all the exceptions taken in the case of piracy charged against Furlong. For whatever the court might have thought on the effect of the act of 1819, he would have been still punishable under the act of 1790. The indictment against him is general, against the form of the statute in such case made and provided, and it matters not that his offense was committed subsequent to passing the act of 1819, since the other act still remains in force, and reaches his case.

It would seem to be unnecessary to go farther in the cases against Furlong, as this conclusion decides his fate; but this court cannot foresee how far it may be necessary to the administration of justice, against accessories or otherwise, that the question in the cases of murder should also be decided.

**194\*]** The question whether murder committed at sea on board a foreign vessel be punishable by the laws of the United States, if committed by a foreigner, upon a foreigner, is one which involves a variety of considerations, and which, in the two cases before us, is presented under an obvious distinction; on the one indictment it appears as having been committed simply on board the *Anne*, of Scarborough, a foreign vessel, by a foreigner upon a foreigner; on the other, as committed on board the *Anne*, of Scarborough, from an American vessel by a mariner of the American vessel. It is obvious that neither case comes within the express words of the decision in *Palmer's* case. And with regard to the case in which the American vessel is brought in view, there can exist but one difficulty.

No difference can be supposed to exist between the case of a murder committed on the seas by means of a gun discharged from a vessel, and by means of a boat's crew despatched for that purpose, as was actually the case here. And as to the right of the United States to punish all offenses committed on or from on board their own vessels, it cannot be doubted, nor has it been doubted that the act of 1790 extends to such offenses when committed on the seas. But, we have decided, that in becoming a pirate, the *Mary*, of Mobile, from which the prisoner committed this offense, lost her national character. Could she then be denominated an American vessel?

We are of opinion that the question is immaterial; for, whether as an American or a **195\*]** pirate ship, the offense committed from her was equally punishable, and the words of the act extend to her in both characters. But if it were necessary to decide the question, we should find no difficulty in maintaining, that no man shall, by crime, put off an incident to his situation which subjects him to punishment. A claim to protection may be forfeited by the loss of national character, where no rights are acquired, or immunity produced by that cause. The other case presents a question of more difficulty. It includes

the case of a murder committed by one of a crew upon another, on board a foreign vessel on the high seas. The prisoner is a British subject, the deceased was the same, and the ship also British.

This, though not in all its circumstances the same, is in principle precisely that of *The United States v. Palmer*. The only difference is, that the case of *Palmer* supposes the prisoner and the deceased to belong to different vessels, and the certificate of the court would seem to cover the case of an American as well as a foreigner, who commits an offense on board a foreign vessel.

So far as relates to the point now under consideration, I have no objection to accede to the decision in the case of *Palmer*. I did not unite in the opinion of the court in that case, on this point, because I thought it was carried too far in being extended to piracy as well as murder, and to American citizens as well as foreigners. To me it appears, that the only fair deduction from the obvious want of precision in language and in thought, discoverable in the act of 1790, and insisted on in the case of *Palmer*, is, that in construing it we should test each **\*196** case by a reference to the punishing powers of the body that enacted it. The reasonable presumption is, that the legislature intended to legislate only on cases within the scope of that power; and general words made use of in that law, ought not, in my opinion, to be restricted so as to exclude any cases within their natural meaning. As far as those powers extended, it is reasonable to conclude, that Congress intended to legislate, unless their express language shall preclude that conclusion.

It is true that the 8th section declares murder as well as robbery to be piracy; but, in my view, if anything is to be inferred from this association, it is only that they meant to assert the right of punishing murder to the same extent that they possessed the right of punishing piracy; which would be carrying the construction beyond what I contend for. The contrary conclusion, viz., that they meant to limit the cases of piracy made punishable under that act, to the cases in which they might, upon principle, punish murder, is rebutted by the generality of the terms used; and it would seem that, with this object in view, they ought to have taken the contrary course, and declared piracy to be murder.

It is obvious that the penman who drafted the section under consideration acted from an indistinct view of the divisions of his subject. He has blended all crimes punishable under the admiralty jurisdiction in the general term of piracy. But there exist well-known distinctions between the crimes of piracy and murder, both as to constituents and incidents. **\*Robbery on the seas is con-** **\*197** sidered as an offense within the criminal jurisdiction of all nations. It is against all, and punished by all; and there can be no doubt that the plea of *autre fois acquit* would be good in any civilized state, though resting on a prosecution instituted in the courts of any other civilized state. Not so with the crime of murder. It is an offense too abhorrent to the feelings of man, to have made it necessary that it also should have been brought within this universal jurisdiction. And hence, punishing it



when committed within the jurisdiction, or (what is the same thing), in the vessel of another nation, has not been acknowledged as a right, much less an obligation. It is punishable under the laws of each state, and I am inclined to think that an acquittal in this case would not have been a good plea in a court of Great Britain. Testing my construction of this section, therefore, by the rule that I have assumed, I am led to the conclusion that it does not extend the punishment for murder to the case of that offense committed by a foreigner upon a foreigner in a foreign ship. But otherwise as to piracy, for that is a crime within the acknowledged reach of the punishing power of Congress. As to our own citizens, I see no reason why they should be exempted from the operation of the laws of the country, even though in foreign service. Their subjection to those laws follows them everywhere; in our own courts they are secured by the constitution from being twice put in jeopardy of life or member, and if they are also made amenable **198\*** to the \*laws of another state, it is the result of their own act in subjecting themselves to those laws.

Nor is it any objection to this opinion, that the law declares murder to be piracy. These are things so essentially different in their nature, that not even the omnipotence of legislative power can confound or identify them. Had Congress, in this instance, declared piracy to be murder, the absurdity would have been felt and acknowledged; yet, with a view to the exercise of jurisdiction, it would have been more defensible than the reverse, for, in one case it would restrict the acknowledged scope of its legitimate powers, in the other extend it. If, by calling murder piracy, it might assert a jurisdiction over that offense committed by a foreigner in a foreign vessel, what offense might not be brought within their power by the same device? The most offensive interference with the governments of other nations might be defended on the precedent. Upon the whole, I am satisfied that Congress neither intended to punish murder in cases with which they had no right to interfere, nor leave unpunished the crime of piracy in any cases in which they might punish it; and this view of the subject appears to me to furnish the only sufficient key to the construction of the 8th section of the act of 1790.

As to piracy, since the decision that a vessel, by assuming a piratical character, is no longer included in the description of a foreign vessel, no case of difficulty can occur, unless the piracy be committed by the crew of a foreign vessel upon their own vessel, or by persons issuing **199\*** immediately from shore. If \*such cases occur under the act of 1790, I shall respectfully solicit a revision of *Palmer's* case, if it be considered as including those cases. And shall do the same in the case of murder committed by an American in a foreign ship, if it ever occur; under the belief that it never could have been the intention of Congress that such an offender should find this country a secure asylum to him.

There are a few minor points presented in these cases which it is necessary to notice.

It was moved in favor of the prisoners, that the only legal testimony of the character of the

ships plundered must have relation to their register, or rather, to the documentary papers which establish their national character. But this we think wholly indefensible. It is obvious that such testimony might be suppressed in various ways by the aggressors. Nor is it at all decisive of the real ownership of a vessel. Our laws recognize the possibility of the register's existing in the name of one, whilst the property is really in another person. The laws that require such documents to be on board a vessel, have relation to financial, commercial, or international objects, but are not decisive or necessary in a prosecution for this offense. Property or character is a matter *in pais*, and so to be established. However, it is unnecessary to examine the question farther, as we have decided that the national character of the vessels plundered was, in these cases, wholly immaterial to the crime.

It was also moved, in two of the cases of piracy, that as the offenses charged were committed on vessels \*then lying at anchor [**\*200** near the shore of the islands of Mayo and Bonavista, in a road, and within a marine league of the shore, the prisoners could not be convicted:

1. Because the words, "out of the jurisdiction of any particular state," in the 8th section of the act of 1790, includes foreign as well as domestic states.

2. Because a vessel at anchor in a road is not a vessel on the high seas, as charged in the indictment.

On the first point, we think it obvious, that out of any particular state, must be construed to mean "out of any one of the United States." By examining the context, it will be seen that *particular state* is uniformly used in contradistinction to *United States*. For what reason, it is not easy to imagine; but it is obvious that the only piracies omitted to be punished by that act are land piracies, and piracies committed in our waters.

On the second point, we are of opinion that a vessel in an open road may well be found by a jury to be on the seas. It is historically known, that in prosecuting trade with many places, vessels lie at anchor in open situations (and especially where the trade winds blow), under the lee of the land. Such vessels are neither in a river, haven, basin or bay, and are nowhere, unless it be on the seas. Being at anchor is immaterial, for this might happen in a thousand places in the open ocean, as on the Banks of Newfoundland. Nor can it be objected that it was within the jurisdictional limits of a foreign state; \*for, those [**\*201** limits, though neutral to war, are not neutral to crimes.

It was also moved, in the same cases, that as there were two counts in the indictment, the one charging the offenses as committed on the high seas, the other in a haven, basin or bay, a general verdict of guilty could not be sustained on account of repugnancy and inconsistency, as both facts could not be true. But, on this, it is only necessary to remark, that each count is a distinct substantive charge. Internal repugnancy in any one is a good exception, but *non constat* as to the whole, taken severally, but each may be for a distinct offense.

There is, finally, another question certified to

Wheat. 5.

this court, in one of the cases which arose under the captures made by the *Louisa*. It is, whether an American citizen, fitting out a vessel in an American port, really to cruise against a power at peace with the United States, is protected by a commission from a power belligerent as to the power against which he undertakes to cruise, from offenses committed by him against the United States?

It will be seen that the object of this question is to bring the whole crew of the *Louisa* under the immunities which it is supposed Almeida might have claimed by virtue of his commission. But, having decided that the vessel and crew had forfeited all pretensions to national or belligerent character, this question is anticipated. Yet, lest the ingenious views on this point, presented to the court by one of the gentlemen who argued it, should tempt the unwary into practices that may be fatal to them, **202\***] we think it \*proper to remark, that in *Klintock's* case it has been decided that a belligerent character may be put off, and a piratical one assumed, even under the most unquestionable commission. And if the laws of the United States declare those acts piracy in a citizen, when committed on a citizen, which would be only belligerent acts when committed on others, there can be no reason why such laws should not be enforced. For this purpose the 9th section of the act of 1790 appears to have been passed. And it would be difficult to induce this court to render null the provisions of that clause, by deciding either that one who takes a commission under a foreign power can no longer be deemed a citizen, or that all acts committed under such a commission must be adjudged belligerent, and not piratical acts.

THE UNITED STATES v. JOHN FURLONG, *alias* JOHN HOBSON.

CERTIFICATE.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Georgia, and on the question on which the judges of that court were divided in opinion, and was argued by counsel. On consideration whereof, this court is of opinion that the 8th section of the act of the 30th of April, 1790, on which the indictment is founded, is not repealed by the act of the 3d of March, 1819, entitled, “an act to protect the commerce of the United States, and to punish the crime of piracy.”

**203\*]** \*THE UNITED STATES v. JOHN FURLONG, *alias* JOHN HOBSON.

CERTIFICATE.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Georgia, and on the questions on which the judges of that court were divided in opinion, and was argued by counsel. On consideration whereof, this court is of opinion, as to the first and second questions stated by said Circuit Court, that it was not necessary the indictment should charge the prisoner as a citizen of the United States, nor the crime as committed on board an American vessel, inasmuch as it charges it to have been committed from on board an American vessel, by a mariner sailing on board an American vessel. And as to the third question, That the act of the 30th of April, 1790, is not virtually repealed by the act of the 3d of March, 1819, entitled, “an act to protect the commerce of the United States, and to punish the crime of piracy.”

ner sailing on board an American vessel. And as to the third question, That the act of the 30th of April, 1790, is not virtually repealed by the act of the 3d of March, 1819, entitled, “an act to protect the commerce of the United States, and to punish the crime of piracy.”

THE UNITED STATES v. GRIFFEN and BRAILSFORD.

CERTIFICATE.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of South Carolina, and on the questions on which the judges of that court were divided in opinion, and was argued by counsel. On consideration whereof, this court \*is of [**\*204** opinion, 1. That an American citizen fitting out a vessel in an American port, really to cruise against a power at peace with the United States, is not protected by a commission from a belligerent from punishment for any offense committed by him against vessels of the United States.

2. It is competent for a jury to find that a vessel within a marine league of the shore, at anchor in an open roadstead where vessels only ride under the shelter of the land, at a season when the course of the winds is invariable, is upon the high seas.

3. That the words, out of the jurisdiction of any particular state, in the 8th section of the act of Congress of the 30th of April, 1790, entitled, “an act for the punishment of certain crimes against the United States,” must be construed to mean, out of the jurisdiction of any particular state of the United States.

4. That the 8th section of the act of the 30th of April, 1790, entitled, “an act for the punishment of certain crimes against the United States,” is not repealed by the 8th section of the act of the 3d of March, 1819, entitled, “an act to protect the commerce of the United States, and to punish the crime of piracy.”

5. That the 5th section of the act of the 3d of March, 1819, furnishes a sufficient definition of piracy, and that it is defined “robbery on the seas.”

6. That considering this question, with reference to the case stated, the 8th section of the act of 1790 comprises the case of piracy committed by a foreigner in a foreign vessel upon any vessel, so as to \*make him punish- [**\*205** able with death, inasmuch as both vessel and crew no longer retained any pretension to national character after assuming that of a pirate.

7. That the national character of a vessel is a fact which a jury may find upon such evidence as will satisfy their minds, without production of the register, or proof of its having been on board of her.

8. That the 8th question is answered in the answer given to the fourth question.

THE UNITED STATES v. DAVID BOWERS AND HENRY MATHEWS.

CERTIFICATE.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States, for the District of Georgia, and on the questions on which the judges of that court were divided in opinion, and was argued by counsel. On consid-



eration whereof, this court is of opinion, 1. That the act of the 30th of April, 1790, entitled, &c., section 8th, does extend to piracy committed by the crew of a foreign vessel on a vessel exclusively owned by persons not citizens of the United States, in the case of these prisoners, in which it appears that the crew assumed the character of pirates, whereby they lost all claim to national character or protection.

2. That the 8th section of the act of the 30th of April, 1790, entitled, &c., has not been repealed by the 8th section of the act of March 3, 1819, entitled, &c.

**206\*] \*THE UNITED STATES v. DAVID BOWERS AND HENRY MATHEWS.**

CERTIFICATE.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Georgia, and on the questions on which the judges of that court were divided in opinion, and was argued by counsel. On consideration whereof, this court is of opinion, 1. That it is competent to prove the national character of an American vessel without evidence of her register.

2. That it is competent for the jury to find that the piracy was committed on the high seas, upon evidence that the *Asia*, at the time she was boarded, was at anchor in an open roadstead at the island of Bonavista.

3. That the 8th section of the act of the 30th of April, 1790, entitled, &c., is not repealed by the 8th section of the act of March 3, 1819, entitled, &c.

4. That each count in an indictment is a substantive charge; and if the finding conform to any one of them which in itself will support the verdict, it is sufficient to give judgment.

Cited—5 Wheat. 418; 1 Wood. & M. 314, 318, 320, 484; 7 Story, 260; 2 Cliff. 416; 3 Cliff. 53, 59, 64, 65; 2 Paine, 333; 3 Blatchf. 439; 2 Sumn. 89; 6 McLean, 469.

**207\*] \*[CHANCERY AND LOCAL LAW.]**

**STEVENSON'S HEIRS v. SULLIVANT.**

Previous to the year 1775, H. S., of Virginia, cohabited with A. W., and had by her the appellants, whom he recognized as his children. In July, 1775, he made his will, which was duly proved after his decease, in which he described them as the children of himself, and of his wife A., and devised the whole of his property to them and their mother. In June, 1776, he was appointed a colonel in the Virginia line, upon the continental establishment, and died in the service, having in July, 1776, intermarried with the mother, and died leaving her pregnant with a child, who was afterwards born, and named R. S. After the death of H. S., and the birth of his posthumous son, a warrant for a tract of military lands was granted by the state of Virginia to the posthumous son, R. S., who died in 1796, in his minority, without wife or children, and without having located or disposed of the warrant. His mother also died before 1796. Held, that the children of H. S. were not entitled to the lands, as devisees under his will, under the act of Assembly; nor did the will so far operate as to render them capable of taking under the act, as being named his legal representatives in the will.

The appellants were not legitimated by the marriage of H. S. with their mother, and his recogni-

tion of them as his children, under the 19th section of the act of descents of Virginia, of 1785, which took effect on the 1st of January, 1787.

The appellants were not, as illegitimate children of H. S. and A. W., capable of inheriting from R. S. under the act of descents of Virginia.

**A**PPEAL from the Circuit Court of Ohio. This was a suit in chancery, and the case upon the facts admitted by the parties, was as follows: Previous to the year 1775, Hugh Stevenson, of Virginia, lived and cohabited with Ann Whaley, and had by her the appellants in this cause, whom he recognized \*as his children. In July, 1775, he [\*208 made his will, in which he described the appellants as the children of himself, and of his wife Ann, and devised the whole of his property to them, and to their mother. In July, 1776, he intermarried with the said Ann Whaley, and died the succeeding month, leaving her pregnant with a child, which was afterwards born, and was named Richard. The will was duly proved after the death of the testator. In June, 1776, the testator was appointed a colonel in the Virginia line, upon continental establishment, and died in the service. After his death, and the birth of Richard, a warrant for 6,666 and two-thirds acres of military lands was granted by the state of Virginia to the said Richard, who died in the year 1796, in his minority, without wife or children, and without having located or disposed of the above warrant. His mother also died before the year 1796. The defendant claimed the land in controversy under John Stevenson, the elder paternal uncle of Richard; and the appellants having filed their bill in the court below to recover the premises in question, the same was dismissed, and the cause was brought by appeal to this court.

*Mr. Brush*, for the appellants, stated, that the appellants insisted, that, as representatives of their father, Hugh, the warrant in question ought to have issued to them. All the laws of Virginia, granting military land bounties, were passed after the death of Hugh Stevenson. The act which extends the bounty to those who had died before any bounty was \*pro- [\*209 vided, is that under which the warrant issued. It assigns the bounty to the "legal representatives" of the person upon account of whose services it was granted. We maintain, that the term, representatives, is used purposely, not to exclude the heir, but to embrace others than the legal heir, under the then existing laws. It never could be intended to give a bounty to elder brothers and uncles, who might be in arms against the country; but to the immediate objects of the soldier's attention and care, whom, by his will, he had appointed to represent him, or to that class of relatives among whom personal property was distributed by the statute of distributions; certainly more just and liberal in its provisions than the feudal course of descents, by which real estate was cast on the eldest male relative in a collateral line. But, waving this point, the complainants maintain that they are heirs at law of Richard Stevenson. And they maintain this upon two grounds. First. By the Virginia law regulating the course of descents, passed in 1785, they were legitimated. Second. By the same law, as bastards, they were made capable of inherit-

ing to their deceased brother, on the part of the mother.

1. The ancestor of Richard never had any interest in the subject that constitutes the estate. It is a gratuity given to his representative, who most clearly took as a purchaser, and the estate he held, upon his decease, passed to his heirs generally, without reference to the channel through which he derived it. The estate originated under the laws of Virginia. The parties resided in Virginia, until the establishment of the state of Kentucky, where Richard died. The descent was cast, either under the laws of Virginia or Kentucky; and, in this respect, they are the same. The act of 1785 provides, that "where a man, having by a woman one or more children, shall afterwards intermarry with such woman, such child or children, if recognized by him, shall thereby be legitimated." In the case of *Rice v. Efford*,<sup>1</sup> and in the case of *Sleighs and Strider*, cited by Judge Tucker, and given in a note,<sup>2</sup> it is decided, that this act includes cases of births and marriages, antecedent to its passage. This is its plain and natural interpretation. It was meant, as the judges say, "to protect and provide for the innocent offspring of indiscreet parents, who had already made all the atonement in their power for their misconduct, by putting the children, whom the father recognized as his own, on the same footing as if born in lawful wedlock." It meant to put them on the same footing, not only as it respected their father's estate, but in relation to the estates of each other, and the estates of all their kindred. In both the cases above cited, the father died after the act of 1785 took effect; and, in that point, the present case is to be distinguished from them. It would appear, from the case of *Rice v. Efford*, that the chancellor considered it a material point, that the recognition of the illegitimate children took place after the act of 1785 was in operation. And Judge Roane expressly says, that the interpretation adopted "applies to cases only where **211\*** the father has died \*posterior to the passage of the act." This observation of Judge Roane may properly be termed an *obiter dictum*. The case before him did not require that point to be decided; and, we conceive that the *dictum* is demonstrably incorrect, as is also the intimation of the chancellor. The object of the act was to "protect and provide for the children," by giving them a complete capacity of inheritance. To give them this title, the law requires two facts—the marriage, and the recognition by the father. But, it is said, that although the law embraces the case of an anterior marriage, the recognition must be subsequent. Why this distinction? The grammatical construction of the sentence does not require it. The terms, "shall afterwards intermarry," are correctly referred to the birth of the children, not the date of the act. In relation to the marriage and the recognition, the statute speaks from the same time. The whole structure of the sentence necessarily connects them. The active participle, "having," in reference to the birth of the children, and the passive participle, "recognized," in relation to their ac-

knowledgment, are the only terms which could properly be used to describe both anterior and subsequent cases with reasonable precision. Surely it would be a strange construction, by which the active participle is made to embrace both the past and future, while the passive participle, in the same sentence, is confined to future cases only! This can only be done by interpolating the word *hereafter*, so as to make that part of the sentence read, "such child or children, if *hereafter* recognized by him." The object of the statute does \*not require, [**212** but absolutely forbids such interpolation. It was designed, as the court say, in the case of *Stones v. Keeling*,<sup>3</sup> to establish the most liberal and extensive rules of succession to estates, "in favor of all, in whose favor the intestate himself, had he made a will, might have been supposed to be influenced." It operates solely upon the children, and it must have been designed to operate equally upon all in the same situation, whether the acknowledgment was made before or after the passing of the act. The *dictum* of Judge Roane evidently grew out of an argument suggested by himself, that the interpretation adopted by the court might be considered an invasion of private right. We see no difficulty on this ground; but if there were any, it is not remedied by applying the act to cases only where the father died posterior to its passage.

The possible interest which children have in the father's property, during his life-time, is not of that absolute character which the legislature cannot control. If it were, every change of the law of descents would be an invasion of the rights of expectants under the existing law. A descent cast by the death of an intestate cannot be disturbed by subsequent laws; but that is no reason why the legislature should not change the law, or give to individuals new capacities of inheritance. The security of existing rights remains inviolable, notwithstanding this is often done. By the death of H. Stevenson, before the act of 1785, his property passed \*to his legitimate child. If, under that act, the appellants were legitimated, in 1787, they, thereby, could not prejudice the rights of Richard. Their new capacity was altogether prospective. From that day, they enjoyed a character to inherit rights which might thereafter accrue; and, in relation to those rights, we do not see what bearing the time of their father's death has upon the question. In the case of *Sleighs v. Strider*, W. Hall devised land to his son, R. Hall, for life; and after to his eldest son and his heirs forever; but if no male issue, to his eldest daughter and her heirs. Richard Hall had an illegitimate son born in 1776; in 1778 he married the mother, and recognized the son till his death, in 1796. He had also daughters after the marriage. It was determined that the son was legitimated by the act of 1785, and entitled under the devise from his grandfather. It would seem, from the *dictum* of Judge Roane, that if Richard Hall had died before the 1st of January, 1787, the grandson never could have been legitimated. Whether he could or not, the eldest daughter must have taken. But suppose that the grandson had lived until 1788, and, in the life-time

1.—3 Henn. & Munf. 225.

2.—Id. 229.

Wheat. 5.

3.—3 Henn. & Munf. 228, in note.



of his father, had died leaving issue; would such issue, or the eldest daughter of Richard, have taken under the devise? We maintain that the issue of the deceased son would have taken; from which we infer that the time of death is immaterial. The interpretation of the Virginia courts can only be made rational and intelligible by rejecting the limitations suggested by the **214**[\*] Chancellor and Judge *\*Roane*, and applying the statute to all persons within its literal meaning, without reference to the time of the recognition, or the death of the father. By this course, the new capacity, in all, will take date from the 1st of January, 1787, and will confer rights from that day only; as in cases that have arisen since the statute, the legitimate rights of the children, born before marriage, all take date from the marriage, without any reference to the time of recognition, or the death of the father.

2. We insist that the appellants, being the bastard brothers and sisters of Richard on the part of the mother, are his heirs at law. The law of 1785 contains this provision: "Bastards also shall be capable of inheriting and transmitting inheritance, on the part of the mother, in like manner as if lawfully begotten of such mother." In adopting a rule for the interpretation of this provision, we insist, in the language of the court, in the case of *Stones v. Keeling*,<sup>1</sup> that "the act relates to the disposition of property only; and proceeds to show who shall be admitted to share the property of a person dying intestate, notwithstanding any former legal bar to a succession thereto; and in that light the law ought to receive the most liberal construction; it being evidently the design of the legislature to establish the most liberal and extensive rules of succession to estates, in favor of all, in whose favor the intestate himself, had he made a will, might have been supposed to be influenced." It gives to bastards a full **215**[\*] and complete capacity of inheritance, through the maternal line, both lineal and collateral. By nothing short of this can the terms of the law be satisfied. It is said, however, that the terms of the law are fully satisfied when it is extended to inheritance direct, between the bastard and the mother; thus excluding collateral descents between bastards altogether. This doctrine is founded upon an entirely erroneous rule of construction. It is assumed that the statute being an innovation upon the common law, must be construed strictly, and extended only so far as the letter absolutely requires. The Virginia courts, in the cases referred to, have adopted a different rule; and a rule more consonant to reason and justice, and to our free and equal principles of government. The incapacities of bastards grew out of the feudal system, and originated in the dispositions of the feudal lords to multiply escheats and forfeitures. Most undoubtedly it was the intention of the Virginia legislature to cut up the whole system, root and branch. If bastards cannot inherit from a legitimate brother, they cannot inherit from each other. Neither can they inherit from, or transmit inheritance to, uncles, grandfathers, or any collateral relative whatever. By the same rule, legitimate brothers and sisters cannot inherit from bastards or their descendants. And if this be the case, who can say that bastards are

capable of inheriting "and transmitting inheritance, on the part of the mother, in like manner as if they had been lawfully begotten of such mother."

*\*Mr. Doddridge*, contra, stated: 1. **[\*216]** That in examining the appellants' claim to hold the lands in question, as the legal representatives of Hugh Stevenson, under his will, he would contend, what indeed seemed to be admitted on the other side, that Richard Stevenson took by purchase from the state, and that Hugh never had an interest in the subject, legal or equitable, which he could devise, or which could pass from him in a course of descents. If this be so, it would certainly follow, that upon the death of Richard, under age and without issue, after having survived his mother, the estate passed from him to his heirs general, according to the letter of the act directing the course of descents, as the appellants' counsel contend, and without reference to the channel through which he obtained it. But we shall insist, that according to the equity of the 5th section of the act of descents, the land passed to the fraternal kindred.

One of the laws of Virginia on the subject of land bounties refers to them, as having been "promised by ordinance of Convention." This circumstance made a search for that ordinance necessary. There were three sessions of a convention held in the year 1775. By an act of the last, the convention of 1776 was regularly elected. The present controversy has had the effect of collecting the journals of both conventions. They are now, for the first time, published. A perusal of them will show that the conventions, although they provided for raising troops, never made a promise of land bounty to any description of the public forces. Indeed, until they declared the state independent, *\*they had asserted no claim what- [217]* ever to the crown lands, such a promise would have appeared absurd. The first mention of a land bounty will be found in the acts of the first regular general assembly at their October session in 1776, chapters 11 and 21, enacted after the death of Hugh Stevenson. The practice of giving bounties in land was followed up by the acts of October, 1778, c. 45, May, 1779, c. 6, and the manner of carrying them into grant was provided for by the acts of May, 1779, c. 18, and of October, 1779, c. 21. But these laws having omitted to provide for the heirs of those who were, or should be, lost in the service, two others were passed. By the first a promise was made to the officers and soldiers, then living, in these words: "and when any officer, soldier or sailor, shall have fallen, or died in the service, his heirs or legal representatives shall be entitled to, and receive, the same quantity of land as would have been due to such officer, soldier or sailor, respectively, had he been living."<sup>2</sup> The second is in the following words (comprehending the case of H. Stevenson): "That the legal representatives of any officer, on continental or state establishment, who may have died in the service, before the bounty in lands promised by this or any former act, shall be entitled to demand and receive the same in like manner as the officer himself might have done if living." It is

1.—3 Henn. & Munf. 228, note.

2.—Chan. Rev. Code, 112.

observable that the latter act only respects the heir of an officer who had fallen before any **218\*** land bounty was promised \*to any person; whereas the former is an encouragement held out to the living officer, soldier and sailor, &c. By the latter act, it is evident that the bounty conferred by it was not given to those who died before any bounty was provided; nor to the legal representatives of those, on account of whose services the same was given, as such. The bounty is directly given to the legal representative for the loss of an ancestor; and is so much as the father would have been entitled to had he lived or fallen in the service, &c. Here, if the heir took *quasi* heir, the debts of his ancestor might sweep the gift away. The difference between pay and bounty cannot well be overlooked. The first is a vested estate, and, as such, subject to debts and legacies. Bounties to the widow or heir are in the nature of compensation, or of gratuities for a loss, and are taken directly from the hand that gives. Hugh Stevenson had not, at the time of his death, even a promise of the bounty in question, nor of any other bounty. His services entitled him to his pay and subsistence alone.

It is difficult to comprehend what is meant by the opposite counsel, when he speaks of those "whom by his will he had appointed to represent him, or to that class of relations among whom personal property was distributed by the statute of distributions." As to the statute of distributions, it is enough to say, that then, as well as now, it no more embraced a bastard than the feudal law of descents. And as to the terms "appointed by his will to represent him," if they mean anything, they mean the **219\*** persons to \*whom the party had devised the property in question. But could Hugh Stevenson devise the property in question? Real estate in Virginia was never devisable at the common law. In 1776 the English statute of wills was in force. Under that statute, those only who were seized could devise. The construction of that statute was the same in England and Virginia. Those lands only, which the testator had at the time of making his will, could be devised. The Virginia statute of wills empowers a party to devise such estates, real or personal, as the party hath, "or at the time of his death shall have," &c. This statute passed in 1785, and began its operation on the 1st of January, 1787. It is, then, obvious that the appellants cannot claim as devisees, neither at the common law nor under the English statute of wills; nor even under the Virginia statute of wills, if it had been then in force; because neither at the time of making his will nor at the time of his death, had the testator any interest in the premises.

2. The appellants claim as heirs at law to Richard, under the 19th and 18th sections of the act directing the cause of descents. The 19th section is in these words: "Where a man having, by a woman, one or more children; shall afterwards intermarry with such woman, such child or children, if recognized by him, shall be thereby legitimated." The issue also in marriages deemed null in law, shall, nevertheless, be legitimate. And the 18th section is in these words: "In making title by descent, it shall be no bar to a party that any ancestor **220\*** through \*whom he derives his descent, Wheat. 5.

was, or shall have been, an alien. Bastards also shall be capable of inheriting or transmitting inheritance on the part of their mother, in like manner as if lawfully begotten of such mother."

In the construction of statutes no authority need be quoted for the following rules of interpretation: 1st. All the acts passed at any one session of a legislative body are to be taken together as one act. 2d. Consequently, the same words or phrases, as often as they occur, are to be construed to have the same meaning when that can be given them without gross violation of the sense. 3d. The acts of the same session, made in *pari materia*, are to be taken together as one act. The marriage act, the act of descents, the statute of wills and distributions, and the act respecting dower, were made in *pari materia*. Marriage is the source of all legitimate birth, and, as such, the cause of dower, of descents, and of distributions. These laws have extraordinary claims to be considered as one statute. They were compiled at the same time, by the same committee, composed of the ablest lawyers and civilians of their country; enacted at the same session of the same legislative body, in the same year (1785), and, lastly, all went into operation at the same time—on the 1st of January, 1789. They will be found to contain a complete code for the government of domestic relations, without any contradictions or discrepancies. These four statutes contain 164 sections, in almost every one of which the future verb *shall* occurs, and in all of which, with the exception \*of the [**221** 7th section of the marriage act (which confirms past irregular marriages), its future operation cannot be disputed, nor never has been disputed.

With the rules of construction already stated, and this view of the four statutes, we will proceed to show that the appellants' construction of the 19th section is incorrect. And this, 1st, on principle, and 2d, on authority. First. The rules of constructions entitle us to give to the verb *shall*, in this section, the same meaning intended whenever it occurs in any of the statutes. If the legislature had intended to confer legitimacy on those recognized before the 1st of July, 1787, they certainly would have left us nothing for construction. They would not have been less cautious than in the preceding section had they shown themselves on a less important subject, "is or *hath been* an alien," &c. Again, it is the obvious policy of a just legislature that this act should operate prospectively, not retrospectively. Words which might bear both constructions ought to be expounded, according to that policy; to give a statute a retroactive effect without evident necessity, is inconsistent with this policy. To give to this act an operation upon past births and marriages, is to carry the liberality of construction far indeed. But to cause it to operate on the past recognitions of the father who is dead, before the commencement of the statute itself, would be unjustifiable. The principle of the law is, that after marriage, the father, if he pleases, may render his children legitimate. Legitimation, in this view, is the effect of the father's agreement; an effect of which he must be sensible, \*to make it his act. It is [**222** easy to conceive of cases in which a father, will-



ing to soothe his wife, and make the best of his case, might be brought to say that her children, born before their marriage, were his, at a time when such acknowledgement would have no legal effect whatever; but who, with the provisions of this statute before him, would not make such an acknowledgment; an acknowledgment which would make the child his heir, and pledge him to the mother and the world to provide for it as such. To construe the act as having a retrospective effect on past recognitions, would, therefore, be against the general policy of legislation; contrary, often, to the wish of a deceased individual; and might be productive of much injury to private rights.

But, it is said that the possible interest which children have in the property of their father in his life-time is not of that absolute character which the legislature cannot control. This is admitted, and the statute of descents is an exercise of such a control. But the new rule of descents created by that act is known to the proprietor in his life-time, and if that pleases him not, the statute of wills, of the same date, is placed in his hands, and enables him to control the act of descents. Again, it is a maxim that *nemo est hæres viventis*. In life, the relation of father and child exists between legitimates, but not between illegitimates. The relation of ancestor and heir, presumptive or expectant, may exist while the former is still living. But the legal relation of ancestor and heir never does exist until the death of the father. The moment the eyes of the father are **223\*** closed in death, is \*that in which this legal relation begins to exist, and from that time it becomes unalterable. So, after his decease, Hugh Stevenson became ancestor to Richard in *ventre sa mere*; but not the ancestor of the appellants.

To examine the 19th section upon authority. The cases of *Rice et al. v. Efford et al.*,<sup>1</sup> and of *Stones v. Keeling*, and *Hughes v. Striker*,<sup>2</sup> are all that bear upon the subject. The only question which seemed to create much difficulty in those cases was, whether births and marriages, before the act, were embraced by it; and the decisions are, that such births and marriages are embraced, where the children, born before wedlock, had been recognized by the father after the 1st of January, 1787. But this is said to be nothing more than an *obiter dictum* of Judge Roane. But we regard it as the reasoning of the court, given by the only judge who gave any reason for the decision. A decision, that marriages and births, before the act, are embraced by its provisions, because the recognition took place after the act was in force, is plainly a decision, that, but for the subsequent recognition, prior marriages and births could not be considered as within the act. These cases furnish good authority for applying the 7th section of the marriage act to marriages contracted before, but existing on the 1st of January, 1787; and for substituting the words "hath been," in the act of descents respecting aliens, for the words "shall have been." If this be correct, both those provisions will accord with the residue of the acts containing **224\*** them, \*and with the act concerning

dower, and the statute of wills and distributions. The operation of all will then be prospective.

The statute of descents shows, that wherever, in adopting the civil law, its framers meant to exceed or fall short of its provisions, they have done so in explicit terms. By the civil law, the marriage of the parents legitimated the children previously born, without the father's recognition.<sup>3</sup> This legitimation was the subject of the famous proceeding at the Parliament of Merton. The ecclesiastics there demanded that the marriage of the parent should legitimate the children; to which the barons returned their memorable answer: "*Nolumus leges Angliæ mutari.*"<sup>4</sup> The common lawyers of England, therefore, would not agree to adopt the civil law in this particular. But the common lawyers of Virginia, who compiled the act of 1785, determined to adopt the civil law in this particular, *sub modo*; that the marriage of the parents should legitimate the children, provided the father should afterwards recognize them. It is contended, on the other side, that this recognition is nothing more than statutory evidence of the fact, which might be otherwise proved, and is not of itself a substantive provision. If this argument be correct, then by the common and civil law a bastard must always have been the heir of his natural father, provided the identity of that natural father could be proved. But as we know that the mother, both by \*the common and civil law, was al- [**225** ways a competent witness to establish the fact of the father's identity, and yet never resorted to for the purpose of making her child heir to the father, we have a right to conclude that the recognition required by the statute is something more than mere evidence of the fact.

3. The appellants claim as heirs of Richard Stevenson, under the 18th section, and in support of this claim they contend that the terms "inheriting or transmitting inheritance on the part of the mother, in like manner as if they had been lawfully begotten of such mother" confer a capacity to inherit and transmit inheritance in the ascending as well as descending line, and also from and among collaterals. Their doctrine amounts plainly to this: that by the true construction of the second member of the 18th section, bastards are made the legitimate children of their mothers, at least for the purposes of inheritance.

In expounding the statute of descents, it has been justly remarked by Judge Tucker, that the framers of it were eminent sages of the law, and complete masters of its technical terms. This being the case, it would be reasonable to look for the same technical language in all cases where the same thing was intended. When in the 19th section of the act of descents, and also in the marriage act, they remove from certain classes of bastards all the disabilities under which they labored, they employ that legal term which conveys their meaning clearly, and leaves nothing for construction. They say they shall be "legitimate," not that they shall be capable of inheriting "on the part of their mothers and fathers;" leaving \*us to inquire [**226** after the extent of the capacity. The law causes

1.—3 Henn. & Munf. 225.

2.—Ib.

3.—1 Bl. Comm. 455; Just. Inst., l. 1, tit. 11, s. 13.

4.—1 Bl. Comm. 455.

them to change characters. They cease to be bastards, and become the legitimate children of their father and mother. The consequences of their legitimacy follows. They have father and mother, sisters and brothers, uncles and aunts, with an universal capacity of inheriting and transmitting inheritance. The 18th section immediately preceding, if it had been intended to make bastard children the legitimate offspring of their mothers, would have followed the same language, and would have left nothing to interpretation. That section would have read thus: "In making title by descent, it shall be no bar to a party, that any ancestor through whom he derives his descent from the intestate, is, or hath been an alien or a bastard. Bastards also shall be considered in law as the legitimate children of their mother." The 19th section, like the marriage act, gives no new capacities to bastards as such. They make certain persons of that description legitimate, and the capacities of legitimacy follow of course. They inherit to both parents, not as bastards, but as their legitimate offspring.

The second proposition of this argument is, that all the disabilities of bastardy are of feudal origin. With us it is of Saxon origin. The term bastard being derived from a Saxon word, importing a bad, or base, original. The disabilities of bastardy are the same under the civil as under the common law, and in all ages and **227\*** nations.<sup>1</sup> He has no ancestor; \*no name; can inherit to nobody, and nobody to him; can have no collaterals nor other relatives except those descended from him. He can have no surname, until gained by reputation. This is the origin of new families. He is the *propositus* by common law. But by the civil law he can inherit his mother's estate.<sup>2</sup> She is, therefore, the *propositus* of the civil law. Collaterals descended from a male relative are by the civil law termed *agnati*; those descended from a female relative *cognati*.<sup>3</sup> In a note to Cooper's Justinian, which I take to be from the pen of Sir Henry Spelman, it is said that illegitimate children can have no *agnati*—*Quia neque gentem neque familiam habent*. If for this reason they can have no *agnati*, it follows that they can have no *cognati*; and this is the reason of Justinian's broad proposition, that bastards can have no collaterals;<sup>4</sup> which is our doctrine in this case.

It is admitted that the 18th section does not give legitimacy except specially for inheritance; that is, it removes that incapacity, and no other: finding and leaving them bastards. Now, there are no other disabilities except the incapacity to inherit or to hold a church dignity.<sup>5</sup> And since these dignities do not exist in the United States, if it had been the intention of the legislature to place the bastard on a footing of a lawful child of his mother, for the purposes of inheritance, and thus to admit him among collaterals in her line, it is inconceivable why **228\*** they should not have \*said at once that bastards shall be considered in law the legitimate children of their mother. Instead of

which they have used a technical term, *ex-parte materna*; which, in the civil law, is constantly opposed to this other term, *ex linea materna*. The first importing a capacity of lineal inheritance; the other, that and collateral inheritance also. Neither by the common nor civil law could she inherit to her child, even chattels; she is not mother for inheritable purposes by either code; and the 18th section has given her no inheritable blood of her child. Being incapable of inheriting herself, she cannot give inheritance to a legitimate child by the civil law; because, by one of its canons, the child can never succeed by representation or succession, where the parent could not.

So far, therefore, is the assertion, that the heritable disabilities of bastardy are of feudal origin, from being correct, that they were known and enforced from time immemorial in all nations; were known and enforced in England before the Norman sat foot there. The Ecclesiastics at Merton did not demand of the king that bastards should inherit even to their mother. They simply demanded, that by the intermarriage of their parents they should become legitimate; which was refused.

But it is contended by the appellants' counsel, that the words, "in like manner as if lawfully begotten of such mother," apply as well to collateral as lineal inheritance. But what is that which a bastard has capacity to do, "in like manner as if lawfully begotten of his mother?" The answer is in the words of **\*the [229]** statute, "of inheriting and transmitting inheritance on the part of his mother."

But, we insist, that although Richard Stevenson, the son, took by purchase from the state, yet he took *quasi* heir, to hold as such to the use of his male ancestry, under the equity of the 5th section of the act of descents: "Provided, nevertheless, that where an infant shall die without issue, having title to any real estate of inheritance derived by purchase or descent from the father; neither the mother of such infant, or any issue which she may have by any person other than the father of such infant, shall succeed to, or enjoy the same, or any part thereof, if there be living any brother or sister of such infant on the part of the father, or any brother or sister of the father, or any lineal descendant of either of them." The principle of this section is, that the estate which came from a male ancestor shall return to his stock. The principle of the 6th section, immediately following it, is the same—that the estate which came from a female ancestor shall return to her stock. It is admitted that the case of Richard Stevenson is not within the letter of the 5th section; but is it not within the equity of it? The estate came not from the father by descent, or by gift; but in equity we may pursue the consideration of the grant, and have a right to inquire, whether that consideration was furnished in common, by the paternal and maternal kindred; and, therefore, ought to pass to both lines. The consideration of the grant to Richard Stevenson is his father's military service, and his death in that service. Loss is a valuable \*consideration for a grant, and the grant **[230]** ought, in consequence, to be made to the heir of the family suffering the loss. A military bounty is in the nature of compensation for a loss, or of a gratuity for services. It is intend-

1.—Rees's Cyclopedia, art. Bastard; Cooper's Just. Inst. 37; 1 Bac. Abr. 510.

2.—2 Bl. Comm. 247.

3.—Cooper's Just. Inst. 561.

4.—Cooper's Just. Inst. 561, note.

5.—1 Bl. Comm. 459.



ed to supply to a family, as far as the liberality of the country can supply the place of a lost member. They are intended to avail the heir in his pecuniary concerns to the extent to which it is supposable his father's labor might have availed him had he lived. In this view, therefore, the bounty, given by law to the heir, is, in equity, a paternal estate, and should descend and pass to the paternal kindred, in exclusion of the maternal.

The *Attorney-General*, on the same side, contended, that the appellants were not entitled, either as legal representatives of Hugh or as heirs of Richard Stevenson.

1. The appellants were not the legal representatives of Hugh Stevenson; for legal representatives are those whom the law appoints to stand in a man's place, and such was not the case of the appellants. The law recognized no connection between them and Hugh Stevenson.

But, it is objected that the father had made them his legal representatives by his will. This admits of various answers: but one is sufficient, that the will was a nullity; it was revoked by the subsequent marriage and birth of a child.<sup>1</sup> Neither, therefore, by operation of law, nor by **231\*** any act of Hugh Stevenson,\* does it appear that the appellants were his legal representatives.

2. Neither could they inherit as heirs to Richard Stevenson; for, being natural children, there was no common blood between them.

It is again objected that they were legitimated by the 19th section of the law of descents. But this clause has received a judicial exposition by the highest court of the state in which the law was passed, and is now the settled law of that land. In the cases of *Rich v. Efford*,<sup>2</sup> and *Sleighs v. Strider*,<sup>3</sup> the Court of Appeals of Virginia decided that the act applied to cases of prior births and marriages; but, that to give it an application, the father must have been in life after the passage of the act. In this case, the father had died more than ten years before the act took effect, and, consequently, the case at bar is not within its operation. But it is said that the Court of Appeals were right in extending the law to cases of births and marriages antecedent to the act; but they were demonstrably wrong in declaring that the act applied to cases only in which the father had died posterior to the act. To which we answer, that the precedent cannot be divided; if it is to have the authority of a precedent, it must be taken altogether; it cannot be entitled to the authority of a precedent so far as it favors the opposite side, and be open to dispute so far as it destroys their position. It has been the settled law of Virginia, since the year 1805; for it was then that *Sleighs v. Strider* was decided, and **232\*** though its correctness may have been originally doubtful, yet extreme inconvenience follows the disturbance of a rule of property which has been so long settled; and that this argument, *ab inconvenienti*, was of great weight in the estimation of the Court of Appeals itself, may be seen from the proposition to reconsider the decision of that court in the celebrated case

of *Tomlinson and Delland*.<sup>4</sup> The original decision in that case, which subjected the succession to personal property, to the feudal principle, which, in relation to lands, respected the blood of the first purchaser, had been made in 1801. It having produced great excitement in the state, and being very generally disapproved, a reconsideration was most strenuously pressed in 1810, nine years only after the original decree; but a majority of the court was of the opinion that the inconvenience of overthrowing what was already considered as a settled rule of property, was too great to be encountered, even if the decision were erroneous at first. It is true, that they thought the decision called for by the stern language of the law; but from one of the judges this opinion was wrung with such manifest reluctance that it was believed he would have come to a different result had the question been *res integra*. Here the rule having been settled, the court will say how far it ought now to be considered as the settled law of the state.

If, however, these precedents be open to question at all, they are open throughout; and if the Court of \*Appeals erred at all, it [**233** was not in limiting the operation of the law to cases in which the father has died since the act took effect, but in extending it to cases of births and marriages which happened anterior to the passage of the law. This law took effect on the 1st of January, 1787. The births, the marriage, the recognition, and the death of the father, had all occurred in, and prior to August, 1776. Had the legislature of Virginia the right to pass a retrospective law? The Court of Appeals said not, in the cases of *Turner v. Turner's executors*,<sup>5</sup> *Elliott v. Lyell*,<sup>6</sup> and the *Commonwealth v. Hewitt*.<sup>7</sup> Even where it has been attempted to apply a new remedy to pre-existing rights, it is said the language must be irresistibly clear, or the court will not give it such retrospective operation.

Does the language of this act clearly intend to operate on pre-existing facts? On pre-existing marriages and births? We contend that it does not. In the case of the *Commonwealth v. Hewitt*, before cited, Judge Roane, in resisting the retroactive effect of the law, founds himself, in a great measure, on the general nature of laws, as prospective, and on the time assumed by the act itself for the commencement of its operation, from and after the passing thereof. Both considerations concur here, with this farther circumstance in favor of this law, that while it has (in the original act) the usual clause, "This act shall commence in force from and after the passing thereof," a subsequent and distinct law was passed \*to suspend its operation un- [**234** til the 1st of January, 1787. Again, this act commences with a general declaration, most unequivocally prospective. The first clause is: "Be it enacted by the general assembly, that henceforth, when any person having title, &c." According to settled rules of construction, therefore, the force of this expression, *henceforth*, runs through every subsequent clause. The 19th section under consideration ought to

1.—Wilcocks v. Rootes, 1 Wash. Rep. 140.

2.—3 Henn. & Munf. 225.

3.—Id. 229: note.

4.—3 Call's Rep. 185.

5.—1 Wash. Rep. 139.

6.—3 Call. Rep. 269.

7.—2 Henn. & Munf. 187.



be read thus: "Be it enacted that, HENCEFORTH (that is, after the 1st of January, 1787), where a man, having by a woman, one or more children, shall, afterwards, intermarry with such woman, such child or children, if recognized by him, shall thereby be legitimated." Is this language so irresistibly retrospective, in relation to the date of the law, that the court is constrained to give it that construction? Is it not, on the contrary, so obviously future and prospective, that it requires subtlety and violence to wrest it to a retrospective meaning? The verbs which indicate the acts that are to produce the effect of legitimation, are in the future tense. It is insisted, therefore, that the clause has no application to any case, but to one in which all the facts of which it is to operate, shall happen after its passage; the birth of the children, the marriage, and the recognition. It is true, that in speaking of the children, the present participle is used, "having one or more children." But the present tense of this participle relates, not to the time of passing the act, but to the time of the marriage, "having," at the time of the marriage, "one or more children." This is not a new use of the present tense; grammarians tell us that **235\*** the present tense is occasionally \*used to point at the relative time of a future action. The true reading of this part of the act is this, "where" (*i. e.*, in all cases, hereafter, in which) "a man shall marry a woman, having by him, at the time, one or more children." Thus, the participle, although present at the time of the marriage, is future in relation to the passage of the act. This is no unusual application of this participle; if I say, "if a man shall go to Rome, and having a dagger in his hand, shall strike it to the heart of the Pope," the present participle is properly used in it; it is present in relation to the action with which it stands connected, though future in relation to the time of speaking. So the present participle here is present in reference to the act with which it clearly stands connected, the act of marriage; although future in relation to the date of the act. The sense is the same as if the legislature had said, "wherever, hereafter, a man shall have one or more children by a woman, and shall, afterwards, intermarry with her," &c. It is only by this construction which considers both the birth and marriage as future, that the word "afterwards," used in the act, acquires a grammatical sense, or, indeed, any kind of sense. To prove this, let us see what the effect will be of considering this participle, as used in the present tense, in reference to the time of passing the act. Then the sense will be, "where a man now having one or more children by a woman, shall afterwards intermarry with her:" it is clear that the word, afterwards, becomes insignificant and senseless. It adds nothing to the meaning; for if a man now having one or more children by a **236\*** woman, shall intermarry with \*her, he must of necessity intermarry with her afterwards; for the future verb, shall intermarry, makes the act future, in relation to the passage of the act; and the adverb of time, afterwards, added to the verb, does not perform its appropriate function of adding a new quality to the verb. It is a useless clog, therefore, on the sense, because its tendency is to obscure, and not to illustrate the sense. Whereas, the con-

struction for which we contend (by considering both facts as posterior to the act, but the marriage as being posterior to the birth), gives the word, afterwards, force and significancy; it then performs the office of arranging the order of the two future events. In this point we differ from the Court of Appeals of Virginia, and insist, that the liberality which would apply this act retrospectively, to previous births and marriages, is a liberality which looks beyond the judicial sphere, and belongs only to the legislature. What is the argument on which the Court of Appeals (and the opposite counsel, after them) ground themselves in extending this act to antecedent births and marriages? "I see no difficulty," says Judge Roane, in *Rice v. Efford*,<sup>1</sup> "except what arises from the words, shall afterwards intermarry, which might seem to import only marriages to be celebrated in future: that word, afterwards, however, is rather to be referred to the birth of the children than the passage of the act; and no good reason could possibly have existed with the legislature for varying the construction of a section, embracing two descriptions of cases standing on a similar foundation." The counsel for the appellants, seizing this \*passage, has said, [**237** the terms, "shall afterwards intermarry," are correctly referred (by the court) to the birth of the children, not to the date of the act. This is not accurate: it is not the three words, shall afterwards intermarry, that are referred by the court to the birth of the children: but the word, afterwards, alone. This, we admit, is correctly referred to the birth of the children: but the court having correctly gained this conclusion, forget the force of the future verb, "shall intermarry." We say, that the force of the future verb requires that the marriage shall be after the act. That henceforth, "where a man having by a woman one or more children, shall afterwards intermarry with such woman," irresistibly demands a marriage future to the date of the act; that the words, shall intermarry, make the marriage future in relation to the act. The word, afterwards, removes the marriage farther off, and marks its futurity in relation to another event, the birth of the children; which other event, although expressed by the present participle, is itself drawn forward into futurity by the force of the word afterwards, to which it is attached. That such an intention is utterly inconsistent with the prospective character given to the whole act, by the force of the word henceforth, and in the commencement. That the force of this word runs through the whole act; and that, used in the clause under consideration, it would render the retrospective construction of that clause absurd. In the passage cited, Judge Roane says, that no good reason could possibly have existed with the legislature for varying the construction of a \*sec- [**238** tion embracing two descriptions of cases, standing on a similar foundation. This might have been a good argument on the floor of the legislature, to induce them to embrace past cases; but it is no argument to prove that they have embraced them. Whether they ought to have embraced them is a very different question from whether they have actually done so. The first is purely a legislative question; the last



purely a judicial question, and the only question in the case for the court.

But it is said, the appellants do not seek to give the act a retrospective effect; they say that the act, from the time it took effect, clothed the appellants with a new capacity of inheritance, not in relation to rights previously vested, but in relation to inheritances which might thereafter fall. Let it be admitted that their position is such; let it also be admitted, that the legislature had the right to clothe them with such new capacity in relation to future inheritances. But the question still remains, have they done so? is it to persons in their predicament that this new capacity of inheritance is extended? We have endeavored to show that it is not: whether the court look to the exposition of the statute by the tribunals of the state, or whether they look to the construction of the statute, *per se*. The Court of Appeals of Virginia, while they admit the application of this statute to antecedent births and marriages, decide that the law applies to cases only where the father has died posterior to the passage of the statute. The reasoning on which the court ground this distinction is not fully developed by them; the appellants' counsel infers their **239\*** reasoning, \*and, as we may safely admit, contests it with success. But there is a reason for requiring that the father should continue in life after the act, which applies with equal force both to the marriage and the recognition, and corroborates the construction drawn from the language of the law, that both those facts should be posterior to the act. It is this: the statute attaches new legal consequences to the act of marrying a woman by whom the man had, previously, had children; and to the act of recognizing such children. Make the law prospective in those particulars, and the citizens for whose government it was intended, have it in their choice, by performing those acts thereafter, to incur those consequences or not. But attach those consequences to a past marriage and recognition, and you change the legal character of a past transaction by an *ex post facto* law. By a subsequent law you attach consequences to an act which did not belong to it when it was performed. It is precisely for this reason that *ex post facto* laws are prohibited; because consequences are attached to an act which did not belong to them at the time; and which, consequently, could not have entered into his consideration of the question, whether he would commit it or not. You surprise him by a new case, on which his judgment was never called to pass, and when it is too late to retract the step and avoid the new consequences.

3. The next ground taken by the claimants is, that if they were not legitimated by the 19th section of the law of descents, they were made capable of inheriting from Richard by the 18th **240\*** section of that law.<sup>1</sup> It is contended on the part of the appellants, that this clause opens an inter-communication of blood through the mother, to an indefinite extent lineally and

collaterally. But we insist, that it only gives to the natural children the faculty of inheriting immediately from the mother, and of transmitting such inheritance to their posterity. The legislature has not said that natural children shall be considered as lawfully born of their mother for all the purposes of inheritance pointed out by the act. It has given them two capacities of inheritance only; the capacity to inherit on the part of the mother and the capacity of transmitting inheritances on the part of the mother. These capacities, it is true, they are to enjoy, in like manner "as if they had been lawfully begotten of the mother." But these words, "as if," &c., do not add to the number of their heritable capacities; they seem only to designate the extent to which they shall enjoy the two specific capacities which are expressly given them.

Do these capacities authorize them to claim the inheritance from Richard? What are they? 1st. That they shall be capable of inheriting on the part of their mother. 2d. That they shall be capable of transmitting inheritance on the part of their mother. \*The last ca-**[\*241]** pacity it is not contended has any application to the case at bar, this not being the case of an inheritance transmitted through the natural children, but one which they claim directly for themselves. If they are entitled, therefore, their title must arise under the first capacity—that of inheriting on the part of their mother. What is the meaning of this expression, on the part of their mother? The counsel on the other side contends, that it means from or through the mother; that it connects the bastard with the ancestral line of the mother, and through her, collaterally, with all who are of her blood. On the other hand, we insist, that the capacity does not go beyond an inheritance from the mother, and the transmission of that inheritance lineally and collaterally among their descendants; or, in other words, to make the mother the head of a new family. The expression "on the part of the mother," does not carry the mind beyond the mother, unless connected with words of more extensive significance, such as, ancestors on the part of the mother, or descendants on the part of the mother; and here it would be the supplemental words which would produce the effect, not the words, "on the part of the mother." But, it will perhaps be urged, that in the case of *Barnitz v. Casey*,<sup>2</sup> the counsel upon both sides, and the court, seem to have understood this term in the sense contended for on the other side. That case arose on a statute of Maryland, in which the force of the term is expounded to mean, \*from or through. In our case, **[\*242]** the Virginia statute furnishes an opposite inference. The expressions, "on the part of the father," and "on the part of the mother," occur in the 5th section of the law of descents. It is the only instance in which they do occur, and there they are indisputably synonymous with "of" and "from" any brother or sister of such infant on the part of the father, and *vice versa*. It is said that this provision places the natural children on the footing of legitimate children to all the purposes of inheritance. But, we would ask, does it enable the

1.—Which provides, that "in making title by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate is, or hath been an alien. Bastards also shall be capable of inheriting or of transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother."

2.—7 Cranch, 476.



mother to inherit from them? Does it enable the mother's ancestors or collateral relations so to inherit? The provision is, that the natural children may inherit from the mother. But where is the provision that the mother may inherit from them, or that her relations may inherit from them? It is not to be found: the legislature did not look upwards beyond the mother. It was not their object to force her natural issue upon a family which she had dishonored and offended by bringing them into the world. That they should have connected them with her was just and proper; she could not complain. But to have connected them with a family from which she had probably been expelled on account of her infamy, and to have given them a capacity to inherit the estates of that family, would not have been quite so just or reasonable. We contend, that the legislature have not done it; but that the capacity to transmit applies only to inheritances descending from the mother, and from each other. Again, if the expression "on the part of the mother" is of the extent contended for, **243\*** then the capacity to inherit on the part of the mother is a power to take inheritances, from or through her, in right of her. But the inheritance claimed is not of this description; it is a direct inheritance from a mother, which, both at the common law and under the statute, is not an inheritance on the part of the mother; it does not come from, or through her; it does not come in her right. So say the court in the case of *Barnitz v. Casey*, before cited.<sup>1</sup> That was on the statute of Maryland; the statute of Virginia, in case there is no father, gives the estate to the mother, brothers and sisters, *per capita*, so that the shares taken by the brothers and sisters are cast at once from the deceased brother on them, and do not come to them, from, or through, or in right of the mother. This is the inheritance which the appellants claim, and which they claim in virtue of their specific and single capacity to inherit on the part of the mother.

Mr. Hammond for the appellants, in reply, stated, that the argument on the other side involved the general construction of the act, as well as its operation upon this particular case. It asserts, that the recognition must, in all cases, be subsequent to the marriage; thus proving the consent of the father to the legitimation. Now, if the legitimation does not result from the agreement, or depend upon the assent of the father, this argument is of no avail. The principle is adopted from the civil law. And it is reasonable to suppose, that **244\*** when the ablest lawyers and civilians of the country introduced it into their code, they intended to adopt it as interpreted and understood in the countries where it prevailed. The civilians held, that "this legitimation is a privilege or incident inseparably annexed to the marriage, so that, though both the children and parents should waive it, the children would, nevertheless, be legitimate." The foundation of this doctrine is thus explained: "*Ratio est quia matrimonium subsequens ex fictione legis retrahitur ad tempus susceptionis liberorum ut legitimated habentur legitime suscepti (i. e.) post contractum.*"<sup>2</sup>

1.—7 Cranch, 476.

2.—Hargr. note Co. Litt., fol. 244, b. 245, a. Wheat, 5.

If legitimaey is an incident inseparably annexed to the marriage, it must be the marriage, and not the agreement of the father, that legitimates the child. But there can be no such legitimaey without the agreement or recognition of the father. Agreement and recognition are not synonymous terms. Recognition implies no more than a simple admission of a fact; it is in the nature of evidence. Agreement supposes an assent or compact, from which certain consequences result, made with a view to those consequences. Recognition refers to something past. Agreement implies a transaction from which some effect is to follow. The provision under consideration consists of an enumeration of facts, and a declaration of legal consequences resulting from those facts. The facts are, having children by a woman, and afterwards marrying her. Upon such a case the statute operates, and declares the children legitimate. But the effect follows only \*the legal [**245** proof of the facts; and this the statute has defined. There must be a recognition by the father; and this is considered a third fact. Though as a fact it must exist, yet its existence is only necessary to establish the first fact—that the husband of the mother is, in verity, the father of the child. No legal consequences can result, until facts are established by proof. We insist that the terms "if recognized by him" are inserted for the single purpose of defining the proof upon which the material facts should be established, and are to be regarded only as prescribing a rule of evidence for the particular case. Had the legislature intended this recognition as one fact, a principal condition upon which the legitimaey was to be founded, they could easily have connected it with the other facts, so as to have left no doubt about it. The act would have read thus: "Where a man, having by a woman one or more children, shall afterwards intermarry with such woman, and recognize such child or children, they shall thereby be legitimated." As the words now stand in the sentence, they are of very different import. The two principal facts are first enumerated; then proceeding to declare the result, the mode of proof is set down, as it were, in a parenthesis, hypothetically, and indefinite as to time. As much as to say, "when the father and mother intermarry, if, suppose that, allow that the father recognized the children, they shall be legitimate." If the recognition of the father is a principal fact; if the legitimaey is the consequence of that recognition, the child could only be legitimate from the time of the recognition. This would introduce \*endless confusion [**246** and litigation. The rights of parties would always depend upon the time the father signified his assent, or declared his agreement. This never was the doctrine of the civil law. Some referred the legitimation to the birth, others to the time of marriage; but all dated it from the one or the other of these periods. But as legitimation could not exist until the celebration of the marriage, we hold that it must commence at that time, and from that time confer rights upon the parties. A recognition before marriage is within the letter of the act. It supplies evidence as conclusive of the fact to be established as if made after the marriage. Constantine, who introduced this provision into



the civil law, "is supposed to have intended it as an encouragement to those who had children born in concubinage, to marry the mother of such offspring."<sup>1</sup> But in our case, the recognition is in fact subsequent to the marriage. The will speaks only from the death of the testator, and is, therefore, a recognition by him at the time of his death. The appellants were born illegitimate. Their father recognized them as his children. While illegitimate, he declares their mother his wife. He afterwards marries her, and continues to recognize them as his children. He dies. Then comes an act of the legislature, the special object of which is, "to protect and provide for the innocent offspring of indiscreet parents, who had already made all the atonement in their power for their misconduct, by putting the children whom the father **247**"] \*recognized as his own on the same footing as if born in lawful wedlock." If birth and marriage are the facts upon which the act operates, and recognition nothing but evidence of those facts, the decisions already cited are decisive in our favor. It is settled that the act extends to cases of birth and marriage before its passage; and it is perfectly clear that the enacting part of the act is prospective. The parties upon whom it is acknowledged to operate, could claim no rights, but those which accrued after the first of January, 1787. It was at that period, and not before, that their new capacity commenced. We have shown that this interpretation of the act interferes with no vested right. And we have shown how interests in possession may be affected, upon the principle decided in the Virginia Court of Appeals. In the view we take of the case, the death of the father, before the passage of the act, is a circumstance of no importance. It is upon the children, and not upon the father, that the act operates. It attaches upon existing cases, and gives a character to transactions already past. Were he alive, he could not recall the birth, the marriage, or the recognition. A solemn disavowal of the children could not restrain the operation of the law; for we have shown that legitimation results from the facts, and not from the inclination or pleasure of the father.

The common law rules of succession, both as to real and personal estate, were exceedingly narrow and illiberal. Where those rules have been enlarged by statute, courts have always given the act a liberal interpretation in favor **248**"] of the persons let in. \*Thus the English statute of distributions was construed to extend to cases of intestacy that happened before its passage, where administration was granted afterwards.<sup>2</sup> No vested right was disturbed by this interpretation, though it allowed the act a retrospective operation. So in our case, though legitimated by a law subsequent to their birth, the appellants claim a new capacity, only in regard to inheritances that may fall after their legitimacy takes effect. The appellants do not seek to make themselves heirs to their father Hugh. They claim that, upon the death of their brother Richard, in 1796, they were his heirs at law. In making title by descent from a brother, the father is not noticed at the com-

mon law. The descent is held to be immediate between brothers. So, by the laws of Virginia and Kentucky, where the father and mother are both dead, the descent is cast directly to the brothers and sisters. If this position could at any time have been doubted, it is now settled by the decision of this court in the case of *Barnitz's Lessee v. Casey*.<sup>3</sup>

But if the appellants were not legitimated by the 19th section of the act, they claim that they are entitled, as bastards, under the 18th section. When it is admitted that the act changes the condition of bastards, the extent of that change must be ascertained. By determining the class of cases included, it can be best decided what cases are excluded. The court are called upon for the first time to put a construction upon this part of the act; and we hold, that it will not be correct to say that bastards cannot inherit \*collaterally, without [**249** showing that the terms and policy of the law can be fairly satisfied, and collateral inheritance between bastards denied. The court must say that the act confers nothing but a direct lineal succession between bastards and their mother; or they must say that the act removes entirely their incapacity of inheritance through and from the maternal kindred. To this last position it is objected by the counsel for the respondent, that it makes bastards the legitimate children of their mother for purposes of inheritance, which ought not to be done; because, if such had been the intention of the legislature, they would have said so in express terms. But does it follow that the capacity of inheritance would follow the express legitimation of bastards, without providing that such should be the consequence of legitimation? Children legitimated by the marriage of their parents, are no longer bastards. But bastards legitimated in the maternal line, would still, in law, be without a father, and that badge of illegitimacy must ever attach to them. It was a maxim of the civil law that the prince could legitimate bastards; but the civilians held that such legitimation did not confer the right of succession.<sup>4</sup> It was the right of succession, the capacity of inheriting and transmitting inheritance, that the legislature in this case meant to confer; and they have chosen to do it in express terms. There is no room to doubt what was intended; and we think there is no just foundation \*for the exceptions and limitations [**250** set up by the respondent.

We admit distinctly that the appellants must take as bastards, or they cannot take at all. They are "clothed with all the attributes and disabilities of bastards, except the capacity of inheritance, specially conferred on them, and conferred on them, too, as bastards." What were the disabilities of bastards at the time the act was passed? They could not inherit. In matters of succession and inheritance, they had no mother, and consequently could have no other relative. But except on the single subject of inheritance, the laws recognized and regarded them as standing in the same relation to their kindred as if born in wedlock. In contracting marriage, bastards were held to be relations, and prohibited from marrying within

1.—1 Woodes. 391.

2.—2 Vern. 642.

3.—7 Cranch, 456.

4.—Domat, Loix Civiles, l. 1, s. 2, art. 10.

the levitical degrees. In the case of *Haines v. Jeffell*, the Court of King's Bench refused a prohibition to stay proceedings in the Spiritual Court against Haines for marrying the bastard daughter of his sister.<sup>1</sup> And the court said it had always been held so; especially where it was the child of a woman relative. Here the law expressly recognizes the collateral kindred between the uncle and his bastard niece. Bastards are within the marriage act, which requires the consent of parents or guardians to the marriage of persons within age.<sup>2</sup> In this case, Mr. Justice Buller declares that the rule that a bastard is *nullius filius*, applies only to cases of inheritance, and says it was so considered by Lord \*Coke. Even Blackstone, who it quite a zealot for the common law doctrines respecting bastards, admits, almost in terms, that bastards were, at the time he wrote, subject to no disability but the incapacity of inheritance.<sup>3</sup> And Woodeson asserts the same thing.<sup>4</sup> In passing the act, the legislature meant to effect a change in the legal condition of bastards, by removing, to some extent, the only legal incapacity to which they were subject; and this was a total disqualification to inherit or transmit estates, from or to ascending or collateral kindred. It is therefore evident that the legislature contemplated conferring this capacity, in respect to the ascending or collateral kindred, or both. The civil law distinguished bastards into four classes: Those born in concubinage succeeded to the effects of their mother and relatives, and in some cases to a part of the estate of their putative father.<sup>5</sup> So that the authority of precedent is against the doctrine of the respondent, which would limit the effect of the act to inheritance direct between the mother and the bastard.

But it is urged that the appellants cannot inherit collaterally, because, legally speaking, bastards have no collateral relations, and therefore the appellants cannot be the brothers and sisters of Richard. This was true before the passage of the act. But does it remain so since? The law then provided, that so far as inheritance was concerned, a bastard was the son of no person. He had neither father nor mother, and, consequently, had no blood to convey \*succession except in a lineal descent from himself. There was no blood to convey succession, either to ascendants or collaterals. Having in law no mother, there could be no source from which a bastard could derive inheritable blood, and no channel through which his blood could communicate with that of others. But as this was a provision of positive law, a new provision could restore the connection. Such is the effect of the provision under consideration. "Bastards also shall be capable of inheriting, and transmitting inheritance, on the part of their mother, in like manner as if lawfully begotten of such mother." Henceforth there shall be heritable blood between the bastard and the mother. The bastard has thus a legal mother; and having a

mother, a channel is opened through which he can have brothers and sisters, and every other relative in the ascending and collateral line. It was because the bastard had no mother that he could have no brothers and sisters. The act gives him a mother. He can inherit from, and transmit inheritance to her direct. Heritable blood can flow from the mother to her bastard child, and be traced from the child to the mother, and through the mother to brothers and sisters, and uncles and aunts. The bastard is not legitimated; but his blood is made heritable through that parent about whom there can be no doubt. The character of his blood being changed, he is restored to his kindred in matters of inheritance—the only case in which the law separated him from them. It is true that the appellants were not the brothers and sisters of Richard at the time of his birth, as far as concerned inheritance. But the \*act of [\*253 1785 has effected a change in their condition; and from the day it took effect, they were in law, and for the purposes of succession to estates, his brothers and sisters of the half blood. Had Richard left brothers and sisters of the whole blood, the 15th section of the act would expressly embrace their case. There was no occasion to make express provision for the succession of bastards, either in the law of descents or in Judge Tucker's table, because the general provision for the half blood included their case. This is clearly the mode of succession contemplated. They shall inherit in like manner as if lawfully begotten.

It is argued that, on the part of, are technical terms of the law, which only import immediately from. The operation of the act is thus limited to a descent immediately from the mother. If we are mistaken in the consequence, which we suppose even this intercommunication of blood must work in the legal condition of a bastard, we must still inquire whether the terms of the act can be satisfied by this narrow construction. We do not admit that the terms on the part of import no more than immediately from. We insist that they are used to describe the ancestral kindred in the line of each parent. On the part of the mother, means, from or through the mother, or her relatives. Thus, brothers and sisters of the same mother, but different fathers, are brothers and sisters on the part of the mother, and are described as such in the 6th section of the act. And in the case of *Barnitz's lessee v. Casey*, before cited, the counsel upon both sides, and the court, seem to have understood these terms in the sense we contend for. \*The capacity [\*254 of transmitting inheritance, conferred by the act, can have no operation, if the terms, on the part of, be interpreted to mean, immediately from the mother. The bastard must transmit the inheritance to or through, whether it pass to ascendants or collaterals.

The common law disabilities of bastards are, like the canons of descent, of feudal origin; for it must be remembered that this disability relates entirely to inheritance. Escheats are the fruits and consequences, as Blackstone says, of feudal tenure resulting from the frequent extinction of heritable blood, according to the feudal tenure of inheritance. A bastard, being the son of nobody, could have no heritable blood; consequently, none of the blood of the

1.—*Ld. Raym.* 68.

2.—*The King v. The Inhabitants of Hodnett*, 1 T. R. 96.

3.—1 Bl. Comm. 486.

4.—1 Woodes. 394.

5.—Nov. 89, c. 12, s. 4.



first purchaser. The feudal doctrine of carrying the estate through the blood of the first purchaser, inevitably excluded inheritance among bastards. In this sense the disability of bastards was the consequence of feudal policy, and totally inconsistent with the liberal and equitable canons of descent introduced by the act of 1785. The preference of the male ascending line, preserved by the statute of 1786, is not founded upon feudal doctrines. The inheritance is directed first to the father; not because he is the most worthy of blood, but because he is the head of the family, who can best dispose of the estate among his surviving children. And upon this same principle the grandfather is preferred to the grandmothers and aunts. This is no preference of the male ancestors, but simply a preference of the husband or father, if in existence, to the wife or children of the same person; and the principle **255\***] of \*this doctrine is directly repugnant to that of the feudal or common law. Corruption of blood by convictions for crimes, alienage, and bastardy, were three fruitful sources of escheats at the common law. The principle of extinguishing the inheritable blood applied to each case. The first was cut up by the constitution of Virginia. The act of 1785 laid the axe to the root of the other two. Not by authorizing aliens to hold lands, or by legitimating bastards. In the one case it permits a citizen, claiming by descent, to trace his relation to an intestate through an alien. In the other it confers a capacity of inheritable blood upon bastards. The object of both provisions is the same—to enable the kindred of the intestate to obtain the property he left, instead of rapaciously seizing it for the government. The act is clearly remedial, and should be construed liberally in furtherance of the object of the legislature, conformable to the opinions of the Virginia courts already quoted.

*Mr. Justice WASHINGTON* delivered the opinion of the court: It is admitted by the counsel on both sides, in their argument, with which the opinion of the court coincides, that Hugh Stevenson, though the meritorious cause of the grant of this land never took any interest therein, but that the right to the same vested in his son Richard, to whom the warrants issued, as the first purchaser. It is further admitted by the counsel, that the law of descents of Ohio, at the time when Richard Stevenson died, was not more favorable to the claim of **256\***] the appellants than that of \*Virginia, which will be hereafter noticed; and they have, in the argument, rested the cause upon the construction of the latter law. The opinion of the court, therefore, is founded on this law.

The appellants object to the decree of the court below, upon the following grounds: 1. That the land warrants ought to have been granted to them as the representatives of Hugh Stevenson, designated as such by his last will.

2. That by the marriage of their mother with Hugh Stevenson, and his recognition of them as his children, they were legitimated, and entitled to the inheritance in this land as heirs to Richard Stevenson; if not so, then,

3. That, as bastards, they were capable of inheriting from Richard, who, they contend, was their brother, on the part of the mother.

1. The appellants' counsel do not contend that their clients are entitled to this land, as devisees under the will of Hugh Stevenson; such a claim would be clearly inadmissible, inasmuch as the testator was not only not seized of the land at the time his will was made, but the law which authorized the grant of it was not even then in existence. But they are understood by the court to insist that the will so far operates upon the subject as to name them the representatives of the testator, and to render them capable, as such, of taking under the act of assembly which passed after the death of the testator. The act provides, that where any officer, soldier, or sailor, shall have fallen, or died in the service, his heirs or legal representatives shall be entitled to, \*and receive [**257** the same quantity of land as would have been due to such officer, &c., had he been living.]

This claim is altogether fanciful and unfounded; for, in the first place, the appellants were not appointed by the will to be the general representatives of the testator, but the devisees, together with their mother, of all their testator's property; and 2d, if they had been so appointed, still it could not confer upon them such a description as to entitle them to take under the act of assembly, unless the act itself described them as the legal representatives of Hugh Stevenson, for whose benefit the grant was intended; and then, they would have taken exclusively under the act, by force of such legislative description, and not under, or in virtue of the description in the will. It is not likely that the expression "legal representatives," in the act, was meant to apply to devisees of deceased officers and soldiers for whom the bounty was intended, if they had lived, because, at the time this law was passed there could not be a deviser of those lands under the general law. It is more probable that they were intended to be provided for the case of a person who may have purchased the right of the officer or soldier to such bounty as the legislature might grant to him.

The next question is, whether the appellants were legitimated by the marriage of Hugh Stevenson with their mother, and his recognition of them as his children. This question arises under the 19th section of the act of 1785, directing the course of descents, which took effect on the 1st of January, 1787. This section declares, that "where a man, \*hav- [**258** ing by a woman one or more children, shall afterwards intermarry with such woman, such child or children, if recognized by him, shall be thereby legitimated."

There can be no doubt but that the section applied to bastards *in esse*, at the time the law came into operation, as well as to such as might thereafter be born. But it is contended by the counsel for the appellants, that the section is, in every other respect, prospective, not only as to the fact of legitimation, but as to the two circumstances of marriage and recognition, which entitle the bastard to the benefits of the law; and, consequently, that to bring a case within the operation of this section, both the marriage and recognition must take place after the 1st of January, 1787. On the other side, it is admitted that the privilege of legitimation is not conferred upon a bastard prior to the above period; but it is insisted, that, as to the

marriage and recognition, the law should be construed as well retrospectively as prospectively.

In the case of *Rice v. Efford*, decided in the Court of Appeals of Virginia,<sup>1</sup> the marriage took place prior to the 1st of January, 1787, but the father recognized his illegitimate children, and died, after that period. The whole court seem to have been of opinion that the word "afterwards" referred not to a time subsequent to the 1st of January, 1787, but to the birth of the children, and, therefore, that the marriage, though prior to that period, legitimated the children before born, if they should be recognized by the father. But, it was stated by Judge Roane, in giving his opinion, that the construction of the act applies only to cases where the father has died posterior to the passage of the act.

It is contended by the counsel for the appellants, that since, in the above case, the father recognized the children subsequent to the 1st of January, 1787, this opinion of Judge Roane, as to the time of the recognition, was unnecessarily advanced, and is, therefore, entitled to no higher respect than what is due to a mere *obiter dictum*. Be this as it may, it is the uncontradicted opinion of a learned judge upon the construction of a law of his own state; and is noticed by this court, not upon the ground of its being considered in that state as of conclusive authority, but because it strongly fortifies the opinion which this court entertains upon the point decided; which is, that, however the construction may be as to the inception of the right, it is clearly prospective as it relates to the consummation of it. And this prospective operation being given to the act, by requiring the most important condition upon which the privilege of legitimation is to be conferred, to be performed after the law came into operation, it is less material whether the marriage was celebrated before or after that period. To render the past recognition of the father effectual to give inheritable blood to his children, who were then illegitimate, and incapable of taking the estate by descent, either from him, or from those to whom it should descend, would, in some respects at least, partake of the character of a retrospective law. It would seem to be most reasonable so to construe the law as to enable the father to perceive all the consequences of his recognition at the time he made it.

The 3d question is, are the appellants, as bastards, capable of inheriting from Richard Stevenson?

The 18th section of the law of descents, under which this question arises, is as follows: "In making title by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate, is, or

hath been, an alien. Bastards also shall be capable of inheriting or of transmitting inheritance on the part of their mother, in like manner as if they had been lawfully begotten of such mother."

In the construction of this section, it is never to be lost sight of, that the appellants are to be considered as bastards, liable to all the disabilities to which the common law subjects them, as such, except those from which the section itself exempts them. Though illegitimate, they may inherit and transmit inheritance, on the part of the mother, in like manner as if they had been lawfully begotten of the mother. What is the legal exposition of these expressions? We understand it to be, that they shall have a capacity to take real property by descent immediately or through their mother in the ascending line; and transmit the same to their line as descendants, in like manner as if they were legitimate. This is uniformly the meaning of the expressions, "on the part of the mother or father," when used in reference to the course of descent of real property, in the paternal or maternal line. As bastards, they were incapable of inheriting the estate of their mother notwithstanding they were the innocent offspring of her incontinence, and were, therefore, in the view of the legislature, and consonant to the feelings of nature, justly entitled to be provided for out of such property as she might leave undisposed of at her death, or which would have vested in her, as heir to any of her ancestors, had she lived to take as such. The current of inheritable blood was stopped in its passage from, and through the mother, so as to prevent the descent of the mother's property and of the property of her ancestors, either to her own illegitimate children, or to their legitimate offspring. The object of the legislature would seem to have been to remove this impediment to the transmission of inheritable blood from the bastard in the descending line, and to give him a capacity to inherit in the ascending line, and through his mother. But although her bastard children are, in these respects, *quasi* legitimate, they are, nevertheless, in all others bastards, and as such, they have, and can have, neither father, brothers, or sisters. They cannot, therefore, inherit from Richard Stevenson, because, in contemplation of law, he is not their brother; and even if he were their brother, they would not inherit their estate under this section, on the part of their mother, but directly from Richard, the descent from brother to brother being immediate. Upon no principle, therefore, can this section help the appellant's case. His estate never vested in the mother, so as for her bastard children to inherit from her; nor did it pass through her in the course of descent to the bastard children.

*Decree affirmed with costs.*

1.—The history of the respective disabilities and rights of illegitimate children in different ages and nations, is a subject of curious speculation. The most ancient people of whose laws and political institutions we have any accurate knowledge are the Jews. They appear to make little or no distinction between their legitimate and illegitimate offspring. So, also, the Greeks, in the heroic ages, seem to have regarded them as in every respect equal; but at a subsequent epoch they were

stigmatized with various marks of unfavorable distinction. Among the Athenians, the offspring of parents who had contracted marriages, which, though valid by the law of nations, were contrary to the policy and the positive institutions of the state, were considered as illegitimate; and all bastards were not only deemed incapable of inheriting from either of their parents, but excluded from public honors and offices, and regarded as aliens to the commonwealth. Thus, the citizen



## [LOCAL LAW.]

## PERKINS ET AL. v. RAMSEY ET AL.

The following entry is invalid for want of that certainty and precision required by law: "William Perkins and William Hoy enter 6,714 acres of land on a treasury warrant, No. 10,692, to join Lawrence Thompson and James M'Millan's entry of 1,000 acres that is laid on the adjoining ridge between Spencer's creek and Hingston's fork of Licking on the east, and to run east and south for quantity." The entry referred to in the foregoing was as fol-

lows: "9th of December, 1782, Lawrence Thompson and James M'Millan, assignees of Samuel Baker, enter 1,000 acres on a treasury warrant, No. 4,222, on the dividing ridge between Hingston's fork of Licking and Spencer's creek, a west branch of said fork, to include a large pond in the centre of a square, and a white oak tree marked X, also an elm tree marked V S, near the side of the pond."

THIS cause was argued by *Mr. B. Hardin* for the appellants, and by *Mr. Trimble* for the respondents.

\**Mr. Justice Todd* delivered the opin- [\*270

who married a foreign woman at once degraded and denationalized his offspring.\* The severity of this law was, however, occasionally mitigated from motives of policy; and when the ranks of the citizens of a Grecian republic became thinned by wars and proscriptions, they were filled up again from this disfranchised class. (Arist., *Politie*. l. 3, c. 3; Id., l. 6, c. 4.)

The Roman law distinguished between the offspring of that concubinage which it tolerated as an inferior species of marriage, and "the spurious brood of adultery, prostitution, and incest." (Gibbon's *Decl. & Fall*, &c., c. 44, s. 1.) The former were termed *naturales*; and the latter, *spurii, adulterini, incestuosi, nefarii, or sacrilegi*, according as they were respectively the fruit of prostitution, of incest between persons in the direct line of consanguinity, or related in remoter degrees, and of the violation of vows of chastity.

[263\*] \*None of these different classes of illegitimate offspring were stigmatized by civil degradation, or excluded from aspiring to public honors. (Œuvres de D'Aguesseau, tom. 7, pp. 384, 385; *Disert. sur les Bastards*.) But "according to the proud maxims of the republic, a legal marriage could only be contracted by free citizens; an honorable, at least an ingenious birth, was required for the spouse of a senator; but the blood of kings could never mingle in legitimate nuptials with the blood of a Roman; and the name of Stranger degraded Cleopatra and Berenice to live the concubines of Mark Anthony and Titus." (Gibbon, *ubi supra*.) "A concubine, in the strict sense of the civilians, was a woman of servile or plebeian extraction, the sole and faithful companion of a Roman citizen, who continued in a state of celibacy. Her modest station, below the honors of a wife, above the infamy of a prostitute, was acknowledged and approved by the laws." (Ib.) Thus there were several classes of persons who could not lawfully be concubines, either in respect to the infamy of their characters, *ut meretrices*, or in respect to their rank in life, *ut ingenuæ et illustres*; or in respect to their condition as married women, or nuns professed, or as within the prohibited degrees of consanguinity. (Œuvres de D'Aguesseau, *ubi supra*.)

Although bastards were not deprived of any civil rights by the Roman law, and "the outcasts of every family were adopted without reproach as the children of the state," yet they were excluded in the early ages of the republic from all claim to the property of their deceased parents. As the law of the XII Tables only called to the succession the *agnates*, or the persons connected by a line of males of the same *gens* or family; and absolutely disinherited the *cognates* or relations on the side of the mother, bastards could have no claim to the property of their parents by inheritance; not to that of the father *quis neque gentem, neque familiam habent*; nor to that of the mother, because her relations were entirely excluded. It seems, however, that there was no law prohibiting the father from making a provision for his illegitimate children by will, until the time of Constantine, who made some regulations restraining this liberty; which, however, are involved in such obscurity [264\*] that the commentators \*are not agreed as to their precise nature. J. Godefroy, in his commentary on the Theodosian code, is of the opinion that these regulations annulled such provision by will in favor of bastards wherever the testator left any legitimate children, or father, mother, brothers or sisters. (Jac. Godefroy, *Com. ad Code*; Theodo., l. 1; *De natural. filiis*.) Be this as it may, it is cer-

tain that the Emperor Valentinian, A. D. 371, permitted the bastard children of fathers, who had also legitimate offspring, to acquire either by donation or will, one-twelfth part of the paternal property; and in case the father had no legitimate children, or surviving parents, he might dispose in the same manner of one-fourth of his estate in favor of his illegitimate children. (Cod. Theodos., l. 1, *De natural. liberis*.) Justinian again permitted those who had both legitimate and illegitimate children to give or bequeath one-twelfth part of their property to the latter; and in case they had no legitimate children, to make the same disposition of a moiety of their estate. (Novell. 18, c. 5, Pothier *Pandect. in Nov. Ordin. Redact.* tom. 2, p. 55.) He afterwards permitted them, in case they had no legitimate children, nor father or mother, "*quibus necessitas est legis relinquere partem propriæ substantiæ competentem*," to leave the whole of their property to their illegitimate offspring; and in case their father or mother survived, the whole, except what the parents were entitled to by law. Novell. 89, c. 12. Justinian also established, for the first time in the Roman jurisprudence, the principle of giving to illegitimate children a legal claim to a portion of their father's property by inheritance *ab intestato*, by providing, that in case the father died intestate, leaving neither wife nor legitimate offspring, his natural children and their mother should be entitled to one-sixth part of his estate. (Œuvres de D'Aguesseau, tom. 7, 389.) This, however, must be understood strictly of the children born in concubinage, such as the Roman law recognized this domestic relation; and not of "the spurious brood of adultery, prostitution, and incest, to whom (according to Gibbon) Justinian reluctantly granted the necessary aliments of life;" but from whom it would, in fact, appear that he inhumanly withheld even this provision. "*Omnis qui ex complexibus aut nefariis aut iucistis, aut damnatis proce-*" [265 *serit, iste neque naturalis nominatur, neque alendus est à parentibus, neque habebit quoddam ad præsentem legem participium*." (Novell. 89, c. 12, s. 6.) It seems, therefore, that this provision for the necessary support of illegitimate children was confined to those termed *naturales*. Ib.

The stern contempt of the early Roman legislators for the female sex had entirely excluded the *cognates* from the rights of inheritance, "as strangers and aliens." This necessarily prevented even legitimate children from succeeding to their mother; and it is not, therefore, surprising that bastards could claim no part of the maternal estate. When the rigor of this principle was relaxed by the equitable interference of the prætor, his edict called indiscriminately to the succession both the legitimate and illegitimate children of the mother. (Œuvres de D'Aguesseau, tom. 7, p. 391; Pothier, *Pandect. in Nov. Ordin. Redact.* tom. 2, p. 557.) This rule was subsequently confirmed by the Tertullian and Orphitian senatus consulta, and continued the law of the empire ever afterwards, except that Justinian engrafted into it an exception unfavorable to the illegitimate children of noblewomen, *mulieres illustres*. Ib.

The Roman law had provided various modes by which bastards might be legitimated. 1. The first was by a subsequent marriage of the father and mother; a mode of legitimation first established by Constantine. 2. *Per oblationem curiæ*, a mode introduced by Theodosius and Valentinian, which was when the parent consecrated his child to the service of a city. But this only had the effect of legitimating the children in regard to their father. They had no right to inherit from collaterals, and even their claim to inherit from their father was confined to his property within the city to whose

\* *Leges Atticæ, Sam. Petiti*, tit. 4, *de liberis legitimis, &c.*



ion of the court: 'This is an appeal from the decree of the seventh Circuit Court in the District of Kentucky, and is a controversy between conflicting claims to land originating under the land law of Virginia.

The respondents relying on their elder legal

titles, and denying the validity of the entries, under which the appellants derive their titles, it is necessary to examine those entries only.

The entry under which the appellants derive title is in the following words, as it stands amended, viz.: "William Perkins and William

service they were devoted. 3. Adoption alone was declared by the Emperor Anastasius to be sufficient to legitimate the natural children of the person adopting them. But this law was abolished by Justin and Justinian. 4. By the last will of the father, confirmed by the emperor. But this only applied to cases where he had no surviving legitimate children, and had some sufficient reason for not having married the mother of his natural children. 5. *Per rescriptum principis*; by a special [266\*] dispensation from the emperor granted upon the petition of the father, who had no legitimate offspring, and whose concubine was dead, or where he had sufficient reasons for not marrying her. 6. By the recognition of the father; as if the father designated one of his natural children as his child in any public or private instrument; this had the effect of legitimating the child thus acknowledged, and all his brothers and sisters by the same mother, upon a legal presumption, that a marriage might have been contracted between the parents. In all these cases, except the 2d, the children thus legitimated were in all respects placed upon the same footing as if born in lawful wedlock. (Œuvres de D'Aguesseau, tom. 7, p. 393, and seq. Pothier, Pandect. in Nov. Ord. Redact. tom. 1, p. 27.)

It should be added, that none of these modes of legitimation could apply to the offspring of criminal commerce, *ex damnato coitu*; since they all suppose that the children are born of a concubine with whom the father might lawfully intermarry. (Œuvres de D'Aguesseau, *ubi supra*.)

By the Roman law, if a bastard left legitimate children, they became his heirs precisely as if he himself had been legitimate. But if he died, without having been himself legitimated, and without children, his succession was determined by the rule of reciprocity, and his father and mother, &c., succeeded to him, precisely as he would have succeeded to them. If he had been legitimated while living, his succession was regulated in the same manner with that of persons born in lawful wedlock. (Id., p. 399.)

By the Canon law, the subject of bastardy was, in general, regulated in the same manner as by the civil law. But though bastards were capable by the latter of aspiring to all the honors and offices of the state, the former refused them the same privileges in respect to the dignities of the church. The canonists also aimed to exclude them entirely from the succession of their father or mother, but allowed all indiscriminately a right to claim the necessary aliments of life. After legitimation in any of the modes provided by the civil law, such as a subsequent marriage of the parents, &c., they regarded them in the same manner as if born in [267\*] lawful wedlock. (Id. p. 400, \*and seq.) It was this rule which they endeavored to impose upon the English barons at the parliament of Merton in the reign of Henry III. (1 Bl. Com. 456.)

The laws of those European countries which have adopted the Roman law as the basis of their municipal jurisprudence, regulate the rights and disabilities of illegitimate children in the same manner as they are determined by the civil and common law. But the Gothic monarchies of Europe adopted from the earliest times a legislation on this subject, in many respects different from that of imperial and papal Rome. Thus, in all the provinces of France, where the *droit coutumier*, or unwritten law, prevailed, bastards were incapable of inheriting *ab intestato*, except the property of their legitimate children, and the reciprocal right of the husband and wife to succeed to each other according to the title of the civil law, *unde vir et uxor*. This was the universal law of the kingdom, with the exception of the peculiar customs of a few provinces, and the *pays du droit écrit*, where the Roman law constituted the municipal code. (Ferrière. Dict. Mot. Bastard; Œuvres de D'Aguesseau, tom. 7, pp. 403, 430, 448.)

They were, also, with the exception of certain local customs, incapable of taking by devise from their parents, except *des donations moderées pour leur aliments et entretiens*. (Ferrière. Dict. *ubi supra*; Œuvres de D'Aguesseau, tom. 7, p. 431.)

Wheat. 5.

The king was the heir of all bastards dying without legitimate children, or without having disposed of their property by donation *inter vivos*, or last will and testament, in the same manner as he inherited the estates of *aubains*, or aliens, dying in the kingdom. 1b. Of the various modes of legitimation known to the civil law, that of France adopted only two: 1. That by a subsequent marriage of the parents; and, 2. By authority of the prince. (Œuvres de D'Aguesseau, tom. 7, p. 437.) The bastard who was legitimated by the subsequent marriage of his parents, was placed upon the same footing as if born in lawful wedlock, as to personal rights, and those of property; but he who was legitimated by authority of the prince, *par lettre du prince*, although capable of aspiring to civil honors and offices, was incapable of inheriting, or transmitting property \*by inheritance. (Id., p. 462.) Such [268] was the law of France before the revolution; but it was greatly modified by the compilers of the new civil code, who retained but one mode of legitimation—that by a subsequent marriage and recognition of the parents. (Code Napoleon, art. 331, 332, 333.) Illegitimate children, legally recognized as such, are entitled, in case their father shall have left legitimate descendants, to one-third of the portion to which they would have been entitled had they been legitimate; in case the former shall have left no descendants, but only kindred in the ascending line, or brothers or sisters, to a moiety of the same; and in case the parents shall have left neither descendants, nor kindred in the ascending line, nor brothers or sisters, to three-fourths of the same portion. (1b., art. 757.) They have a right to the whole of their parents' property where the latter shall have left no kindred within the degrees of succession. (1b., art. 758.) Their descendants are entitled to the same rights, *jure representationis*. (1b., art. 759.) But bastards are not entitled in any case to succeed to the relations of their parents (1b., art. 756); and none of these provisions are applicable to bastards, the fruit of incestuous or adulterous intercourse, who are only entitled to necessary aliments. (1b., art. 762, 763, 764.) The property of bastards leaving no posterity, is inherited by the parents who shall have recognized them. (1b., art. 765.) And in case the parents are deceased, the property received from them is inherited by the legitimate brothers and sisters of the bastard; and all his other property by his illegitimate brothers and sisters, or their descendants. (1b., art. 766.)

By the law of Scotland, the king succeeds as *ultimus hæres*, to the estates of bastards, and they cannot dispose of their property by will, unless to their lawful issue, without letters of legitimation. But those letters do not enable the bastard to succeed to his natural father, to the exclusion of lawful heirs; for the king cannot, by any prerogative, cut off the private right of third parties. But he may, by a special clause in the letters of legitimation, renounce his right to the bastard's succession, in favor of him who would have been the bastard's heir had he been born in lawful marriage, as such renunciation does \*not encroach upon the [269] rights of third parties. (Erskine's Inst. B. 3, tit. 10, s. 3.) A bastard is not only excluded, 1. From his father's succession, because the law knows no father who is not marked out by lawful marriage; and, 2. From all heritable succession, whether by the father or mother; because he cannot be pronounced lawful heir by the inquest, in terms of the brief; but, also, 3. From the movable succession of his mother; for, though the mother be known, the bastard is not her lawful child, and legitimacy is implied in all succession deferred by law. But though he cannot succeed *jure sanguinis*, he may succeed by destination, where he is specially called to the succession by an entail or testament. (1b., s. 4.)

The laws of England respecting illegitimate children are too well known to render any particular account of them necessary in this place. (Vide 1 Bl. Comm. 454, et seq.; Co. Litt. by Hargr. & Butler, 3 b, note 1; Id. 123, a, note 8; Id. 123, b, note 1, 2; Id. 243, b, note 2; Id. 244, a, note 1, 2; Id. 244, b, note 1.)



Hoy enter 6,714 acres of land on treasury warrant No. 10,692, to join Lawrence Thompson and James M'Millan's entry of 1,000 acres that is laid on the dividing ridge between Spencer's creek and Hingston's fork of Licking, on the east, and to run east and south for quantity."

The entry referred to in the foregoing one is in the following words, viz.: "9th of December, 1782, Lawrence Thompson and James M'Millan, assignees of Samuel Baker, enter 1,000 acres on a treasury warrant, No. 4,222, on the dividing ridge between Hingston's fork of Licking and Spencer's creek, a west branch of said fork, to include a large pond in the center of a square, and a white oak tree marked X, also, an elm tree marked V S, near the side of the pond."

On reading this last entry, the impression would be strong that the dividing ridge, Spencer's creek, and the large pond, were all to be found on the west side of Hingston's fork of **271\*** Licking. A subsequent \*locator, or those desirous of ascertaining the land embraced by this entry, on making inquiry for the objects called for, would be informed that Spencer's creek is not a water of Hingston's fork; but is a water of Slate Creek, and lies on the east, and not on the west side of Hingston. Each of those creeks was, at the date of this entry, generally known by their respective names. There is, then, in this entry, a mistake in describing Spencer's creek as a west branch of Hingston's fork. If this mistake can be corrected according to legal principles, and well-settled rules of construing entries, it should be done, if by the correction the entry can be sustained. It is stated to be a rule of construction adopted in the courts of Kentucky, that where there are repugnant, false, or mistaken calls in an entry, they may be rejected. Admitting the correctness of this rule, the call for Spencer's creek as being a west branch of Hingston's fork, is not a repugnant, but is a mistaken one. This mistake being corrected, the entry would then read: "Lawrence Thompson and James M'Millan, assignees of Samuel Baker, enter 1,000 acres on a treasury warrant, on the dividing ridge between Hingston's fork of Licking and Spencer's creek, to include a large pond in the center of a square, and a white oak tree marked X, also, an elm tree marked V S, near the side of the pond." Those who were acquainted with Hingston's fork and Spencer's creek, would know—and the connected plat before the court shows—that there is a dividing ridge extending in a northern and southern direction between those water-courses. A subsequent **272\*** locator might thus have ascertained three of the objects called for in this entry—viz., the dividing ridge, Hingston's fork, and Spencer's creek; but the large pond and marked trees are still wanting to ascertain the specialty and precision of this entry. The most diligent inquiry and laborious research would not enable him to find them on, or near this dividing ridge. Here another false call or description is discovered. How is this to be corrected? It is contended that Slate Creek must be substituted for Hingston's fork, by doing which, all mistakes will be corrected, and every object called for in the entry may be easily found, and correctly ascertained. Waiving for the present all objection to this substitution,

let it be examined how the entry would then stand. The description would then be "on the dividing ridge between Slate Creek and Spencer's creek, a west branch thereof, to include a large pond in the center of a square, and a white oak tree marked X; also, an elm tree marked V S, near the side of the pond." With this correction, a subsequent locator being placed at the mouth of Spencer's creek, would naturally look for the dividing ridge to conduct him to the pond and marked trees. The connected plat exhibits three ridges, one extending in a northern direction, between Slate and a branch of Spencer's creek; a second, extending westwardly up Spencer's creek, on the south side thereof, which is a dividing ridge between Spencer's creek and Greenbrier Creek, also a water of Slate; and a third, extending westwardly up Greenbrier on the south side thereof, which is a dividing ridge between Greenbrier and Brush \*Creek, also a **[\*273]** water of Slate. Which of these would he decide to be the dividing ridge between Spencer's creek and Slate; or can either of them be properly so called? It is contended, on the part of the appellants, that the ridge on the upper, or south side of Spencer's creek, would, in the general and common acceptance of men, be considered as the proper one. It may be admitted, that in many, perhaps in most cases, a call for the dividing ridge between two streams would generally be considered as designating that point above the one, and adjoining the other; but it must also be admitted, that in some cases it would not be so considered; it would depend on the direction or course of the streams, and the manner in which they are united with each other. If the general course of the one was south, and the other north, and the other running south, should turn east to form the junction, and the one running north should continue its course, then the land below the junction would by every person be considered as dividing the one stream from the other. Take as an example that branch of Spencer's creek called Harper's fork; suppose it the main stream, and that it formed a junction with Slate Creek instead of Spencer's creek, could a doubt exist that the land on the lower side was the dividing ridge between that stream and Slate Creek? The dividing ridge on the south side of Spencer's creek is, in truth and in fact, a dividing ridge between that creek and Greenbrier, another water of Slate, running nearly parallel with Spencer's creek, and forming a junction with Slate above it. The same **\*fact** exists as to the dividing ridge be- **[\*274]** tween Greenbrier and Brush creeks. The ridge, then, extending northwardly from the mouth of Spencer's creek might, with equal probability, be pursued as either of the others; it would lead to a pond, as designated on the connected plat 32. It is true, this pond is not proved to be a large one, and a subsequent locator on a view of it might conclude it did not answer the description of that called for in the entry. If he returned and pursued the ridge between Greenbrier and Brush creeks, he would be conducted to a pond, designated on the connected plat 38. This also is not a large pond, and may be considered as not answering the description. But supposing he should pursue the ridge on the south side of Spencer's creek,

would it conduct him certainly to the pond No. 1., as designated on the connected plat? We think it very doubtful, from the proofs in the cause. It is not situate on the dividing ridge, but is nearly surrounded by the drains and branches of Greenbrier, is from 50 to 80 poles distant from the ridge, was nearly surrounded by high, strong, and thick canes; and, although from the testimony there appears to have been a good deal of conversation among the residents at Boonesborough respecting a large pond in this section of country, yet its precise situation was known only to a few, among some of whom existed an agreement to conceal their knowledge of it, and many of the residents at that place and its vicinity knew not, nor had heard anything respecting it; to which may be added, that the pond designated on the connected plat 275\*] 37 is a large \*pond, was also known to many, and possibly may have been the one spoken of in some of the general and loose conversations at Boonesborough; and it may be further observed, that the residents at Strode's and M'Gee's stations (which were the nearest ones), as well as many others, who were conversant in that section of country, had never seen, and did not know of, the pond No. 1, until a considerable time after the date of the entry. The court is, therefore, of opinion, that this pond was not so generally known, or could be so readily found, as to support and uphold this entry; and that it would be requiring more than ordinary and reasonable diligence to traverse and search all the dividing ridges represented on the connected plat.

But we are not satisfied that, according to the legal principles or well-settled rules for construing entries, Slate Creek can be substituted for Hingston's fork; on the contrary, we believe it would be making, rather than construing an entry. No case has been produced where this has been permitted, and it is believed none such exists. The counsel for the appellants contends, that as from the proofs in the cause it appears that Slate Creek was by many supposed to be Hingston, this circumstance would authorize such substitution. To this it may be answered, that this mistake existed among the hunters and locators at Boonesborough only, and that among them there were several who knew Slate Creek by its appropriate name; to which it may be added, that all the hunters and locators at Strode's and M'Gee's stations, as well as many others, also knew Slate 276\*] Creek, and that it was \*not a water of Hingston's fork; so that a majority of those conversant in that section of country did not labor under the mistake. We are therefore of opinion that it would be extending the rules of construction too far to make this substitution, in support of the mistake of a few, against the knowledge of the majority; if a substitution could be permitted in any case. We are farther of opinion that Hingston's fork was of more general notoriety than any of those streams, and ought not to be disregarded in construing this entry; that it is one of the prominent calls to ascertain its situation; and that a subsequent locator having arrived at Hingston's fork, and finding the pond designated on the plat 37, which is proved to have been known to many, and is little inferior in size to the pond 1, might rationally conclude that the locator of the en-

try under consideration had mistaken some western branch of Hingston for Spencer's creek; thus situated, he would conjecture, that an entry containing such incorrect, mistaken, or false calls, and requiring so much diligence and labor, was so doubtful and uncertain as to induce him to abandon further research. This entry, therefore, from a full view of all the proofs and circumstances, is deemed invalid, for want of that certainty and precision required by law.

In accordance with this opinion, is the decision of the Court of Appeals of the state of Kentucky, in the suit of *Dnnleary against Reed and others*, wherein the same entry was examined upon substantially the same evidence.

*Decree affirmed with costs.*

\*[COMMON LAW.]

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### MANDEVILLE v. WELCH.

Bills of exchange and negotiable promissory notes are distinguished from all other parol contracts by the circumstance that they are *prima facie* evidence of valuable consideration, both between the original parties and against third persons.

Where a chose in action is assigned by the owner, he cannot interfere to defeat the rights of the assignee in the prosecution of a suit brought to enforce those rights.

It makes no difference, in this respect, whether the assignment be good at law, or in equity.

But this doctrine only applies to cases where the entire chose in action has been assigned, and not to a partial assignment.

**E**RROR to the Circuit Court for the District of Columbia. This was an action of covenant brought by the plaintiff, James Welch, for the use of Allen Prior, against the defendant Mandeville, one of the firm of Mandeville & Jamesson, for the breach of certain articles of agreement set forth in the declaration. Several pleas were pleaded by the defendant; but as the opinion of this court turned altogether upon the fourth set of pleadings, on which issue was joined, and at the trial a bill of exceptions taken, it is unnecessary to state the other pleadings.

The fourth plea alleged a release of the cause of action by the plaintiff before the commencement of the present suit. The plaintiff replied, in substance, that Welch being indebted to Allen Prior in a sum exceeding \$8,707.09, and Mandeville & Jamesson being in- [\*278 debted to Welch, by virtue of the covenant in the declaration mentioned, in the same sum of \$8,707.09, Welch did, in the year 1799, appropriate, assign, and transfer to Prior, by a good and sufficient assignment in equity, the same debt due by reason of the same covenant, of which appropriation and assignment to the use

NOTE.—Bills of exchange and promissory notes import a consideration, and it is unnecessary to aver or prove one. *Cook v. Gray*, Hempst. 84; *Averett's Adm. v. Booker*, 15 Grat. 169; *Gosceline v. Lassero*, 10 Mod. 294, 317; *Haydock v. Lynch*, 2 Ld. Raym. 1563; *Collins v. Martin*, 1 Bos. & Pull. 651; *Holliday v. Atkinson*, 5 Barn. & C. 501. But if made payable out of a particular fund, or on condition, or in something besides money, it loses its character as a bill and does not import a consideration, and one



and benefit of Prior, Mandeville, afterwards, in 1799, had notice; that the present suit was brought for the sole use and benefit of Prior, and Mandeville, at its commencement, had notice thereof, and knew the same suit was depending for the use and benefit of Prior, at the date of the pretended release; that the release was obtained without the knowledge, consent, or approbation of Prior, or of his attorney in court; and that Welch had no authority from Prior or his attorney to execute the release, which was known to Mandeville at the time of the release, and that the release was made with the intent to defraud Prior, and to deprive him of the benefit of this suit. To this replication, there was a rejoinder and issue, upon which the parties went to trial.

At the trial, the plaintiff, to prove that Welch did transfer and assign to Prior, by a good and sufficient assignment in equity, the debt in the replication mentioned, gave in evidence to the jury the articles of agreement in the declaration mentioned, and sundry indorsements of payments thereon, and a memorandum also, thereon, dated the 1st of January, 1798, and signed by Welch, stating that there then remained owing to him, on the articles payable at the times therein mentioned, the sum of **279\*** \$8,707.09. \*The plaintiff further offered three bills of exchange drawn by Welch, in favor of Prior, upon Mandeville & Jameson, dated on the 7th of September, 1799, each for \$2,500, payable to Prior or his order; one on the 24th of November, 1800, another on the same day and month, 1801, and the third on the same day and month, 1803, being the respective times at which certain installments for like sums would become due on the articles of agreement stated in the declaration. Each of these bills purported to be "for value received" of Prior, and were directed to be charged "to account as advised." The plaintiff further offered in evidence to the jury an account rendered to Welch by Mandeville & Jameson, dated the 31st of January, 1798, stating the balance of \$8,707.09, due to Welch, and payable by installments in the manner mentioned in the articles of agreement; and proved that this account had been delivered to Prior by Welch.

The defendant then gave in evidence the bill and proceedings in a suit in chancery in Fairfax county, by Prior, against Welch and Mandeville & Jameson (excepting the answers of the latter), which suit was brought to recover

the amount of the three bills of exchange from Mandeville & Jameson, as debtors of Welch, and was discontinued by the plaintiff, Prior, after the answer of Welch had come in, denying that Prior was owner of the bills, and asserting that Prior held them merely as his agent, and for his use. And the defendant further proved that Welch had never authorized the present suit to \*be brought, un- **[\*280]** less the circumstances above stated would have given Prior authority to institute the same.

The defendant then prayed the court to instruct the jury, that if, from the evidence so given, they should be of opinion that the sums for which the bills were drawn amounted to less than the sums payable by Mandeville & Jameson to Welch, under the covenant, and were known to be less by Welch, then Prior is not such an assignee of the covenant as would authorize him to sustain this suit in the name of Welch. Which instruction the court gave; but further instructed the jury, that if they should be of opinion, from the evidence that the bills were drawn for the full and valuable consideration expressed on the face of them, paid by Prior to Welch, and if there was no other evidence than what is before stated, they ought to infer from the evidence that Prior was, and is such an assignee of the right of action upon the covenant as authorized him to sustain this action in the name of Welch's administrator (Welch having died pending the proceedings, and his administrator having been made party to the suit) for the whole debt due by the covenant at the time of Welch's delivering the account above stated to Prior; and further, that the bills were *prima facie* evidence of such value having been paid by Prior to Welch. The jury found a verdict for the plaintiff under this instruction; and the cause was brought before this court by a writ of error, to revise this among other supposed errors assigned upon the record.

\**Mr. Swann and Mr. Taylor*, for the **[\*279]** plaintiffs in error, argued: 1. That the court below erred in its instruction to the jury that the words "value received" were evidence against Mandeville & Jameson, that money had been actually paid by Prior to Welch, or the bills. They do not claim under the bills, nor under Welch as the drawer. They claim as assignees of the fund on which the bills were drawn. In the case of *Evans v. Beatty*,<sup>1</sup> Lord

1.—5 Esp. N. P. C. 26.

must be averred and proved, unless it be stated in it that it was given for "value received." *Atkinson v. Manks*, 1 Cow. 151; *De Forest v. Frary*, 6 Cow. 151; *Beiderback v. Burlingame*, 27 Ill. 311.

The words "value received" in a bill or note, not necessary. *Benjamin v. Tillman*, 2 McLean, 213; *White v. Ledwick*, 4 Doug. 247; *Townsend v. Derby*, 3 Metc. 363; *Hatch v. Traves*, 11 Ad. & Ell. 702; *Jones v. Jones*, 6 Mees. & W. 84; *Holliday v. Atkinson*, 5 Barn. & Cr. 503; *Clayton v. Gosling*; 5 Barn. & Cr. 360; *Story, Prom. Notes*, sec. 51, 52, 53; *Poplewell v. Wilson*, 1 Strange, 274; *McLeod v. Snce*, 2 Ld. Raym. 1481; *Grant v. Da Costa*, 3 Maule & S. 351; *Kendall v. Galvin*, 15 Me. 131; *Hubble v. Fogartie*, 3 Rich. 413; *Arnold v. Sprague*, 34 Vt. 402; *Hughes v. Wheeler*, 8 Cow. 77; *People v. McDermott*, 8 Cal. 288.

A state statute requiring that any note given in consideration of a sale of a patent-right shall contain a recital that it was so given, is unconstitutional and void for infringing the exclusive power of Congress to regulate the subject of patents. Only Con-

gress can prescribe special regulations as to the mode in which a patent-right may be sold and conveyed. Any interference by a state with the right to assign a patent is void. *Woolen v. Banker*, 17 Aeb. Law J. 72; 5 Reporter, 259.

The purchaser in good faith of a promissory note for value before maturity, without notice of equities existing between the maker and payee, is not bound by them. *Irwin v. Bailey*, 8 Reporter, 421; *Re Great West. Tel. Co.*, 5 Biss. 363; *Hatch v. Burroughs*, 1 Woods. 439; *Dresser v. Missouri & C. R. Co.*, 3 Otto, 92; *Hotchkiss v. Nat. Bank*, 21 Wall. 354; *Collins v. Martin*, 1 Bos. & Pull. 651; *Brauuh v. Roberts*, 1 Bing. N. C. 469; *Haly v. Lane*, 2 Atk. 182; *Lickbarrow v. Mason*, 2 Term. R. 71; *Chalmers v. Lanion*, 1 Camp. R. 383; *Miller v. Race*, 1 Burr. R. 452; *Grant v. Vaughan*, 3 Burr. R. 1516; *Peacock v. Rhodes*, 2 Doug. R. 633; *Lowndes v. Anderson*, 13 East, R. 130; *Thurston v. McKown*, 6 Mass. 428; *Wheeler v. Guild*, 20 Pick. 545; *Wyat v. Bulmer*, 2 Esp. R. 533; *Gould v. Armstrong*, 2 Hall. R. 266; *Story, Prom. Notes*, sec. 191, 192.



Ellenborough held, that on a guaranty to pay for goods sold to a third person, the declarations of the latter were not evidence to charge the person giving the guaranty; because there might be collusion between the third person and the plaintiff. So in this case, if the defendant proved an assignment to him, Welch's declaration, that he had previously assigned to the plaintiff, would not be admissible, and his declaration in writing cannot have any greater effect. 2. It was not the intention of Welch, and of Prior, that the whole covenant should be assigned, nor does the law imply such an assignment. The bills are general, not payable out of any particular fund, and there is no proof of any agreement between Welch and Prior that the latter should have a lien on the funds in the hands of Mandeville & Jamesson. The legal consequence of the decision of the court below is, that the drawing of a bill of exchange amounts, *per se*, to an assignment in law of the funds of the drawer in the hands of the drawee, so as to authorize a suit in the name of the [280\*] drawer, without his consent, against the drawee, and when recourse might be had to the former. There is no case to support the idea that the drawing of a bill, under any circumstances, will amount to an assignment at law. Cases, indeed, have occurred, where, under peculiar circumstances, a court of equity has considered the drawing of a bill as giving to the payee a superior claim or equitable lien. Thus, in the case of *Yeates v. Groves*,<sup>1</sup> the creditor surrendered a security he held, under an express agreement that he should be paid out of the money to arise from a particular specified fund, on which the bill was drawn, and the drawer became bankrupt. But the proposition, that the drawing of a bill on a specific fund would, *per se*, have created such a lien, is repelled by Lord Thurlow. It would be highly impolitic to consider the drawing of a bill, under any circumstances, as amounting to an assignment, or creating a lien, in a court of law. These questions generally arise on the bankruptcy of the drawer. His general creditors have an interest, and ought to be heard. They cannot be made parties to a suit at law.

*Mr. Jones* and *Mr. Lee*, contra, insisted: 1. That bills and negotiable notes expressing upon their face "value received" are evidence of that fact, both as between the original parties and against third persons. 2. The facts and circumstances of the case establish by legal inference that the articles of agreement were wholly assigned in equity. The bills [281\*] being *prima facie* evidence of an equivalent advance by Prior, the possession by him of the articles of agreement, and the delivery to him of the account signed by Mandeville & Jamesson, furnish a legal presumption that both were delivered as security for the payment of the advance. He thus acquired a lien on them similar to that acquired by the delivery of title deeds as security for a debt, which lien has always been deemed by courts

of equity equivalent to a mortgage.<sup>2</sup> So, also, the deposit of a note or bill, as security for a debt, entitles the creditor to enforce his lien in equity.<sup>3</sup> But supposing this position not to be correct, still it is contended that there was here a partial lien or appropriation of the debt due from Mandeville & Jamesson under the articles, to the extent of the sums due on the bills, which is sufficient to authorize Prior to maintain this action. The drawing of a bill of exchange is, in itself, an assignment by the drawer to the payee of the money due from the drawee. The acceptance is not necessary to make the assignment complete, but only to give an action against the drawee in the name of the payee.<sup>4</sup> In the case of *Clark v. Adair*, cited by Mr. Justice Buller in *Masters v. Miller*,<sup>5</sup> it was determined that an unaccepted bill was such an assignment as entitled the payee to the money. In *Yeates v. Groves*,<sup>6</sup> an order to pay out of a particular fund, though not accepted, was considered such a transfer as to prevent the assignee of the party, who became bankrupt after drawing the order, from claiming the fund on which the order was drawn.

*Mr. Justice STORY* delivered the opinion of the court: Two questions arise upon the instruction to the jury: 1. Whether the bills were *prima facie* evidence that value had been paid for them by Prior to Welch. 2. Whether, under all the circumstances of the case, Prior was an assignee in equity entitled to maintain the present action.

Upon the first point, we are of opinion that the law was correctly laid down by the court below. The argument of the defendant's counsel admits, that where a bill imports on its face to be for "value received," it is *prima facie* evidence of that fact between the original parties; but it is stated that it is not evidence of the fact against third persons. We know of no such distinction. In all cases where the bill can be used as evidence either against the parties or against third persons, the same legal presumption arises of its having been given for value received, as exists in relation to a deed expressed to be given for a valuable consideration. In this respect, bills of exchange and negotiable notes are distinguished from all other parol contracts, by authorities which are not now to be questioned.<sup>7</sup>

The other question requires more consideration, though it does not, in our judgment, present any intrinsic difficulty. It has been long since settled, that where a chose in action is assigned by the owner, he shall not be permitted fraudulently to interfere and defeat the rights of the assignee in the prosecution of any suit to enforce those rights. And it has not been deemed to make any difference whether the assignment be good at law, or in equity only. This doctrine was fully recognized by this court when this case was formerly before

1.—1 Vez., Jun., 280.

2.—*Sweas v. Camelford*, 1 Vez., Jun., 235; *Walwyn v. Sheppard's Assignees*, 4 Ves. 119; *Jones v. Gibbons*, 9 Ves. 411; *Ex-parte Langston*, *Rose's Rep.* 26; *Russel v. Russel*, 1 Bro. Ch. Cas. 269.

3.—*Ex-parte Crossbey*, 3 Bro. Ch. Cas. 237; *Ex-parte Byas*, 1 Atk. 148.

*Wheat.* 5.

4.—*Gibson v. Minet*, 1 H. Bl. 569, 602; *Tatlock v. Harris*, 3 T. R. 174.

5.—4 T. R. 343.

6.—1 Vez., Jun., 280.

7.—*Chitty on Bills* (2d edit.), 12, 62; 1 Wils. Rep. 189; *Burr.* 1516; *Salk.* 25; 1 Bos. & Pull. 651.



us.<sup>1</sup> It was then applied to a case where the whole chose in action was alleged to have been assigned; and it was certainly then supposed that the doctrine in courts of law had never been pressed to a greater extent. We are now called upon to press it still further, so as to embrace cases of partial assignments of choses in action.

It is contended on behalf of the plaintiff, in the first place, that the facts of this case establish by legal inference that the articles of agreement were entirely assigned in equity to the plaintiff. If this ground fails, it is in the next place contended that an assignment was made of the debt due by the articles to the extent of \$7,500, the amount of the bills drawn on Mandeville & Jamesson, and that **284**]\* this, *per se*, authorizes Prior to sustain the present action.

In support of the first position, it is argued, that the bills being *prima facie* evidence of an equivalent advance made by Prior, the possession by the latter of the articles of agreement, and the delivery to him of the account signed by Mandeville & Jamesson, afford a legal presumption that the articles and account were delivered to him as security for the payment of such advance, and thereby he acquired a lien on them like that acquired by the delivery of title deeds as security for a debt, which lien has always been deemed to be equivalent to an equitable mortgage. It may be admitted, that according to the course of the authorities in England, and as applicable to the state of land titles there, a deposit of title deeds does, in the cases alluded to, create a lien, which will be recognized as an equitable mortgage, and will entitle the party to call for an assignment of the property included in the title deeds. It may also be admitted, that a deposit of a note not negotiable, as security for a debt, will entitle the creditor, after notice to the maker, to enforce in equity his lien against the depositor, and his assignees in bankruptcy. Such was the case cited at the bar from Atkyn's Reports.<sup>2</sup> But in cases of this nature, the doctrine proceeds upon the supposition that the deposit is clearly established to have been made as security for the debt; and not upon the ground that the mere fact of a deposit unexplained affords **285**]\* such proof. In the case at the bar, it was not proved that the articles were delivered by Welch to Prior at all, much less that they were delivered as security for the bills. The delivery of the account is certainly an equivocal act, and might have been as a voucher of the right of Welch to draw on Mandeville & Jamesson. There is this farther deficiency in the proof, that the bills do not appear ever to have been presented to the drawees for acceptance, which not only rebuts the presumption from the face of the bills that they were received for value, since a *bona fide* holder could not be supposed guilty of such fatal laches, but draws after it the auxiliary presumption that they were in the hands of Prior as agent, and, therefore, that he had not any assignment of the articles as security. And it may be added, that the suit commenced in chancery by Prior, for this very debt, and afterwards discontinued, does

not assert any assigned title in himself, but proceeds against Mandeville & Jamesson, as the mere debtors of Welch. Under such circumstances, this court cannot say that the instruction of the Circuit Court was correct, that the jury ought to infer that Prior was an assignee, entitled to sue for the whole debt due upon the articles.

The ground, then, that there was a deposit of the articles as collateral security failing, we are next led to examine the position of the defendant's counsel, that there was a partial lien or appropriation of the debt due from Mandeville & Jamesson, under the articles to the extent of the sum due on the bills, which is equivalent to an equitable assignment of so \*much of the debt. It is said that a **[\*286** bill of exchange is, in theory, an assignment to the payee of a debt due from the drawee to the drawer. This is undoubtedly true, where the bill has been accepted, whether it be drawn on general funds or a specific fund, and whether the bill be in its own nature negotiable or not; for in such a case, the acceptor, by his assent, binds, and appropriates the funds for the use of the payee. And to this effect are the authorities cited at the bar.<sup>3</sup> In cases also where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and after notice to the drawee it binds the fund in his hand. But where the order is drawn either on a general or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft; or an obligation to accept may be fairly implied from the custom of trade, or the course of business between the parties as a part of their contract. The reason of this principle is plain. A creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments by which it may be broken \*into frag- **[\*289** ments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to any other persons. So that if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the present suit. But, in the present case, there is no proof of any presentment of the bills, much less of any acceptance by the defendant to establish even a partial assignment of the debt. And if there were, it would still be necessary to show that there was an assignment of the articles as an attendant security, before the plaintiff could found his action upon them. Indeed, by the very terms of the pleadings, the plaintiff undertakes to establish an assignment of the whole debt due by the articles; and if he fails in this, there is an end to his recovery. So that, in whatever view we contemplate the facts of this case, or the law applicable to it, the plaintiff has not shown any

1.—Welch v. Mandeville, 1 Wheat. Rep. 235.

2.—*Ex-parte* Byas, 1 Atk. 148.

3.—Yeates v. Groves, 1 Ves., Jun., 280; Gibson v. Minet, per Eyre, C. J., 1 H. Bl. 569, 602; Tatlock v. Harris, 3 T. R. 174.

sufficient title to sustain his replication to the fourth plea.

Several other objections have been taken at the bar to the plaintiff's right of recovery, which, under other circumstances, would have deserved serious consideration; but as, upon the merits of the case, as they are apparent upon the record, the judgment of this court is decidedly against the plaintiff, it is unnecessary to give any opinion upon those objections.

*Judgment reversed.*

JUDGMENT.—This cause came on to be heard **290\*** on the transcript of the record of the Circuit Court for the District of Columbia in the county of Alexandria, and was argued by counsel. On consideration whereof, this court is of opinion that the said Circuit Court erred in instructing the jury, "that if they should be of opinion, from the evidence, that the said bills were drawn for the full and valuable consideration expressed on the face of them, paid by the said Prior to the said Welch, and if there be no other evidence than what is hereinbefore stated, they ought to infer from the said evidence that the said Prior was, and is such an assignee of the right of action upon the covenant aforesaid as authorizes him to sustain the action in the name of the said Welch's administrator for the whole debt due by the said covenant, at the time of the said Welch's delivering the said account to the said Prior." It is therefore adjudged and ordered, that the judgment of the said Circuit Court in this case be, and the same is hereby reversed and annulled. And it is further ordered, that the said cause be remanded to the said Circuit Court, with directions to issue a *venire facias de novo*.

See S. C., 1 Wheat. 233.

Cited—5 Pet. 394, 598; 6 Pet. 297; 1 Sumn. 141, 142, 146; 11 Bank. Reg. 159, 300, 301; 12 Bank. Reg. 395; 1 Curt. 241, 242; 3 Wood. & M. 386; 2 McLean, 236; 2 Ben. 13; 2 Ware (Da.), 207; 13 Nott. & H. 241.

**291\*** [PRACTICE.]

### WALLACE v. ANDERSON.

An information for a *quo warranto*, to try the title to an office, cannot be maintained but at the instance of the government; and the consent of parties will not give jurisdiction in such a case.

**E**RROR to the Circuit Court of Ohio.

This was an information for a *quo warranto*,

brought to try the title of the defendant to the office of principal surveyor of the Virginia military bounty lands north of the river Ohio, and between the rivers Sciota and Little Miami. The defendant had been appointed to the office by the state of Virginia, and continued to exercise its duties until the year 1818, during a which time his official acts were recognized by the United States. In that year he was removed by the Governor and council of Virginia, and the plaintiff appointed in his place. The writ was brought, by consent of parties, to try the title to the office, waiving all questions of form, and of jurisdiction. Judgment was given in the court below for the defendant, and the cause was brought by writ of error to this court.

The cause was argued by *Mr. Hardin* for the plaintiff, and by the *Attorney-General* and *Mr. Scott*, for the defendant. But as the cause was dismissed for want of jurisdiction, it is deemed unnecessary to insert the argument.

\**Mr. Chief Justice MARSHALL* delivered the opinion of the court, that a writ of *quo warranto* could not be maintained except at the instance of the government, and as this writ was issued by a private individual, without the authority of the government, it could not be sustained, whatever might be the right of the prosecutor, or of the person claiming to exercise the office in question. The information must therefore be dismissed.

*Judgment reversed.*

JUDGMENT.—This cause came on to be heard on the transcript of the record of the Circuit Court for the District of Ohio, and was argued by counsel. On consideration whereof, this court is of opinion that no writ of *quo warranto* can be maintained, but at the instance of the government; and as this is a writ issued by an individual without the authority of government, it is the opinion of this court that the same cannot be sustained, whatever may be the right of that individual, or of the person who claims to exercise the office, to try the title to which, the writ is brought. It is therefore, the opinion of this court, that the judgment of the Circuit Court ought to be reversed, and the cause remanded to that court, with directions to dismiss the information because it is not filed at the instance of the United States.

Cited—3 Wall. 239.

NOTE.—The writ of *quo warranto* was in the nature of a writ of right for the king, against him who claimed or usurped any office, franchise, or liberty, to inquire by what authority he supported his claim, in order to determine the right.

3 Bl. Com. 262.

The *quo warranto* at common law was a criminal proceeding; and in addition to the judgment of seizure, or of ouster, there was judgment that the defendants be taken to make fine to the king for the usurpation. The information in the nature of a *quo warranto*, under the statute of New York, was strictly a criminal proceeding, being for the usurpation of a state prerogative.

*Attorney-General v. Utica Insurance Company*, 2 John. Ch. 377.

It was held to be so far a criminal proceeding in the cases of *Rex v. Bennett* (1 Str. 101), *Wheat. 5*.

and of *The King v. Jones* (8 Mod. 201), that the king's bench did not deem itself authorized even to award a new trial. But it is now so far considered a civil proceeding that a new trial may be granted. *King v. Francis*, 2 Term. R. 484. But this was not decisive as to whether it be properly of a civil or criminal nature, for the power to award new trials was subsequently exercised in all cases of misdemeanors. 6 Term. R. 638.

In New York, the writ of *quo warranto*, and proceedings by information in the nature of *quo warranto* are abolished; and the remedies heretofore obtainable in those forms are now obtained by civil actions under the code of procedure. Code, s. 428; 4 Seld (N. Y.) 71.

The action under the code in New York, although differing in some of the formula of procedure from proceedings by information, or by writ, is nevertheless in substance the same, and is governed by



293\*] \* [LOCAL LAW.]

## POLK'S LESSEE v. WENDELL ET AL.

There are cases in which a grant is absolutely void; as where the state has no title to the thing granted, or where the officer had no authority to issue the grant, &c. In such cases, the validity of the grant is necessarily examinable at law.

A grant raises a presumption that every prerequisite to its issuing was complied with, and a warrant is evidence of the existence of an entry; but where the entry has never in fact been made, and the warrant is forged, no right accrues under the act of North Carolina of 1777, and the grant is void.

Where a party, in order to prove that there were no entries to authorize the issuing of the warrants, offered to give in evidence certified copies of warrants from the same office, of the same dates and numbers, but to different persons, and for different quantities of lands: Held, that this was competent evidence to prove the positive fact of the existence of the entries specified in the copies; but that in order to have a negative effect in disproving the entries alleged to be spurious, the whole abstract ought to be produced in court, or inspected under a commission, or the keeper of the document examined as a witness, from which the court might ascertain the fact of the non-existence of the contested entries.

In such a case, certificates from the secretary's office of North Carolina, introduced to prove that on the entries of the same dates with those alleged to be spurious, other warrants issued, and other grants were obtained in the name of various individuals, but none to the party claiming under the alleged spurious entries, is competent circumstantial evidence to be left to the jury. In such a case, parol evidence, that the warrants and locations had been rejected by the entry-taker as spurious, is inadmissible.

It seems that, whether a grant be absolutely void, or voidable only, a junior grantee is not, by the law of Tennessee, permitted to avail himself of its nullity as against an innocent purchaser without notice.

**E**RROR to the Circuit Court of West Tennessee. This was an action of ejectment, **294\*** for five thousand acres of land, in the state of Tennessee, granted by the Governor of North Carolina to Polk, the lessor of the plaintiff, on the 6th of May, 1800, on a warrant from John Armstrong's office, dated May 25th, 1784. The defendants, who were proved to be in possession of part of this tract, claimed title under a grant from the Governor of North Carolina to John Seveir, for twenty-five thousand and sixty acres, bearing date on the 28th of August, 1795. This grant appears by the annexed certificate of survey to be founded on forty land warrants of six hundred and forty acres each, numbered from 1634 to 1676, and surveyed in one entire tract. The land in dispute was proved to lie within the lines of Seveir's grant. The plaintiff having proved that John Carter was entry-taker of Washington county until February 28th, 1780, and that Landon Carter was then appointed, offered in

evidence an office copy of an abstract (marked K. in the transcript) of the warrants, on which Seveir's survey and grant were founded; the original book of entries being destroyed. From this copy it appeared that all the warrants were issued from the Washington county office in April or May, 1780, to the surveyor of Sullivan county, and purported to be founded on entries which bore date on the 16th of September, 1779. They were all signed "Landon Carter, entry-taker." He also produced, and offered to give in evidence, office copies of warrants from the same office (marked H. and L. in the transcript), of the same dates and numbers, but to different persons, and for different quantities of land. These warrants appeared \*to be issued by John Carter; [**\*295** and were offered, like Seveir's warrants, for the purpose of showing that the latter were spurious, and, consequently, that Seveir's grant was void. The plaintiff also offered in evidence a grant of Seveir for 32,000 acres, dated 27th of November, 1795, which purported to be founded on thirty-six warrants, all of them, except the two first on alleged entries, dated on the same 16th of September, 1779. He also offered to prove that the two first warrants had been satisfied by prior grants, and in respect to the others, that warrants for the same numbers issued to other persons, and were recognized in the abstract of Carter's entry-book, but none of Seveir's. The plaintiff also offered to prove that the warrants and locations of Seveir had been insinuated, in 1794 or 1795, into the entry-taker's office without his knowledge; that they were rejected by the entry-taker as spurious, and that the locations were in Seveir's handwriting. The plaintiff also offered to give in evidence a report to the legislature of Tennessee, of November 8th, 1803, declaring all Seveir's warrants to be fraudulent fabrications. All this testimony was overruled and rejected by the court, to which the plaintiff excepted. A verdict was taken, and judgment rendered for the defendants, and the cause was brought by writ of error to this court.

*Mr. Harper* and *Mr. Gaston*, for the plaintiff, argued: 1. That it was competent for the plaintiff to show that no entries had been made in the land-office of North Carolina, and that therefore the governor had no power to issue the grant. The act of 1777, c. 1, s. 3, makes the entry the first essential \*and [**\*296** indispensable requisite to obtaining a title to vacant land. The 5th section points out the difference between location, entry, and warrant. The entries are the foundation of the claim, and are all to be numbered in the order in which they are made. The 9th section de-

all the rules which regulated the proceedings under the former practice. 30 Barb. 501.

The modern information, in the nature of the writ of *quo warranto*, tends to the same purpose as the ancient writ; being properly a criminal prosecution, in order to fine the defendant for his usurpation, as well as to oust him from his office; yet is usually considered at present as merely a civil proceeding.

4 Black. Com. 307, 308.

The only proper proceeding, for trying the title to an office, is the action, in the nature of *quo warranto*, brought by the people of the state.

Mayor of New York v. Conover, 5 Abb. Pr. 171;

Lewis v. Oliver, 4 Abb. Pr. 121; People v. Sampson, 25 Barb. 254; 24 N. Y. 86.

A proceeding in the nature of a *quo warranto* must be in the name of the United States. Territory v. Lockwood, 3 Wall. 236; United States v. Lockwood, Burn. 215.

An information in the nature of *quo warranto* lies against those who claim to exercise some public office or authority; to inquire into the election of an officer of a corporation. Commonwealth v. Dearborn, 15 Mass. 125; Commonwealth v. Fowler, 10 Mass. 290; Commonwealth v. Union Ins. Co., 5 Mass. 230; Commonwealth v. Athearn, 3 Mass. 285; Sudbury v. Stearns, 21 Pick. 148. A *quo warranto* cannot put the legal officer in his place. Strong, petitioner, 20 Pick. 484, 497.

clares every right obtained in any other manner "utterly void." This section follows the directions in regard to the entry, and makes a valid entry the one thing needful. In the construction of this statute, it has been settled in the courts of North Carolina that no legal title is created until the grant; and that the elder grant, though founded on a junior entry, is, at law, to be preferred to a junior grant on an elder title; that an equitable interest is acquired by the first entry, which is to be enforced as other equitable titles are enforced. It is also settled, that when a grant issues, it furnishes sufficient *prima facie* evidence that all the prerequisites of the law have been complied with, and that it cannot be avoided by showing irregularities in the conduct of the officers who superintended the progress of the claim from the entry to the grant. There have been loose *dicta*, unsatisfactory and inconclusive reasonings, from which other inferences have been drawn. But it is denied that it ever was law in North Carolina that a grant should be good if it could be clearly shown that it was not founded on an entry, but was wholly fraudulent. It would have been impossible to pronounce such a decision without a violation of the plain, strong words of the 9th section of the act, "shall be deemed, and are hereby declared utterly void." Such **297**]\* a decision, too,\* would have been inconsistent with the first principles of the common law, fraud being the object of its peculiar abhorrence, and contaminating every act.<sup>1</sup> Courts of common law have a concurrent jurisdiction with courts of equity in all cases of frauds.<sup>2</sup>

It is impossible that a grant, begun and ended in fraud, where there has been no claim entered, nor purchase made from the state, should be valid. If, however, a doubt could exist in the case of a grant issuing before the year 1789, assuredly none can be entertained on a grant made by the Governor of North Carolina since the cession of the territory, which now forms the state of Tennessee, to the United States. By the act of cession, the sovereignty and domain are relinquished by North Carolina, and a mere ministerial power is reserved to the governor of that state to perfect grants; "where entries have been made agreeably to law, and the titles not perfected." The state has no longer authority to dispose of the lands. She is no longer their proprietor. The governor has a mere naked power, unconnected with an interest, to make grants where entries have been previously made. A grant issued where no entry has been made, is an act wholly unsupported by the power, and cannot possibly transfer an interest. The whole question has, in fact, been already settled by the reasoning and decision of this court, when this case was **298**]\* formerly before it.<sup>3</sup> \*2. The evidence offered by the plaintiff was proper in itself, and relevant to show that no entries had been made, prior to the cession, authorizing the

Governor of North Carolina to make a grant to Sevier. The best evidence was offered of the pretended warrant on which his grant was founded, and, also, to show that other warrants existed of precisely the same numbers. This alone raised a presumption that one or the other must have been spurious. According to the act of 1777, c. 1, s. 5, there could not possibly be two sets of entries of the same numbers, without the most extraordinary negligence. This testimony ought to have gone to the jury, even if there had been no other. It should have been left to them to decide which of the two sets of warrants was spurious under the peculiar circumstances of the case. But it was supported by corroborating evidence of great weight; by the abstract of Carter's entries. The competency of this evidence may be maintained both on the ground of common law principles and on special enactments of the local legislature. It is the best which the nature of the case admits of. Works compiled by authority and order of the government of the country, on public occasions, and on subjects of public interest, are recognized as authentic documents in courts of justice, and admitted as evidence in matters of private right. Such are, in England, the celebrated Domesday Book; the Survey of King's Ports; the Valor Beneficiorum;<sup>4</sup> copies of Surveys of Church and Crown Lands; \*kept in un- [\***299** suspected repositories.<sup>5</sup> The day-book of a prison, containing a narrative of the transactions there, is proof of the time of a prisoner's commitment.<sup>6</sup> So, terriers are evidence of manorial boundaries, either when found in the regular repositories or in places where the custody can be satisfactorily explained.<sup>7</sup> But, in this case, there are positive statutes of the legislature of Tennessee by which this book of entries and copies from it are made evidence.<sup>8</sup> In addition to all this, was the parol evidence. The introduction of these locations and warrants into the office in 1795, in a secret manner, betrayed a consciousness that they had not before existed there. This accumulation of proof fully established the plaintiff's allegation; or, at all events, it had a tendency to establish it, and its sufficiency ought to have been left to the jury. As to the legislative report, there is some reason to believe that the legislature of Tennessee intended, by their act of 1807, c. 82, to make it evidence. At least it might have been proper evidence to bring home notice to the defendants, prior to their purchase.

The *Attorney-General* and *Mr. Williams*, contra, insisted: 1. That the proceedings on which a grant issues are to be presumed to be correct. They constitute a question between the state and the grantee \*only. Be- [\***300** tween private parties, evidence *dehors* the patent is wholly inadmissible at law.<sup>9</sup> 2. The testimony offered in this case was clearly inadmissible upon the principles of the former decision of this court, in which, it may be added,

1.—Ferner's case, 3 Co. Rep. 77.

2.—3 Bl. Com. 431; *Bates v. Graves*, 2 Ves., Jun., 295; 8 Ves., Jun., 283; *Arthur Legat's case*, 10 Co. Rep. 109.

3.—9 Cranch, 87.

4.—Gilb. Law of Evid. 69; *Phillips on Evid.* 303, 304.

Wheat. 5.

5.—*Phillips*, 304; 11 East, 234; 1 Maul. & Selw. 294.

6.—*King v. Aikley*, cited *Phillips*, 213.

7.—*Phillips*, 316, 317.

8.—*Laws of Tenn.* 261.

9.—*Spalding v. Reeder*, *Maryl. Rep.* 187; 1 Hayw. 106; *Id.* 135; *Id.* 359; *Id.* 497; 3 Hayw. 215; 1 Tenn. Rep. 318; 2 Tenn. Rep. 25; *Id.* 47.



that the court has gone further than the local courts in permitting inquiries into facts occurring prior to the issuing of a grant.<sup>1</sup> The court below gave no opinion upon any specific evidence, but on the general question, and rejected the whole testimony, which was offered to prove that the warrants were forged. But in order to prove this, the production of the warrants was indispensable, and no inferior proof ought to have been received. The abstract is defective, because it is only of a part of a record, when it ought to be of the whole, and so certified. It is a part only of a copy of a copy. The attempt to infer the spuriousness of the warrants from the identity of the numbers, was justly repelled, because the same numbers are often given to many warrants, and it can seldom be shown on what entry the grant issued. The report of the select committee of the legislature was also inadmissible as evidence; both because there is no proof that it was ever acted on by the house and because the state of Tennessee had, at the time, no authority over the lands, North Carolina having retained the right of completing titles originating before the cession. 3. But, even **301\*** supposing the grant under \*which the defendants claim to have been fraudulently obtained by the original grantees, as they are *bona fide* purchasers without notice, they are entitled to the protection of the court.<sup>2</sup> The courts of Tennessee have established the doctrine, that even in the case of a void grant, a junior grantee shall not avail himself of its nullity as against an innocent purchaser without notice.<sup>3</sup>

*Mr. Justice JOHNSON* delivered the opinion of the court: Both these titles are founded on what are called removed warrants, and priority of entry is altogether immaterial to the issue. But the existence of an entry, it is contended on behalf of the plaintiff, is indispensable to the issuing of a warrant of survey, and to the validity of grants, which ought by law to have their origin in such entries. With a view, therefore, to impeach the prior grant to Sevier, under which these defendants claim, the plaintiff proposes to prove that there never were in fact any entries made to justify the issuing of the warrants under which their title had its inception. It has been also suggested, that his intention further was to prove the warrants themselves forgeries. But this does not appear from the bill of exceptions, as will be more particularly shown when we come to analyze it, with a view of determining what evidence appears to have been rejected in the Circuit Court. **302\*** The evidence offered in the court below, with a view to invalidating Sevier's grant, was rejected, and on the writ of error to this court, one general question arises, whether any, and if any, what evidence of facts, prior to the issuing of a grant, shall be received to invalidate it.

When the case was before this court, in the year 1815, the same question was brought to its notice, and received its most earnest and anxious attention. Long experience had satisfied

the mind of every member of the court of the glaring impolicy of ever admitting an inquiry beyond the dates of the grants under which lands are claimed. But the peculiar situation of Kentucky and Tennessee, with relation to the parent states of Virginia and North Carolina, and the statutory provisions and course of decisions that have grown out of that relation, has imposed upon this court the necessity of pursuing a course which nothing but necessity could have reconciled to its ideas of law or policy. The sole object for which jurisdiction of cases, between citizens of different states, is vested in the courts of the United States, is to secure to all the administration of justice, upon the same principles on which it is administered between citizens of the same state. Hence, this court has never hesitated to conform to the settled doctrines of the states on landed property, where they are fixed, and can be satisfactorily ascertained; nor would it ever be led to deviate from them, in any case that bore the semblance of impartial justice.

It has been supposed, that in the former decision alluded to in this case, this court has gone beyond \*the decisions of the courts [**303** of Tennessee, in opening the door to inquiries into circumstances occurring prior to the issuing of a grant.

An attentive perusal of that decision will detect the error; or prove, if it has done so, it has done it on principles that cannot be controverted.

It is obvious from the report of the decision that it was at that time presented under an aspect somewhat different from that in which it now appears. The forgery of the warrants constituted a part of the case which the plaintiff was precluded from making out in evidence. And to collect the purport of the decision, at that time rendered, the best resort will be to the words in which it is delivered.

Two sentences will give the substance of that decision. They are expressed in the following words: "But there are cases in which a grant is absolutely void; as where the state has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases, the validity of the grant is necessarily examinable at law." And "If, as the plaintiff offered to prove, the entries were never made, and the warrants were forgeries, then no right accrued under the act of 1777; no purchase of the land was made from the state; and independent of the act of cession to the United States, the grant is void by the express words of the law."

These two sentences comprise the substance of that decision. For, as to the doubts expressed in the last paragraph of the opinion, relative to the inception of a right in the ceded territory prior to the cession, it is but a doubt, and is removed by a reference \*to the [**304** 6th section of the act of 1784. As to the question what evidence shall be sufficient to prove the existence of the entry, the court is silent. As to what validity shall be given to the grants emanating from North Carolina, the decision places it upon the statutes of North Carolina. And although an opinion is expressed that North Carolina could make no new grants after the cession, who could have entertained a doubt upon that question? The right reserved to her—

Wheat. 5.

1.—9 Cranch, 98.

2.—Fletcher v. Peck, 6 Cranch, 133.

3.—Miller v. Holt, 1 Tenn. Rep. 111.

was to perfect incipient grants; but what restraint is imposed upon her discretion? or what doubt suggested of her good faith in executing that power?

It will be perceived, that as to irregularities committed by the officers of government prior to the grant, the court does not express a doubt but that the government, and not the individual, must bear the consequences resulting from them. On the contrary, it declares that the existence of the grant is, in itself, a sufficient ground, from which every man may infer that every prerequisite has been performed. All, then, that it decides is, that an entry was indispensable as the inception of a title to Sevier; that if an original grant had issued to him after the cession, or a title had been perfected where there was no incipient title before the cession, as in the case of a grant on a forged warrant, and no entry, that it would be void. But, in admitting that the grant shall support the presumption that every prerequisite existed, it necessarily admits that a warrant shall be evidence of the existence of an entry. Nor is it by any means conclusive to the contrary that **305** the entry does not appear upon the abstract of entries in Washington county, recorded in the secretary's office. On the contrary, if the warrants issued are signed by the entry-taker, it is conclusive that the locations were received by him, and if he omitted to enter them, his neglect ought not to prejudice the rights of him in whose favor the warrants were issued.

That an entry is necessary to give validity to these grants, we think not only perfectly deducible from the statutory provisions in force in Tennessee, but also from the legal adjudications of their courts. Nay, they have not assumed the principle, that the issuing of the grant shall be deemed a recognition of the legal sufficiency of an entry; but have decided a grant void which emanated from an entry not sanctioned by the statutes of North Carolina, though the grant was issued when it might have lawfully issued. (*Jackson v. Honeycutt*, 1 Tenn. Rep., 30.) And in the case of *Dodson v. Cocke & Stewart*, so much relied on in the argument, the legal validity of a grant is expressly referred to the validity of the entry at the time it was made. (*Id.* 232.) It would, indeed, be wonderful if it were otherwise, since it is the acknowledged law of Tennessee, that a prior entry will give precedence to a junior grant; a principle which obviously supposes the entry to be of the essence of the transfer of property; the grant, that which gives it palpable existence; or, at least, that it holds the freehold in abeyance, ready to vest upon the contingency of the expected grant.

It has also been asserted, that the courts of the state of Tennessee have frequently, and uniformly **306** formally, decided directly the reverse of the opinion of the Supreme Court. This assertion has reference to that part of the opinion which declares, that a grant issuing "without entry, and on forged warrants," is a void grant. Such an idea could only have resulted from inattention to the obvious distinction between the acts of the state's agents or officers and the impositions practiced upon them; between the case of a right really incipient, and that where no right ever did exist. How could the state of North

Carolina have been performing an act toward perfecting a right, where, by the supposed case no right could possibly have existed, no entry ever was made, and the warrant forged? A new grant, it must be admitted, she could not have made; but would not this have been a new grant? We will respect the decisions of the state tribunals, but there are limits which no court can transcend.

But the courts of Tennessee have not so decided. In the case of *Dodson v. Cocke & Stewart*, it will be found that the marginal note of the decision is too general in its expression, and that the court decides nothing but what has been expressly admitted by this court, since the legal validity of the entry is made the very basis of that decision. So of the case of *Serier & Anderson v. Hill*, the only point on which the judges seem to have coincided was, that no other consideration should be proved than what the grant expressed on the face of it (see the opinion of Judge Humphreys). If any other point is decided, it is immaterial to the present question.

\*This court disavows having ever de- **307** cided more than that an entry, or other legal incipency of title, was necessary to the validity of a grant issued by North Carolina, for lands in Tennessee, after the separation. They have never expressed an inclination to let in inquiries into the frauds, irregularities, acts of negligence, or of ignorance of the officers of government, prior to the issuing of the grant; but, on the contrary, have expressed the opinion that the government must bear the consequences. But while they admit that a genuine warrant shall be in itself the evidence of an entry, they cannot yield to the absurdity of attaching that effect to a forged warrant.

With regard to the decisions of the state of North Carolina, it is a well-known fact, that on the subject of the effect of entries, the courts of the two states are at direct variance. And, singular as it may seem, opposite constructions of the same laws constitute rules of decision to their respective courts. And if it is the law upon their own citizens, we are willing to apply the same rules of property to all others. But even the courts of that state, in their rigid adherence to the dates and effect of grants, and the principle that they are not void but voidable, are sometimes driven to the most awkward shifts in adjudicating on cases affected by the act of 1777. Thus, in *The Trustees of the University v. Surger* (Taylor's Rep., 114), they have said, that although "they cannot declare a grant void, they will adjudge that the grantee takes nothing under it." And in a case decided in 1802 (N. Carolina Rep., 441), they have found **308** themselves compelled, under their acts of 1777, 1778 and 1783, to declare a grant absolutely void, on the ground of the invalidity of the entry with reference to facts that required the intervention of a jury. So that it would seem even in North Carolina a valid entry was indispensable to a valid grant. That priority of entry would not give priority to a junior grant is certainly decided in the case of *Williams v. Wells*, reported in the North Carolina Law Repository, 383. But even that point, it would seem, had not been well established as a principle of law, since the jury in that case (which is a recent one) manifested their dissat-



isfaction with the charge of the court, by finding against it.

There was one point made in the argument of this case, which, from its general importance, merits our serious attention, and which may have entered into the views of the Circuit Court in making their decision. It was, whether, admitting this grant to be void, innocent purchasers without notice, holding under it, should be affected by its nullity.

This would seem to depend on the question, whether we shall, as to innocent purchasers, view it as a void or voidable grant.

On general principles, it is incontestable, that a grantee can convey no more than he possesses. Hence, those who came in under the holder of a void grant can acquire nothing. But it is clear that the courts of the state of Tennessee have held otherwise. In *Miller v. Holt* (1 Tenn. Rep., 111), it is expressly adjudged, that **309\***] whether a grant be \*void or voidable, a junior grantee shall not avail himself of its nullity as against an innocent purchaser without notice. Yet the North Carolina act of 1777 certainly declares grants obtained by fraud to be absolutely void. And the same result must follow where the state has relinquished its power to grant, or no law exists to support the validity of a grant. But it seems that the courts of Tennessee have adopted this distinction, that grants in such cases shall be deemed void only as against the state, and not then until adjudged so by some process of law. That as between individuals, the title shall be held to vest *sub modo*, and innocent purchasers, without notice, shall not be ousted by the intervention of a subsequent grantee.

If this be the settled law of Tennessee, we are satisfied that it should rest on the authority of adjudication. There is certainly a palpable distinction between the cases of an original grantee and a subsequent purchaser without notice. There can be no reason why the grantee should be favored by the leaning of courts; but the latter, finding the grantee in possession of the patent of the state, which on its face presents nothing to put him on his guard, has strong claims upon the favor of courts, and the justice of the country.

Upon analyzing the bill of exceptions, it will be found that the plaintiff does not propose to prove in express terms that the warrants in this case were forgeries. But, with a view to proving that there were no entries to authorize the issuing of the warrants, he tenders various **310\***] certified documents from \*the several offices of North Carolina and Tennessee, from which he would raise an inference that it was impossible that such entries could have existed; and then tenders parol evidence to prove that the locations on which the warrants purport to have issued had never been passed to entry, and together with the warrants and surveys founded upon them had been rejected by a particular entry-taker (the successor of him who is supposed to have issued these warrants), on the ground of their being spurious and invalid. Also, that they had been reported as spurious by a committee of the Tennessee legislature.

As the exception does not come up on a misdirection of the court, but generally on the rejection of the evidence offered, the only remaining questions arise on its legal competency.

And, first, we are of opinion that the document marked K. in the transcript of the record was competent evidence to prove the fact of the existence of the entries therein specified, and so far it ought to have been admitted, because it is expressly made evidence by the act of the 21st of September, 1801. But, as far as a negative use was intended to be made of that abstract, we are of opinion, the certificate of the officer was properly rejected. There is no such effect given either to that document or the clerk's certificate, by any legislative act, and such an effect could only be given to the production of the whole abstract, from which the court might, by inspection, have ascertained the fact of the non-existence of the contested entries; or from an examination \*of the [**311** keeper of that document as an ordinary witness, or inspection of it made under a commission.

The documents offered, marked H. & L., were numerous certificates from the secretary's office of North Carolina, of warrants and grants, introduced to prove that on the entries of the dates specified as the dates of the entries to Sevier, other warrants issued, and other grants were obtained in the name of various individuals, but none to Sevier. This evidence, also, we are of opinion, was competent circumstantial evidence, and ought not to have been wholly rejected.

With regard to the report of the committee of the house, we can hardly think it could have been seriously offered; and the parol evidence respecting the rejection by the subsequent entry-taker, was also properly rejected, inasmuch as the rejection of the return of these warrants and surveys was a perfectly immaterial circumstance upon this issue. It might as well have been the result of that entry-taker's folly, or his wrong, as of any other cause. The emanation of the grant is sufficient evidence that the claim of Sevier must have met with a more favorable reception from a higher quarter. Upon the whole, the only ground on which we could sustain the decision in the court below is, that a subsequent purchaser without notice is not to be affected by any legal defects in a grant which might have issued conformably to existing laws. For, in that case, all the evidence rejected may have been immaterial to the issue. But, *non constat*, that the evidence rejected was \*not connected with proof to rebut that [**312** defense. It is, therefore, not necessary here to decide definitively on that point of the law. If it is the received doctrine of the Tennessee courts, we have expressed our inclination not to shake it. But the cause must necessarily be sent back upon the rejection of the documents marked H. K. & L.

*Judgment reversed.*

JUDGMENT.—This cause came on to be heard on the transcript of the record of the Circuit Court for the District of West Tennessee, and was argued by counsel. On consideration whereof, it is the opinion of this court that there is error in the proceedings of the said Circuit Court in rejecting the documents marked in the transcript of the record with the letters H. K. & L., as incompetent evidence. It is therefore adjudged and ordered, that the judgment of the Circuit Court, for the District of

Wheat. 5.

West Tennessee, in this case, be, and the same is hereby reversed and annulled. And it is further ordered, that the said cause be remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Rev'g—2 Avert. 433.

Cited—7 Wheat. 5; 11 Wheat. 384; 2 Pet. 237; 7 Pet. 241; 12 Pet. 437; 13 Pet., 448; 15 Pet. 106; 18 Wall. 118.

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[\*CHANCERY.]

### MARSHALL v. P. R. BEVERLEY.

In equity, a final decree cannot be pronounced until all parties in interest are brought before the court.

Where a bill was filed for a perpetual injunction, on judgments obtained on certain bills of exchange drawn by the plaintiff, and negotiated to the defendant, and which had subsequently passed from the latter into the hands of third persons, by whom the judgments were obtained; held, that the injunction could not be decreed until their answers had come in, although the bill stated, and the defendant admitted, that he had paid the judgments, and was then the only person interested in them, because such statement and admission might be made by collusion.

**A**PPEAL from the Circuit Court of Virginia.

Carter Beverley, being indebted to the appellant, Horace Marshall, assigned to him several bills of exchange, amounting, in the aggregate, to £900 sterling, which had been drawn by the respondent, Peter R. Beverley, on Bird Beverley, of London, in favor of the said Carter Beverley. These bills were severally transferred, for valuable consideration, by the appellant, to Luke Tiernan & Co., Stewart Montgomery & Co., Jesse Eichelberger & Co., and Cornelius and John Comegys; and having been forwarded by them to London for payment, were protested for non-acceptance and non-payment, and so returned. Suits were instituted by these parties against Peter R. Beverley, on which he confessed judgments. Having been taken in execution and **314\***] imprisoned, he gave bond for the prison bounds, which he broke. A second series of suits

were brought on the prison bounds bonds, after judgments on which, he filed the present bill against Horace Marshall, Carter Beverley, Luke Tiernan & Co., Stewart Montgomery & Co., Jesse Eichelberger & Co., Cornelius and John Comegys, and John Brown, charging usury in the transactions between Carter Beverley and Horace Marshall, and a fraudulent sale of certain slaves of Carter Beverley, on which Horace Marshall retained a lien, as a collateral security for his debt; and charging, also, that although the suits were in the name of Luke Tiernan and others (to whom the bills had been transferred), they were, in fact, for the complainant's benefit, he having paid to his indorser what was due on those bills. On these grounds, a perpetual injunction was prayed for and awarded. The appellant, by his answer, admitted the last allegation, but denied the usury, and insisted that the sales of Carter Beverley's negroes had been made in strict conformity with the deed of trust under which they were sold. None of the other defendants answered the bill.

This cause was argued by the *Attorney-General* for the appellant, and by *Mr. Jones* and *Mr. Taylor* for the respondent.

*Mr. Justice LIVINGSTON* delivered the opinion of the court: This is an appeal from a decree in equity, of the Circuit Court for the District of Virginia,\*to which the following objec-[\***315** tions have been made:

1st. That there is a defect of parties. Although all the persons in interest are made defendants to the bill, yet none of them had appeared to it except the appellant, on whose answer, and the proofs in the cause, the decree was made.

2d. Another objection is, that there was competent relief at law against the usurious contract stated in the bill; but as no defense of this kind was there set up, a court of chancery ought not to have interfered, especially after judgment had been obtained on the bills, and even on the prison bounds bonds, which were taken on the execution which had issued on those judgments.

3d. It is also contended that there was no

NOTE.—A bill filed by a non-consenting stockholder of a railroad corporation which had become consolidated with three others, to have the consolidation declared void, and proceedings under it enjoined, may be dismissed, if the president and directors of the consolidated company are not made defendants. *Tyson v. Virginia R. Co.*, 1 *Hugh*. 80.

The proper time to take objection for want of parties, is upon opening the pleadings, and before the merits are discussed; but it frequently happens that after a cause has been heard, the court feels compelled to let it stand over for the purpose of amendment. 1 *Barb. ch. Pr.* 320; *Jones v. Jones*, 3 *Atk.* 111; *Darwent v. Walton*, 2 *Atk.* 510.

The objection for want of parties ought to proceed from the defendant. *Innes v. Jackson*, 16 *Ves.* 356. Where plaintiff was not aware, at the commencement of the action, that there are other parties who should be joined, he ought to apply as soon as he has obtained that knowledge. *Id.*

An objection at the hearing for want of a particular party, may be obviated by plaintiff's waiving the relief he is entitled to against such party. *Pawlet v. Bishop of Lincoln*, 2 *Atk.* 296. All persons interested in the object of the bill are necessary and proper parties. *Cockburn v. Thompson*, 16 *Ves.* 321, 326; *Adair v. New River Co.*, 11 *Ves.* 429; *Wendell v. Van Rensselaer*, 1 *John. Ch.* 349; *Wiser v. Blackley*, 1 *John. Ch.* 437; *Brasher v. Van Cort*. *Wheat.* 5. U. S., Book 5.

*land*, 2 *John. Ch.* 245, 247; *West v. Randall*, 2 *Mason*, 190; *Hallett v. Hallett*, 2 *Paige*, 15; *Joy v. Wirtz*, 1 *Wash. C. C.* 517; *Elmendorf v. Taylor*, 10 *Wheat.* 152; *Crocker v. Higgins*, 7 *Conn.* 342.

If complete justice between the parties before the court cannot be done without other parties being made, whose rights or interests will be prejudiced by a decree, then the court will altogether stay its proceedings, even though those other parties cannot be brought before the court; for, in such cases, the court will not, by its endeavors to do justice between the parties before it, risk the doing of positive injustice to other parties, not before it, whose claims are or may be equally meritorious. *Harding v. Harding*, 11 *Wheat.* 126; *Hallett v. Hallett*, 2 *Paige*, 15; *West v. Randall*, 2 *Mason*, 190-196; *Fell v. Brown*, 2 *Bro. Ch.* 276; *Joy v. Wirtz*, 1 *Wash. C. C.* 517; *Ward v. Arredondo*, 1 *Paine*, 410; 1 *Hopk.* 213; *Story Eq. Pl. s. 77*; *Bailey v. Inglee*, 2 *Paige*, 278; *Davis v. Mayor*, 14 *N. Y.* 506; 2 *Duer*, 663; *Hoxie v. Carey*, 1 *Sumn.* 173; *Cameron v. Roberts*, 3 *Wheat.* 591; *Shields v. Baron*, 17 *How.* 130.

The want of proper parties to a bill is a good defense in equity. *Story, Eq. Jur. s. 1526*; *Cooper, Eq. Pl. ch. 1, p. 34*; *Miford, Eq. Pl. by Jeremy*, 163, 164; *McMahon v. Allen*, 12 *How. Pr.* 39; 3 *Abb. Pr.* 89; 1 *Hilt.* 103; *Powell v. Finch*, 5 *Duer*, 666; *Warnig v. Warnig*, 3 *Abb. Pr.* 246; *Shaver v. Brainard*, 29 *Barb.* 25; *Baldwin v. Lamar*, *Chase Dec.* 432; *Conn. v. Penn.*, *post*, 324.



usury in any of the contracts between the appellant and Carter Beverley, and that the sale of the negroes under the deed of trust was fair, and in strict pursuance of the authority vested in the trustee.

4th, and lastly. Admitting the usury, and a fraud in the sale, it is insisted that the respondent, being an entire stranger to these transactions, had no right to call the appellant to account, or to any relief as against him.

The court has had under its consideration all these objections; but will now give its opinion only on the first of them. We are all satisfied that when this decree was pronounced, the case was not prepared for a final hearing. The bills which had been drawn by P. R. Beverley, having passed by Marshall into the hands of third **316\*** persons, who had \*obtained judgments on them, and it being a principal object of the suit to enjoin further proceedings on them, the parties in whose favor they were rendered, ought not only to have been made defendants but a perpetual injunction ought not to have been decreed until their answers were filed. It was not enough in their absence that the complainant should state, and the defendant admit, that the latter had paid these judgments, and was now the only person interested in them. This might be done by collusion, and although that may not be the case here, it is not the course of a court of equity to make a decree which is to operate directly upon the parties in interest, as the perpetual injunction does here, without affording them an opportunity of being heard. For this error, the decree must be reversed, and the cause remanded for further proceedings.

*Decree reversed.*

DECREE.—This cause came on to be heard on the transcript of the record of the Circuit Court for the District of Virginia, and was argued by counsel. On consideration whereof, it is the opinion of this court that the said Circuit Court erred in perpetually enjoining the proceedings on the judgments obtained against the respondent, Peter R. Beverley, and the appellant, Horace Marshall, because the bills of exchange, which had been drawn by the said Peter R. Beverley, had passed into the hands of third persons, by whom the said judgments had been obtained, and before the answers of such creditors, who had been made defendants **317\*** to said bill of complaint, had come \*in. It is therefore decreed and ordered, that the decree of the said Circuit Court in this case be, and the same is hereby reversed and annulled. And it is further ordered, that the said cause be remanded to the said Circuit Court for further proceedings to be had herein according to law.

Cited—16 Wall. 451; 5 Biss. 28.

#### [CONSTITUTIONAL LAW.]

#### LOUGHBOROUGH v. BLAKE.

Congress has authority to impose a direct tax on the District of Columbia, in proportion to the census directed to be taken by the constitution.

The power of Congress to levy and collect taxes, duties, imposts and excises, is co-extensive with the territory of the United States.

The power of Congress to exercise exclusive jurisdiction in all cases whatsoever within the District of Columbia, includes the power of taxing it.

THIS case, which was an action of trespass brought in the Circuit Court for the District of Columbia, to try the right of Congress to impose a direct tax on that district, and in which the court below gave judgment for the defendant, was argued by *Mr. Jones* for the plaintiff, and by the *Attorney-General* for the defendant.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court: This case presents to the consideration of the court a single question. It is this: \*Has Congress a right to im- **[\*318]** pose a direct tax on the District of Columbia?

The counsel who maintains the negative has contended, that Congress must be considered in two distinct characters. In one character as legislating for the states; in the other, as a local legislature for the district. In the latter character, it is admitted, the power of levying direct taxes may be exercised; but, it is contended, for district purposes only, in like manner as the legislature of a state may tax the people of a state for state purposes.

Without inquiring at present into the soundness of this distinction, its possible influence on the application in this district of the first article of the constitution, and of several of the amendments, may not be altogether unworthy of consideration. It will readily suggest itself to the gentlemen who press this argument, that those articles which, in general terms, restrain the power of Congress, may be applied to the laws enacted by that body for the district, if it be considered as governing the district in its character as the national legislature, with less difficulty than if it be considered a mere local legislature.

But we deem it unnecessary to pursue this investigation, because we think the right of Congress to tax the district does not depend solely on the grant of exclusive legislation.

The 8th section of the 1st article gives to Congress the "power to lay and collect taxes, duties, imposts and excises," for the purposes thereafter mentioned. This grant is general, without limitation as to place. It consequently extends to all \*places over which **[\*319]** the government extends. If this could be doubted, the doubt is removed by the subsequent words which modify the grant. These words are, "but all duties, imposts, and excises, shall be uniform throughout the United States." It will not be contended that the modification of the power extends to places to which the power itself does not extend. The power, then, to lay and collect duties, imposts, and excises, may be exercised, and must be exercised throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of states and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States than Maryland or Pennsyl-

Wheat. 5.

vania; and it is not less necessary, on the principles of our constitution, that uniformity in the imposition of imposts, duties, and excises, should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously co-extensive with the power to lay and collect duties, imposts and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States.

The extent of the grant being ascertained, how far is it abridged by any part of the constitution?

The 20th section of the first article declares, that "representatives and direct taxes shall be apportioned among the several states which **320\*** may be included \*within this Union, according to their respective numbers."

The object of this regulation is, we think, to furnish a standard by which taxes are to be apportioned, not to exempt from their operation any part of our country. Had the intention been to exempt from taxation those who were not represented in Congress, that intention would have been expressed in direct terms. The power having been expressly granted, the exception would have been expressly made. But a limitation can scarcely be said to be insinuated. The words used do not mean that direct taxes shall be imposed on states only which are represented, or shall be apportioned to representatives; but that direct taxation, in its application to states, shall be apportioned to numbers. Representation is not made the foundation of taxation. If, under the enumeration of a representative for every 30,000 souls, one state had been found to contain 59,000, and another 60,000, the first would have been entitled to only one representative, and the last to two. Their taxes, however, would not have been as one to two, but as fifty-nine to sixty. This clause was obviously not intended to create any exemption from taxation, or to make taxation dependent on representation, but to furnish a standard for the apportionment of each on the states.

The 4th paragraph of the 9th section of the same article will next be considered. It is in these words: "No capitation, or other direct tax, shall be laid, unless in proportion to the census, or enumeration hereinbefore directed to be taken."

**321\*** The census referred to is in that clause of the constitution which has just been considered, which makes numbers the standard by which both representatives and direct taxes shall be apportioned among the states. The actual enumeration is to be made "within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct."

As the direct and declared object of this census is, to furnish a standard by which "representatives, and direct taxes, may be apportioned among the several states which may be included within this Union," it will be admitted that the omission to extend it to the district or the territories would not render it defective. The census referred to is admitted to be a census exhibiting the numbers of the respective states. It cannot, however, be admitted, that the argu-

ment which limits the application of the power of direct taxation to the population contained in this census is a just one. The language of the clause does not imply this restriction. It is not that "no capitation or other direct tax shall be laid, unless on those comprehended within the census hereinbefore directed to be taken," but "unless in proportion to" that census. Now, this proportion may be applied to the district or territories. If an enumeration be taken of the population in the district and territories, on the same principles on which the enumeration of the respective States is made, then the information is acquired by which a direct tax may be imposed on the district and territories, "in proportion to the \*census or enumeration" which the [**322** constitution directs to be taken.

The standard, then, by which direct taxes must be laid, is applicable to this district, and will enable Congress to apportion on it its just and equal share of the burthen, with the same accuracy as on the respective states. If the tax be laid in this proportion, it is within the very words of the restriction. It is a tax in proportion to the census or enumeration referred to.

But the argument is presented in another form, in which its refutation is more difficult. It is urged against this construction, that it would produce the necessity of extending direct taxation to the district and territories, which would not only be inconvenient, but contrary to the understanding and practice of the whole government. If the power of imposing direct taxes be co-extensive with the United States, then it is contended, that the restrictive clause, if applicable to the district and territories, requires that the tax should be extended to them, since to omit them would be to violate the rule of proportion.

We think a satisfactory answer to this argument may be drawn from a fair comparative view of the different clauses of the constitution which have been recited.

That the general grant of power to lay and collect taxes is made in terms which comprehend the district and territories as well as the states, is, we think, incontrovertible. The subsequent clauses are intended to regulate the exercise of this power, not to withdraw from it any portion of the community. \*The [**323** words in which those clauses are expressed import this intention. In thus regulating its exercise, a rule is given in the 2d section of the first article for its application to the respective states. That rule declares how direct taxes upon the states shall be imposed. They shall be apportioned upon the several states according to their numbers. If, then, a direct tax be laid at all, it must be laid on every state, conformably to the rule provided in the constitution. Congress has clearly no power to exempt any state from its due share of the burden. But this regulation is expressly confined to the states, and creates no necessity for extending the tax to the district or territories. The words of the 9th section do not in terms require that the system of direct taxation, when resorted to, shall be extended to the territories, as the words of the 2d section require that it shall be extended to all the states. They, therefore, may, without violence, be understood to give a rule



when the territories shall be taxed, without imposing the necessity of taxing them. It could scarcely escape the members of the convention that the expense of executing the law in a territory might exceed the amount of the tax. But be this as it may, the doubt created by the words of the 9th section relates to the obligation to apportion a direct tax on the territories as well as the states, rather than to the power to do so.

If, then, the language of the constitution be construed to comprehend the territories and District of Columbia, as well as the states, that language confers on Congress the power of **324\*** taxing the district \*and territories as well as the states. If the general language of the constitution should be confined to the states, still the 16th paragraph of the 8th section gives to Congress the power of exercising "exclusive legislation in all cases whatsoever within this district."

On the extent of these terms, according to the common understanding of mankind, there can be no difference of opinion; but it is contended that they must be limited by that great principle which was asserted in our revolution—that representation is inseparable from taxation.

The difference between requiring a continent, with an immense population, to submit to be taxed by a government having no common interest with it, separated from it by a vast ocean, restrained by no principle of apportionment, and associated with it by no common feelings; and permitting the representatives of the American people, under the restrictions of our constitution, to tax a part of the society, which is either in a state of infancy advancing to manhood, looking forward to complete equality so soon as that state of manhood shall be attained, as is the case with the territories; or which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government, as is the case with the district, is too obvious not to present itself to the minds of all. Although in theory it might be more congenial to the spirit of our institutions to admit a representative from the district, it may be doubted whether, in fact, its interests would be rendered thereby **325\*** \*the more secure; and certainly the constitution does not consider their want of a representative in Congress as exempting it from equal taxation.

If it were true that, according to the spirit of our constitution, the power of taxation must be limited by the right of representation, whence is derived the right to lay and collect duties, imposts and excises, within this district? If the principles of liberty, and of our constitution, forbid the raising of revenue from those who are not represented, do not these principles forbid the raising it by duties, imposts, and excises, as well as by a direct tax? If the principles of our revolution give a rule applicable to this case, we cannot have forgotten that neither the stamp act nor the duty on tea were direct taxes.

Yet it is admitted that the constitution not only allows, but enjoins the government to extend the ordinary revenue system to this district.

If it be said that the principle of uniformity,

established in the constitution, secures the district from oppression in the imposition of indirect taxes, it is not less true that the principle of apportionment, also established in the constitution, secures the district from any oppressive exercise of the power to lay and collect direct taxes.

After giving this subject its serious attention, the court is unanimously of opinion that Congress possesses, under the constitution, the power to lay and collect direct taxes within the District of Columbia, in proportion to the census directed to be taken by the constitution, and that there is no error in the judgment of the Circuit Court.

*Judgment affirmed.*

Cited—12 Pet. 733; 19 How. 514, 621; 7 Wall. 446; 3 Cliff. 386.

\*[COMMON LAW.]

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## MECHANICS' BANK OF ALEXANDRIA

v.

## THE BANK OF COLUMBIA.

The 17th section of the act incorporating the Mechanics' Bank of Alexandria, providing "that all bills, bonds, notes, and every other contract or engagement on behalf of the corporation, shall be signed by the president, and countersigned by the cashier; and the funds of the corporation shall in no case be liable for any contract or engagement, unless the same shall be signed and countersigned as aforesaid," does not extend to contracts and undertakings implied in law.

Where a check was drawn by a person who was the cashier of an incorporated bank, and it appeared doubtful upon the face of the instrument whether it was an official or a private act, parol evidence was admitted to show that it was an official act.

The acts of agents do not derive their validity from professing on the face of them to have been done in the exercise of their agency.

The liability of the principal depends upon the facts. 1st. That the act was done in the exercise, and 2d. Within the limits of the power delegated.

In ascertaining these facts, as connected with the execution of any written instrument, parol testimony is admissible.

## ERROR to the Circuit Court for the District of Columbia.

NOTE.—A corporation may be bound by contract not under its corporate seal, and by contracts made in the ordinary discharge of the official duty of its agents and officers. In the United States it is well settled that the acts of a corporation evidenced by vote, written or unwritten, are as completely binding upon it, and are as complete authority to its agents as the most solemn acts done under the corporate seal; that it may as well be bound by express promises through its authorized agents as by deed; and that promises might as well be implied from its acts and the acts of its agents as if it had been an individual. *Railway Co. v. McCarthy*, 6 Otto, 258; 2 Kent's Com. 291; *Matter of Mu. L. Soc.* 6 Ben. 35; *Bk. of Col. v. Patterson*, 7 Cranch, 305; *Twin Lick Oil Co. v. Marbury*, 1 Otto, 587; *Fleckner v. U. S. Bank*, 8 Wheat. 357; *Re Great Western Tel. Co.*, 5 Biss. 363; *Bank of U. S. v. Dardridge*, 12 Wheat. 68; *Dimpfel v. Ohio*, 8 Reporter, 641; *Peterson v. Mayor of N. Y.*, 17 N. Y. 449; *Upton v. Burnham*, 3 Biss. 421; 1 Potter on Corp. 68; *Dunn v. Rector of St. Andrew's Church*, 14 John. 118; *Felton v. McClure*, 46 N. Y. Supr. Ct. R. (14 J. & S.) 53; *Am. Ins. Co. v. Oakley*, 9 Paige, 496; *Watson v. Bennett*, 12 Barb. 196; *Fister v. LaRue*, 15 Barb. 323; *Spring Co. v. Union Co.*, 4 Blatchf. 1; *Overseers of N. W. v. Overseers of S. W.*, 3 Serg. & R. 117; *Pusey v. N. W. R. Wheat*, 5.

This was an action of *assumpsit*, brought by the defendants in error against the plaintiffs in error, on the following check:

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No. 18.  
MECHANICS' BANK OF ALEXANDRIA,  
June 25th, 1817.  
CASHIER of the Bank of Columbia,  
Pay to the order of P. H. Minor, Esq.,  
Ten Thousand Dollars.  
WM. PATON, Jr.  
\$10,000.

This check was offered in evidence by the plaintiff below, and testimony to prove that the said Paton, before, at the time, and subsequent to the drawing of the said check, was cashier of the said Mechanics' Bank, and the said Minor, the teller thereof; and in order to prove that the said check was drawn by the said William Paton in his capacity as cashier, and was so understood by him, and so understood by the said Bank of Columbia, their officers and servants; evidence was further offered to prove, that from the 5th of May, 1817, to the time of drawing the said check, there was kept in the said Mechanics' Bank, by the proper officer thereof, a book of printed checks in blank, for the purpose of being used by the cashier, in drawing his official checks; and that the check in question had been cut out of the said book. That the said cashier, in his official character, had frequently used the blank checks out of the said book, in drawing upon other banks in the district, and there was no other difference between the checks so drawn and the check in question, other than the letters "Cas." or "Ca." being superadded to the name of the said William Paton, Jun., in the checks 328\*] \*so drawn upon the said other banks. That although the said check-book was intended for the use of the bank, the checks in the same were sometimes used for other purposes; that the business of the said banks was sometimes managed through the medium of letters;

and in such official correspondence, it was usual to subscribe the names of the cashiers, with the addition of some letters denoting their capacity of cashier; but such form was sometimes omitted, and was in no case deemed indispensable, when, from other circumstances, such correspondence appeared to be official. The plaintiffs further offered in evidence two letters of the said William Paton, directed to William Whann, cashier of the Bank of Columbia, each signed with the proper name of the said William Paton, without the addition of cashier, or the letters "Cas." or "Ca.," one of which letters related to the private concerns of the said William Whann, and the other to the concerns of the bank.

Evidence was further offered to prove that the check given in evidence as aforesaid, was (together with a number of other checks, drawn by the said William Paton upon other banks, with the addition in his signature of the letters "Ca." and "Cas." and cut out of the official check-book) sent by the said Paton, on the 12th of July, 1817, by the hands of the said Philip H. Minor, then being teller as aforesaid, to Richard Smith, cashier of the office of discount and deposit of the Bank of the United States at Washington, to be paid in liquidation of a balance due from the said Mechanics' Bank to the said office of discount and deposit. That the said letter was \*delivered by [\*329 the said Minor to the said Smith, and the checks and moneys contained in the same were applied to the credit of said Mechanics' Bank. That among the checks so sent, was one for \$17,626.05, written upon, and cut out of the check-book aforesaid, and in the words and figures following, to wit:

*Mechanics' Bank of Alexandria, July 12, 1817.*

No. 32.

Cashier of the Branch Bank of the United States, Washington—Pay to the order of Philip H. Minor, amount of discount made me, which I believe is seventeen thousand, six hundred and twenty-six dollars and five cents.

WM. PATON, Jun.

That the said Richard Smith, about the 17th of July, 1817, did cause the same to be presented to the Bank of Columbia for payment, and the same was accordingly paid, and was thereupon immediately charged to the said Mechanics' Bank.

Evidence was further offered to prove that the said Richard Smith considered the said

Co., 14 Abb. Pr. N. S. 434; Chestnut Hill T. Co. v. Rutter, 4 Serg. & R. 16; Middleton v. Railroad Co., 43 How. Pr. 481; McGargle v. Hazleton, 5 Watts & S. 436; Hamilton v. Lycoming Ins. Co., 5 Barr. 344, 345; Bk. of Kentucky v. Schuylkill Bk., 1 Pars. Sel. Cas. 251, 265; Legrand v. Hampton S. College, 5 Munf. 324; The Banks v. Poitiaux, 3 Rand. 143; Hope Ins. Co. v. Perkins, 38 N. Y. 104, 4 Rob. 182; Union Bank v. Ridgely, 1 Harr. & G. 413; Elysville M. Co. v. Okisko Co., 1 Md. Ch. 392; Ross v. Carter, 1 Carter Ind. 281; Hayden v. Middlesex T. Corp., 10 Mass. 401; White v. Westport Co., 1 Pick. 215; Bulkeley v. Derby F. Co., 2 Conn. 256; White v. Derby Co., 2 Conn. 260; Waring v. Catawba Co., 2 Bay. 109; Garvey v. Colcock, 1 Nott & McC. 231; Petrie v. Wright, 6 Smedes & M. 647; Inhabitants, &c., v. Wood, 13 Mass. 193; Baptist Ch. v. Mulford, 3 Halst. 132; Gray v. Portland Bank, 3 Mass. 364; Sanger v. Third Parish, &c., 8 Mass. 265; Titcomb v. Union Ins. Co., 8 Mass. 326; Brown v. Penobscott Bk., 8 Mass. 445; Dorr v. Un. Ins. Co., 8 Mass. 494; Shotwell v. McKeown, 2 South. 828; Abbot v. Hermon, 7 Greene, 118; Waller v. Bk. Wheat. 5.

of Kentucky, 3 J. J. Marsh. 201; Lee v. Flemingsburg, 7 Dana, 28; Muir v. Canal Co., 8 Dana, 161; Bunscombe Turnpike Co. v. McCarron, 1 Dev. & B. 310; Bates v. Bk. of Ala., 2 Ala. 452; Eastman v. Coos Bk., 1 N. H. 26; Maine Stage Co. v. Longley, 14 Me. 444; Lime R. Bk. v. Macomber, 29 Me. 564; Bk. of Metropolis v. Gutschlick, 14 Pet. 19; Poulitney v. Wells, 1 Aiken, 180; Sheldon v. Fairfax, 21 Vt. 102; Gassett v. Andover, 21 Vt. 343; San Antonio v. Lewis, 9 Tex. 69; Palmer v. Medina Ins. Co. 2 Ohio, 537; Ang. and Ames on Corp., ch. 8; N. Y. R. Co. v. New York, 1 Hilt. 587; Merrick v. Burlington Co., 11 Iowa, 75; Buckley v. Briggs, 30 Misso. 452; Railroad Co. v. Lightfall, 16 Rob. N. Y. 407; 36 How. Pr. 481; 5 Abb. N. S. 458.

When the charter of the statute are silent as to what contracts a corporation may make, it has a power, as a general rule, to make all such contracts as are necessary and usual in the course of its business, and none other. Broughton v. Manchester Co., 3 Barn. & Ald. 1; Old Colony R. Co. v. Evans, 6 Gray, 25.



check as the official check of the said William Paton, and it was so paid by him; and that the cashier of the Bank of Columbia also considered it as the official check of the said Paton, and it was so paid by him.

Evidence was further offered, on the part of the Mechanics' Bank, to prove that the said William Paton, at the time he drew the said check, declared it was his private individual **330\*** check; that he had \*funds in the Bank of Columbia to meet it, and that it was passed by him to the said Mechanics' Bank as the individual check of the said William Paton. And evidence was further offered to prove that the Mechanics' Bank paid to the said Paton the amount of the said check.

Upon the evidence thus offered by the plaintiffs below, the counsel for the defendants objected to the whole of the said evidence, and insisted, that if the said check for \$10,000 could be used as evidence against the said Mechanics' Bank, that the character of the said check could only be decided by the check itself, and that no parol or other testimony could be received to explain the same, and objected to the testimony offered upon that ground. But the court overruled the objection, and gave it as their opinion to the jury, that the said check was, in connection with the other evidence, proper and competent evidence in this case against the said Mechanics' Bank, and that it was competent to explain the character of the said check; or, in other words, to prove, by parol or other testimony, that the said check was drawn under such circumstances, and in such a manner, as justified the plaintiffs in considering it as an official check, and paying it as such, and charging the same to the debit of the defendants. And the evidence offered as aforesaid, with said check, was admitted by the court, and given in evidence to the jury.

The defendants below then prayed the opinion of the court, and their instruction to the jury, that the check for \$10,000, produced in **331\*** evidence \*by the plaintiffs, is, on the face of it, a private, and not an official check, and of itself cannot, in law, charge the Mechanics' Bank with the payment of the said \$10,000; and that the said William Paton was liable in his individual character for the payment of the same. Which opinion the court refused to give.

They also prayed the court to instruct the jury, that the check aforesaid was, upon the face of it, *prima facie* evidence of its being the private individual check of the said William Paton, and the possession of the said check by the said Mechanics' Bank, if proved to be in their possession, was *prima facie* evidence that they had paid a value for it; and, that unless the Bank of Columbia should satisfy the jury by other evidence than the said check, that it was an official check of the cashier of the said bank, that the jury should find their verdict for the defendants. Which instruction the court refused to give.

The defendants below also prayed the court to instruct the jury, that if they should be of opinion that the check was drawn by the said William Paton as his individual check and was received by the said Mechanics' Bank, as the individual check of the said William Paton, and that the Bank paid to

the said Paton the full amount of the said check, that then the said bank having received the amount thereof from the bank of the United States as aforesaid, would have a right to retain the amount of the said check as against the said Bank of Columbia, notwithstanding the said Bank of Columbia may have been under an impression that it was the official check \*of the said William Paton. [**332** Which instruction the court refused to give.

A bill of exceptions was filed, and a verdict and judgment thereon having been rendered for the plaintiff, the cause was brought by writ of error to this court.

*Mr. Swann and Mr. Lee*, for the plaintiffs in error, argued: 1. That parol evidence to prove the character or capacity in which the check was drawn was clearly inadmissible. The check bears, on the face of it, all the qualities of a bill of exchange. It binds the drawer in his individual capacity. When it is competent for a party to bind himself individually, parol evidence cannot be introduced to show that what he has in fact done in his own name was intended to be done as an agent for others.<sup>1</sup> If one of several partners promise individually to pay a debt, he will not be permitted to show that it was due jointly from himself and his partners.<sup>2</sup> And, generally, all parol evidence to contradict, or vary, a written instrument, is inadmissible.<sup>3</sup> The object of the testimony in the present case, is not to show that the drawer is liable to a greater or less extent than that expressed on the face of the check, but to make a corporation, whose servant he was, liable for a debt which, according to the face of the instrument, is a private debt. For if the check, on the \*face of it, was an official one, the [**333** evidence was unnecessary; and introducing it is an admission that the instrument itself was not sufficient to bind the corporation. 2. The evidence of the debt being a written instrument, the construction of it is matter of law for the decision of the court, and the court ought to have instructed the jury that the check was, on the face of it, a private, and not an official check, and could not bind the Mechanics' Bank. 3. But at all events the check was *prima facie* evidence of its being the private check of the drawer, and the possession of it by the plaintiffs in error was also *prima facie* evidence of their having paid a valuable consideration for it. 4. Again, this action cannot be maintained, because the contract upon which it is brought was not made in conformity with the character of the Mechanics' Bank, which provides (s. 17) "that all bills, bonds, notes, and every other contract or engagement on behalf of the corporation, shall be signed by the president, and countersigned by the cashier; and the corporation shall in no case be liable for any contract or engagement, unless the same shall be signed and countersigned as aforesaid.

*Mr. Jones and Mr. Key*, contra, insisted: 1. That the check, upon the face of it, did not purport to be the private check of Paton, but the check of the bank, drawn by him as its

1.—*Frontin v. Small*, Lord Raym. 1418; Salk. 96; *Wilks v. Pack*, 2 East, 142; *Preston v. Morceau*, 2 Wm. Black. 1249; *Meres v. Ansell*, 3 Wils. 275.

2.—*Murray v. Somerville*, 2 Camp. N. P. 99.

3.—*Russell v. Clarke*, 3 Dall. 424, and the cases there cited.



cashier, and that the presumption was, that it was an official act. 2. But supposing it to be equivocal on the face of the instrument, whether he acted in his official or private capacity, extrinsic parol evidence, to show in what capacity he acted, was admissible. This would not **334\***] be evidence to contradict the written instrument, but only to explain it.<sup>1</sup> Suppose the Bank of Columbia had sued Paton, the date and entire face of the check would have been sufficient to defeat their action. There was enough to raise a presumption that he acted officially, because the act was within the scope of his authority. No rule of law obliged him to add to his name any designation of his official character; and even supposing him to be liable in his individual capacity, it does not follow that his principles are not liable for what he has done, the presumption being strongly in favor of the official character of the act. And if it be doubtful whether he is personally liable to the Bank of Columbia, he is certainly liable to the Mechanics' Bank, whose servant he was; who had the best means of knowing and correcting the fraud or mistake; and who, upon the principle of the rule *de damno evitando*, ought to bear the loss. 3. As to the law incorporating the Mechanics' Bank, it has no application to this case, unless it be contended that it would extend to the case of a deposit, and every other case where the law implies a contract. The action is not brought upon any such express undertaking as the act contemplates must be signed by the President, &c.; but upon an undertaking which the law implies, and which it may as well imply in the case of a corporation as of an individual.

Mr. Justice JOHNSON delivered the opinion of the court: The merits of this case lie within a very limited compass. The question is, **335\***] whether a certain act, done by the cashier of a bank, was done in his official or individual capacity. Had the draft, signed by Paton, borne no marks of an official character on the face of it, the case would have presented more difficulty. But if marks of an official character not only exist on the face, but predominate, the case is really a very familiar one. Evidence to fix its true character becomes indispensable.

It has been contended—but the argument was not pressed with much confidence—that this defendant could not be bound otherwise than in conformity with the 17th section of the charter; by which it is enacted, “that all bills, bonds, notes, and every other contract or engagement, on behalf of the corporation, shall be signed by the president, and countersigned by the cashier; and the funds of the corporation shall in no case be liable for any contract or engagement, unless the same shall be signed and countersigned as aforesaid.”

It is to be hoped this argument was not intended to reach the case of a deposit of money; and yet if it proves anything, it proves that no contract in law could be imputed to this bank. The truth is, that a check is properly neither a bond, bill, or note, with regard to the bank drawn upon, but an acquittance. And the contract arising out of a payment upon it, is a

contract for money advanced, and must be so declared upon. It is true that checks are generally made payable to bearer, and this was made payable to order; but it is in evidence that it was drawn as a check, and paid as a check, and the declaration contains only the common money counts.

Of the six exceptions in the transcript of the \*record, the 1st, 2d, 4th and 5th are **[\*336** taken on behalf of the Mechanics' Bank of Alexandria. Upon comparing these exceptions with the evidence, it does not appear that they affirm any other proposition growing out of that evidence, but that the check, on the face of it, purported to be the private check of Paton, and no extrinsic evidence could be received to prove the contrary.

The only ground on which it can be contended that this check was a private check, is, that it had not below the name the letters *Cas.* or *Ca.* But the fallacy of the proposition will at once appear, from the consideration, that the consequence would be, that all Paton's checks must have been adjudged private. For no definite meaning could be attached to the addition of those letters without the aid of parol testimony.

But the fact that this appeared on its face to be a private check, is by no means to be conceded. On the contrary, the appearance of the corporate name of the institution on the face of the paper at once leads to the belief that it is a corporate, and not an individual transaction; to which must be added the circumstances, that the cashier is the drawer, and the teller the payee; and the form of ordinary checks deviated from by the substitution of *to order*, for *to bearer*. The evidence, therefore, on the face of the bill, predominates in favor of its being a bank transaction. Applying, then, the plaintiff's own principle to the case, and the restriction as to the production of parol or extrinsic evidence could have been only applicable to himself. But it is enough for the purposes of the defendant to establish, that there existed, \*on the face of the paper, circum- **[\*337** stances from which it might reasonably be inferred that it was either one or the other. In that case, it became indispensable to resort to extrinsic evidence, to remove the doubt. The evidence resorted to for this purpose was the most obvious and reasonable possible, viz., that this was the appropriate form of an official check; that it was, in fact, cut out of the official check-book of the bank, and noted on the margin; that the money was drawn in behalf of, and applied to the use of the Mechanics' Bank; and by all the banks, and all the officers of the banks through which it passed, recognized as an official transaction. It is true, it was in evidence that this check was credited to Paton's own account, on the books of his bank; but it was done by his own order, and with the evidence before their eyes that it was officially drawn. This would never have been sanctioned by the directors, unless for reasons which they best understood, and on account of debits which they only could explain.

It is by no means true, as was contended in argument, that the acts of agents derive their validity from professing, on the face of them, to have been done in the exercise of their agency. In the more solemn exercise of deriv-



ative powers, as applied to the execution of instruments known to the common law, rules of form have been prescribed. But in the diversified exercise of the duties of a general agent, the liability of the principal depends upon the facts: 1. That the act was done in the exercise, and, 2. Within the limits of the powers delegated. These **338\*** facts are necessarily inquirable into by a court and jury; and this inquiry is not confined to written instruments (to which alone the principle contended for could apply), but to any act with, or without writing, within the scope of the power or confidence reposed in the agent; as, for instance, in the case of money credited in the books of a teller, or proved to have been deposited with him, though he omits to credit it.

*Judgment affirmed.*

Cited.—8 Wheat. 358; 13 Pet. 98; 8 How. 468, 469; 1 Wall. 241; 3 Wood. & M. 111; 1 McAll. 23; 1 Biss. 196; 8 Bank. Reg. 414; 10 Bank. Reg. 89; 1 Cliff. 523.

[PRIZE AND INSTANCE COURT.]

THE JOSEFA SEGUNDA.

CARRICABURA ET AL., *Claimants*.

An information under the act of the 3d of March, 1807, c. 77, to prevent the importation of slaves into the United States. The alleged unlawful importation attempted to be excused upon the plea of distress. Excuse repelled and condemnation pronounced.

Upon a piratical capture, the property of the original owners cannot be forfeited for the misconduct of the captors in violating the municipal laws of the country where the vessel seized by them is carried.

But where the capture is made by a regularly commissioned captor, he acquires a title to the captured property, which can only be divested by recapture, or by the sentence of a competent tribunal of his own country; and the property is subject to forfeiture for a violation, by the captor, of the revenue or other municipal laws of the neutral country into which the prize may be carried.

**A**PPPEAL from the District Court of Louisiana. From the proceedings in the court **339\*** below, it appeared \*that the brig Josefa Segunda being Spanish property, and on a voyage from the coast of Africa to the Island of Cuba, with a cargo of negroes, was captured on the 11th day of February, 1818, off Cape Tiberon in St. Domingo, by the Venezuelan privateer, the General Arismendi. On the 24th of April following she was seized in the river Mississippi, by certain custom-house officers, and conducted to New Orleans, where a libel was filed against her in the District Court for the Louisiana district.

The libel contained four counts. The first alleged that the said negroes were unlawfully brought into the United States from some foreign country in the said brig, with intent to hold, sell, or dispose of them as slaves, or with intent that the same should be held to service or labor contrary to the act of Congress in such case made and provided..

The second count alleged that these negroes were taken, received and transported on board the said brig, from some of the coasts or kingdoms of Africa, or from some other foreign

kingdom, place or country, for the purpose of selling them in some port or place within the jurisdiction of the United States, as slaves, or to be held to service or labor contrary, &c. In the third count it was charged that the said brig was found in some river, port, bay or harbor of the United States, or on the high seas, within the jurisdictional limits of the United States, or hovering on the coast thereof, to wit, in the river Mississippi, having on board some negroes, mulattoes, or people of color, for the purpose of selling them as slaves, or with an intent to land the same, in some port or place within the jurisdiction of the **[\*340]** United States, contrary, &c. The fourth allegation or count was, that one hundred and seventy-five persons of color, not being native citizens, or registered seamen of the United States, or natives of countries beyond the Cape of Good Hope, were landed from said brig, in a port or place, situate in a state which, by law, had prohibited the admission or importation as aforesaid, to wit, at or near the Balize in the state of Louisiana, contrary, &c.

This libel was filed on the 29th of April, 1818, and on the 5th of May following a claim was interposed by Messrs. Carricabura, Arieta & Co., merchants of the Havanna, which stated that they were owners of the said brig, which, with the said negro slaves, was, on the high seas, while pursuing a lawful voyage, captured and taken from them by a certain Rene Beluche, and the crew of the armed ship or vessel called the General Arismendi, sailing under the flag of the revolted colonies of Venezuela and New Grenada; that the said brig put into the Balize in very great distress, and without any intention on the part of the crew, or any other person on board, to infringe or violate any law of the United States. That whatever may have been the conduct of the prize crew, or of any other persons on board, the claimants insist that they cannot be made responsible for any of their acts, because the said brig, with her cargo, was taken from their possession unlawfully, and in violation of the law of nations, inasmuch as the captors had no legal authority to take the same; and if they had any commission, the capture \*was illegal, be- **[\*341]** cause the privateer, the General Arismendi, was armed and fitted out, or her armament or equipment increased, in a port of the United States, in violation of the laws thereof.

On this libel and claim, it appeared in evidence that the capture of the brig Josefa Segunda, with a cargo of slaves, was made off Cape Tiberon, in the Island of St. Domingo, on the 11th of February, 1818, on a voyage to the Havanna, from the coast of Africa, which she had left in the preceding month of December or January. The capture was made by a Venezuelan brig, the General Arismendi. This vessel was commissioned as a privateer by John Baptista Arismendi, who styled himself Commander-General of Venezuela, and Captain-General of the Island of Marguerita. The caption of the commission was, "Republic of Venezuela;" and it purported to have been given in the Island of Marguerita, the 1st of February, in the year 1818, and to be sealed with the great seal of the state. At the time of capture, there were from two to three hundred slaves on board; some of these, but what num-



ber does not appear, afterwards died; others, but how many is not stated, were sold at the Jardins de la Reine, on the south side of the Island of Cuba, in order to purchase provisions. Toward the end of the month of February, the prize-master of the brig received written orders from the captain of the privateer to conduct the prize to the Island of Marguerita; and always steered, as he says, eastward, the winds being always ahead. The prize-master had no log-book on board; he wrote every day's occurrences on \*a slate, effacing what had been written the day before. On the 18th of April, 1818, in the morning, the brig was boarded by a pilot, about forty miles from the Balize, and arrived there about 4 o'clock p. m. About twenty-five miles from the Balize, the brig fell in with the American ship Balize, from which no provisions were asked, but from whom he received six bags of rice. On the 24th of April, the brig was seized by the custom-house officers, and conducted to New Orleans. On the 27th of April, 1818, Laporte, who was the agent of Beluche at New Orleans, wrote a letter to the prize-master of the brig, containing, among others, these expressions: "Maintain always your declaration of being forced into port." "Take care that your sailors neither say nor do anything which may prejudice the interest of Venezuela." The privateer, after the capture of the brig, went to Jamaica for provisions. The pilot who first boarded the brig stated that her mainmast was sprung, her ropes were all bad, the sails not fit to go to sea; that they were pumping the last cask of water on board. Her spars were middling, except the mainmast; there were no provisions on board; the men were in a state of starvation; that the slaves had nothing but skin upon their bones. A witness, who was on board in her passage up the river, stated that the brig sailed equal to anything in the river; that he would not be afraid to make a voyage in her; her tackle, ropes, &c., were as good as usual; she was pumped out but once while he was on board; they carried topsails coming up; the spars were generally good. He saw nothing in the appearance of \*the crew of their having been starved. It also appeared that the agent of the claimants in New Orleans received letters from the owners of the brig sometime prior to her arrival at New Orleans, and that one of the owners had arrived in that city while this cause was depending, and before the 19th of June, 1818.

It was admitted by the claimant that there existed an understanding between them and the captors; that the former were to render to the latter a compensation for their not interposing any claim, which was so far ascertained that the sum which the captors were to receive was not to be less than six, nor more than eight thousand dollars, to depend on the expense and trouble incident to the prosecution, and the repairing of the vessel; that this arrangement was made by the advice of the captor's counsel, from a conviction on his part that they could not recover on account, as he conceived, of the illegality of the commission. It was also admitted, that the claimants were the original owners of the brig and slaves on board.

On this testimony, the District Court condemned the brig, and effects found on board,

Wheat. 5.

to the United States, and the cause was brought by appeal to this court.

*Mr. C. J. Ingersoll*, for the appellants and claimants, argued: 1. That the vessel was compelled by necessity to enter the Mississippi, and, therefore, was not liable to forfeiture under the acts of Congress for suppressing the slave trade. 2. That the commission \*of [\*344 General Arismendi, under which the original capture was made, was unlawful, he having no authority to issue it as Governor of the Island of Marguerita, a dependent province of the new state of Venezuela. The owners were, therefore, entitled to restitution under the 9th article of the Spanish treaty of 1795, as well as under the general law of nations; the right of property not being changed by a piratical seizure.<sup>1</sup> 3. But supposing it to have been a regular capture in the exercise of the rights of war, and supposing the captors to have entered the waters of the United States with the intention of violating the acts of Congress, it is insisted, that the prize thus carried into a neutral port, before adjudication, cannot be forfeited to the neutral state for a breach of its municipal laws, committed by the captors, without the consent or collusion of the original owners. It has been repeatedly determined, that when captures are made in violation of our neutral rights, as ascertained by the law of nations, the acts of Congress, and treaties with foreign powers, restitution of the captured property will be decreed by our tribunals to the original owners.<sup>2</sup> Why? Because it is the right as well as duty of the nation to prevent its neutral territory and resources from being used for the purposes of hostility by either belligerent. It will, therefore, restore in two cases: \*First, where [\*345 the capture is made within its territorial limits, and, secondly, when made by a vessel armed or re-equipped in its ports. The same principles apply where the captor violates the laws of police or the revenue laws of the neutral state. The infringement of the one is as injurious to that state, and to the captured belligerent, as the infringement of the other. The injury to the original owner is equally great, whether the privateer was fitted in the neutral ports or is permitted to carry his prizes into those ports for sale. The *spes recuperandi* is gone; and will the neutral sovereign condescend to avail himself, as against an innocent friend, of the forfeiture incurred by the misconduct of the enemy of the latter? The captor cannot sell; he cannot completely divest the original owner of his remaining right to the captured property before its lawful condemnation; shall he then be permitted to do so by smuggling, or even by attempting, or barely intending to smuggle it in a neutral port? It is the well-established doctrine of public law that belligerents have no right to sell or dispose of their prizes in a neutral port, before they are judicially condemned in a competent court of the captor's country; unless in case of necessity, or when the right is secured to them by treaty, or by the express permission of the neutral govern-

1.—Grotius, de J. B. ac. P., l. 3, c. 9, sec. 17; Bynk. Q. J. Pub., l. 1, c. 17; Valin, sur l'Ordon., l. 3, tit. 9, art. 10; 2 Bro. Civ. & Adm. Law, 461.

2.—The *Divina Pastora*, 4 Wheat. 62, 55, and the cases cited in note (3).



ment; or in case of the intervention of peace.<sup>1</sup> **346\*** If, then, the captor has not such an \*interest in his uncondemned prize as will enable him to dispose of it by sale to another, how can he be said to have such an interest as will enable him to forfeit it to the neutral state for a breach of its municipal laws? This is a novel question, both here and in the European courts of prize. It indeed settled that the prize court may dismiss the claim of a citizen, violating the law of his own country where the court sits; or of an ally or neutral violating the treaties between his own country and that of the court; and that it may dismiss the libel of a captor (of the country where the court sits), for a collusive capture, or for a violation of the laws of trade. But the moment the neutral court, in the present case, ascertained that this was a capture *jure belli*, or piratical, it had nothing to do but to restore it to the original possessor. The captor had not such a proprietary interest as rendered him capable of forfeiting it to the United States. The first case of a forfeiture in the prize court for a breach of municipal law, which is reported, is that of *The Walsingham Packet*.<sup>2</sup> That was the case of a British packet, retaken from the enemy, wherein a claim was given for the cargo as the property of British and Portuguese merchants, and resisted on the part of the captors, on the ground that such trade was prohibited by act of Parliament. **347\*** Here the jurisdiction of the \*court, with respect to the thing recaptured, was unquestionable; and Sir W. Scott rejected the claim on account of the claimant's own personal misconduct, reserving the ultimate question to whom the property should be condemned. In the case of *The Etrusco*,<sup>3</sup> it was subsequently determined that condemnation in such cases should be, not to the captors, but to the crown. In the case of *The Recovery*,<sup>4</sup> Sir W. Scott determined that the claim of a neutral could not be rejected in a prize court of the captor's country, for violating the municipal law of that country. Why? Because, as to him, it was a mere court of the law of nations, though as to British subjects it was also a court of municipal law. As to him, the offense was merely *malum prohibitum*; as to British subjects, it was *malum in se*; and they had no right to complain if they were punished for it

in any tribunal of their own country, however constituted. The cases of *The Bothnea* and *The Jahnstaff*,<sup>5</sup> and of *The George*,<sup>6</sup> in this court, were also cases where the court had undoubted prize jurisdiction, and the original owner, being an enemy, could interpose no claim. The captor had been guilty of collusion with the public enemy, and had assisted him in violating the non-importation act. The court, therefore, dismissed his libel and condemned the property of the United \*States. [**348** A similar observation is applicable to the case of *The Venus*,<sup>7</sup> in which the joint claim of a citizen and an alien to the vessel was rejected, on the ground that the former had made a false oath, in order to obtain a register, whereby she became liable to forfeiture under the registry act. The District Court of Louisiana, beside its circuit court powers, may exercise jurisdiction as a prize court, or an instance court of admiralty. In neither of these capacities could it take cognizance of the present case. Not as a prize court: for the jurisdiction belonged exclusively to the Venezuelan tribunals. Nor as an instance court of the law of nations: since, as such, its decree could only be for restitution to the captors or to the original owners, according as our neutrality had or had not been violated. Nor as an instance court of municipal law, could it condemn the captured property of a friend before it had been declared good prize by a competent prize tribunal; unless, perhaps, where the owner or his agent had subjected his property to such a forfeiture by an offense against the municipal law, consummated before the capture. The proper course of proceeding, where there is no collusion between the captor and the former owner, is to punish those captors who attempt to violate our municipal laws in the same manner as those who violate our neutrality; that is, by disposing of them of their prizes, and restoring them to the original proprietors. Such was the conduct of Holland on a similar occasion, as \*stated by Bynkershoek.<sup>8</sup> It is true [**349** that he animadverts upon these ordinances of the states general; but his reflections will be found to be solely applicable to his own favorite notion of the right of belligerents to carry their prizes into neutral ports, and to \*sell [**350** them there, which has long since been ex-

1.—Bee's Adm. Rep. 263; *The Flad Oyen*, 1 Rob. 114; *The Purissima Conception*, 6 Rob. 45; *The Schooner Sophie*, Ib. 138, 2 Bro. Civ. & Adm. Law, 255; 1 Peters' Adm. Dec. 24; 2 Peters' A. D. 345; *The Kierlighett*, 3 Rob. 82; *Wheelright v. Depeyster*, 1 Johns. Rep. 471, 481; 2 Valin. Com. Sur l'Ord. 272 and seq.; Vattel, l. 4, c. 2, s. 22; Marten's Law of Nations, 323; Wheat. on Capt. 262.

2.—2 Rob. 64.

3.—4 Rob. 256. Note.

4.—6 Rob. 341.

5.—2 Wheat. 169.

6.—Ib. 278.

7.—8 Cranch, 253.

8.—The passage of Bynkershoek here alluded to is as follows: He begins by observing: "Although it be lawful, on national principles, to carry a prize into neutral territory, and there to sell it, if the captor thinks proper, laws have, nevertheless, more than once been made to the contrary." He then proceeds: "The states general, on the 9th of August, 1658, issued an edict, by which they ordered, that no foreign captor who might be compelled by stress of weather, or some other reasonable cause, to bring his prize into the ports of this country,

should presume to sell any part of it, or even to break bulk; but that he should inform the bailiff of the place of his arrival, who, having placed a guard on board of the ship, should keep a strict watch over her, until her departure: inflicting, moreover, a discretionary penalty, and a fine of one thousand florins, on any one that should assist in unloading, or purchase anything out of her. To which edict, the said states general, on the 7th of November, in the same year enacted a supplement, by which it was ordered, that no prize ship should be brought into the port itself, but merely into the outer roads, where she might be sheltered from danger, and that nothing should be unladen or sold out of her; and if anyone should act to the contrary, the prize should be restored to the former owner, as though it had never been taken, and the captor himself should be detained, and his own vessel seized and confiscated. The remainder of the edict merely confirms that of the 9th of August above mentioned. Whether those edicts were extorted from the states general by fear, or by any other cause, I do not know; but lest they should hereafter militate against national principles, we must declare that we rather believe them to have been temporary than perpetual laws." Bynk. Q. J. Pub., l. 1, p. 121, of Mr. Duponceau's translation.



ploded. The force of this historical example is not diminished by his criticism, founded, as it is, upon a false theory. In the case now before the court, there can be no objection to restitution, on the ground of the traffic in which the original owners were engaged being prohibited by the laws of their own country; for it is notorious that Spain tolerates the trade. The principle, therefore, applied by the Lords of Appeal in England to an American slave-trader, in the case of *The Amedie*,<sup>1</sup> does not apply to this case. And Sir William Scott, since the determination of the lords, has decided, in the case of a Swedish vessel, that he would not condemn, because there was no positive proof that Sweden had prohibited the trade, although it did not appear that this state had ever sanctioned it, or that her subjects had been in the habit of carrying it on.<sup>2</sup> If it be said that the condemnation rests on the act of Congress, and that this act is general in its terms, and makes no distinction as to the manner in which vessels violating the law may have been brought into our waters, it is answered, that, like all other penal laws, it must receive an equitable and liberal construction, and cannot be applied to cases of distress, or other cases of *vis major*.

The *Attorney-General*, contra, argued principally upon the facts, to show that the capture was collusive, \*and that, consequently, the court had jurisdiction to condemn the property to the United States, in a case where the captor and captured had combined in a scheme of fraud to defeat the execution of our municipal laws. He insisted, that even if this were not the fact, that the captors had by possession, *jure belli*, such a title to the property as rendered it liable to confiscation for any breach of our laws by the captors. Their title could only be divested by recapture, or by the sentence of a competent prize court of their own country; and how improbable it was that such court would dispossess them of it, is shown by the proofs and the pleadings in this cause, by which it appears that the property was Spanish, and, therefore, liable to condemnation in the prize courts of Venezuela. The establishment of a contrary doctrine by the court would furnish an effectual recipe by which all our laws of trade might be violated with impunity, since it would be extremely difficult in many cases to show that the capture was collusive, and in case of detection in the attempt to smuggle, the claimant would have nothing to do but to throw the blame upon the pretended captor, whilst, in case of success, he would reap the fruits which might attend it. However ingeniously contrived such a scheme might be, it was the duty of the court to penetrate through it, and when detected, to visit it with the penalty of confiscation.

*Mr. Justice LIVINGSTON* delivered the opinion of the court, and after stating the facts, proceeded as follows: The third count of the libel **352\*** is the only one \*that has any bearing on the present case. It alleges a violation of the seventh section of an act of Congress prohibiting the importation of slaves into the United

States, after the first day of January, in the year 1808, and which passed the 3d of March, 1807.

By this section it is enacted, "That if any ship or vessel shall be found, from and after the first day of January, 1808, in any river, port, bay, or harbor, or on the high seas, within the jurisdictional limits of the United States, or hovering on the coast thereof, having on board any negro, mulatto, or person of color, for the purpose of selling them as slaves, or with intent to land the same in any port or place within the jurisdiction of the United States, contrary to the prohibition of this act, every such ship or vessel, together with her tackle, apparel and furniture, and the goods or effects which shall be found on board the same, shall be forfeited to the use of the United States, and may be seized, prosecuted and condemned, in any court of the United States having jurisdiction thereof. And the proceeds of all such ships and vessels, their tackle, apparel and furniture, and the goods and effects on board of them, which shall be so seized, prosecuted, and condemned, shall be divided equally between the United States and the officers and men who shall make such seizure, or bring the same into port for condemnation, and the same shall be distributed in like manner as is provided by law for the distribution of prizes taken from an enemy; provided that the officers and men are entitled to one-half of the proceeds aforesaid, \*shall safe-keep every negro, [**353** mulatto, or person of color, found on board of any ship or vessel so seized by them, and deliver them to such persons as shall be appointed by the respective states to receive the same," &c.

It is not denied that the brig *Josefa Segunda*, shortly before her seizure, had been hovering on the coast of the United States, having on board a large number of persons of the description of those whose importation into this country is prohibited by the act; nor can there be any doubt, from the situation and circumstances under which she was found, and the manner in which she came within the jurisdictional limits of the United States, which appears to have been a voluntary act on the part of the prize-master, that there is at least *prima facie* evidence of an intention to dispose of these people as slaves, or to land them in some port or place within the jurisdiction of the United States.

The claimants, aware of the necessity of accounting for circumstances, which, unexplained, could not but prove fatal to their interests, contend, in the first place, that the coming into the Mississippi was a matter of necessity, produced by the perilous situation of the vessel, and the famishing condition of the people on board; and that, therefore, neither she nor her cargo can be obnoxious to the provisions of the act of Congress. If the claim be not sustained on this plea, it is insisted,

In the next place, that the capture being illegal or piratical, the original owners cannot be affected by any of the acts of the prize crew; and,

\*In the third place, it is asserted, that [**354** the vessel having been ransomed, and taken out of the hands of the captors, the claimants are restored to all their original rights, unimpaired by any acts on the part of the former.

1.—Acton's Rep. 240; Edinburgh Rev., Vol. XVI., No. XXI., p. 436; Wheat. on Capt. 227.

2.—The *Diana*, Dodson, 95.

Wheat. 5.



Each of these claims for restitution will now be examined.

When any act is done, which of itself, and unexplained, is a violation of law, and a party to extricate himself, or his property, from the consequences of it, resorts to the plea of necessity or distress, the burden of proof is not only thrown upon him; but when the temptation to infringe the law is great, and the alleged necessity, if real, can be fully and easily established, no court should be satisfied with anything short of the most convincing and conclusive testimony. The proofs before us are so far from being of this character, that we look in vain for testimony of any serious disaster having befallen this vessel in her voyage from the Island of Cuba, to the Mississippi, or for a calamity of any kind, which might not have been averted or prevented, had the master seriously and honestly endeavored to reach the Island of Marguerita, which is now pretended to have been her real port of destination. That neither he nor his employer should have any great solicitude for the arrival of the prize at Marguerita, is easily accounted for, when it is recollected that this island, as well from its small extent, being not more than forty miles in length, and perhaps not more than half as broad, as from the scantiness and poverty of its population, could afford but a wretched, if **355\*** any market at all for slaves; while at New Orleans, each of them would produce the extravagant and tempting sum of one thousand dollars. It has not escaped the observation of the court that the General Arismendi made the passage from Marguerita to the place of capture off the Island of St. Domingo in the short space of nine days; for the owner's letter of instructions to the captain bears date at Marguerita on the 2d day of February, 1818, and on the 11th of the same month the capture was made; and yet with the important fact before us, it is seriously contended, that a voyage which had just been made in nine days could not be performed back again in six weeks. This is a possible case; but we ought not to be expected on slight grounds to believe that a vessel after leaving the Island of Cuba, in the latter end of February, should, on the 18th of April following, be found, not only several miles farther from her destined port than at the time of sailing, but that she had pursued this circuitous route in search of provisions: a story so improbable could hardly, under any circumstance, be entitled to belief; but it becomes absolutely incredible, when so many ports, more contiguous, and where supplies might easily have been obtained, were passed in her way to the Balize, without a single effort to procure a supply at any of them. Why not go to Kingston, in Jamaica, which was in the neighborhood of the place where the capture was made, and to which port the privateer went after making the capture? Her not going there can be accounted for on no supposition other than **356\*** that of her being well supplied with provisions at the time of her leaving Cuba. It is vain, then, to urge a plea which is contradicted by the internal evidence of the case. If, however, it can be made out that an attempt were really made to reach Marguerita, which was frustrated by adverse winds, or by any one of those disasters which so frequently occur on

the ocean, or that the Josefa was forced by stress of weather so very far from the track of a direct voyage to that island, the claimant might still contend that their plea of necessity had been made out. But, on this subject, there is an impenetrable obscurity, which it was their duty to remove. What winds, or what weather were encountered, we are not informed. No log-book, from which alone accurate and safe knowledge might be derived, is produced. A journal of that kind was not even kept, a circumstance which, of itself, excites a suspicion which none of the testimony in the cause is calculated to dispel. But it is not necessary to pursue this inquiry farther, or to take notice of several minor circumstances which are relied on, and which so far from making out a case of real distress, only serve to confirm the view which has already been taken of the other evidence, and leave no reasonable doubt of the whole story being a fiction; or that the want of provisions, if real, at the time of seizure, was produced by a voluntary protraction of the voyage for the purpose, and with the intent of violating the law on which the present libel is founded. If, on testimony so vague, so contradictory, and affording so little satisfaction, this court should award restitution, all the acts of Congress which have been passed to prohibit **\*357** the importation of slaves into the United States may as well be expunged from the statute book; and this inhuman traffic, for the abolition of which the United States have manifested an early and honorable anxiety, might, under the most frivolous pretexts, be carried on, not only with impunity, but with a profit which would keep in constant excitement the cupidity of those who think it no crime to engage in this unrighteous commerce. In the execution of these laws, no vigilance can be excessive, and restitution ought never to be made, but in cases which are purged of every intentional violation, by proofs the most clear, the most explicit and unequivocal.

But the claimants, not relying exclusively on the plea of necessity, contend, that the capture being piratical, and by a vessel having no commission, they ought not to be injured by any acts of the prize-master which may be deemed infractions of the laws of the United States.

It would, indeed, be unreasonable and unjust to visit upon the innocent owners of this property the sins of a pirate; and were this allegation made out, the court would find no difficulty in making the restitution which is asked for. But is it so? Was the General Arismendi a piratical cruiser? The court thinks not. Among the exhibits is a copy of a commission—which is all that, in such a case, can be expected—which appears to have been issued under the authority of the republic of Venezuela. This republic is composed of the inhabitants of a portion of the dominions of Spain in South America, who have been for **\*358** some time past, and still are, maintaining a contest for independence with the mother country. Although not acknowledged by our government as an independent nation, it is well known that open war exists between them and His Catholic Majesty, in which the United States maintain strict neutrality. In this state of things, this



court cannot but respect the belligerent rights of both parties; and does not treat as pirates the cruisers of either, so long as they act under, and within the scope of their respective commissions. This capture, then, having been made under a regular commission of the government of Venezuela, the captors acquired thereby a title to the vessel and cargo, which could only be divested by recapture, or by the sentence of a prize court of the country under whose commission the capture was made. The courts of neutral nations have no right to interfere, except in cases which do not embrace the present capture. The captors, therefore, at the time of the violation of our laws, must be regarded as the lawful owners of the property, and as capable of working a forfeiture of it, by any infraction on their part of the municipal regulations of the United States. The property, in the present case, not only belonged, at the time, to the captors, in virtue of the capture which they had made, but it is evident from the testimony and admissions in this cause that it was owned at the time of capture by an enemy, and that a condemnation in a prize court of Venezuela was inevitable.

As little foundation is there for resting a claim to restitution on the ransom, which it is **359\*** alleged took place, of this vessel and cargo. This ransom, whether real or pretended, whether absolute or contingent (about which, doubts may well be entertained), cannot affect the rights of the United States. The forfeiture having attached before any ransom took place, could not be divested by any act between parties, consensual as these were, not only of the fact that a seizure had taken place for a violation of law, but that legal proceedings had been instituted, and were then carrying on, to obtain a sentence of condemnation founded on such violation.

*Decree affirmed with costs.*

See S. C. 10 Wheat. 312.

#### [LOCAL LAW.]

#### BLAKE ET AL. v. DOHERTY ET AL.

It is essential to the validity of a grant that the thing granted should be so described as to be capable of being distinguished from other things of the same kind. But it is not necessary that the grant itself should contain such a description as without the aid of extrinsic testimony to ascertain precisely what is conveyed.

Natural objects called for in a grant may be proved by testimony, not found in the grant, but consistent with it.

The following description, in a patent, of the land granted, is not void for uncertainty, but may be made certain by extrinsic testimony: "A tract of land in our middle district on the west fork of Cane Creek, the waters of Elk River, beginning at a hickory, running north 1,000 poles to a white oak, then east 800 poles to a stake, then south 1,000 poles to a stake, thence west 800 poles to the beginning, as per plat hereunto annexed doth appear."

**360\*** The plat and certificate of survey annexed to the patent, and a copy of the entry on which the survey was made, are admissible in evidence for this purpose.

A general plan made by authority, conformably to an act of the local legislature, may also be  
Wheat. 5.

submitted with other evidence to the jury, to avail, *quantum valere potest*, in ascertaining boundary.

But a demarcation or private survey, made by direction of a party interested under the grant, is inadmissible evidence, because it would enable the grantee to fix a vagrant grant by his own act.

THIS cause was argued by *Mr. Swann* and *Mr. Jones* for the plaintiffs in error, and by the *Attorney-General* and *Mr. Kelly* for the defendants in error.

Mr. Chief Justice MARSHALL delivered the opinion of the court: This was an ejectment brought in the Circuit Court of the United States for the District of West Tennessee. The plaintiff made title, under a grant from the state of Tennessee, dated in 1808, which comprehended the land in controversy.

The defendants claimed under a patent from the state of North Carolina, dated in 1794, containing the following description of the land granted, viz.: "A tract of land containing 5,000 acres, lying and being in our middle district, on the west fork of Cane Creek, the waters of Elk River, beginning at a hickory running north 1,000 poles to a white oak, then east 800 poles to a stake, then south 1,000 poles to a stake, thence west 800 poles to the beginning, as per plat hereunto annexed doth appear."

For the purpose of designating the land described in this grant, the defendants then gave in evidence the plat and certificate of survey annexed thereto, a certified copy of the entry on which the grant was issued, and the **[\*361]** general plan or plat filed in the cause. They also proved, that this plan or plat was a correct representation of Cane Creek, of the west fork thereof, and of the land claimed by them. They also proved, that in 1806, prior to the entry on which the plaintiff's grant was issued, a survey had been made, and a corner hickory and white oak, and lines around the said tract (as the defendants then claimed), were marked; and, prior to the plaintiffs' entry, were esteemed by the people in the neighborhood to have been marked as the defendants' land. The land in dispute lay within the territory ceded to the United States by the Indians in 1806, and no actual survey thereof had been made previous to the emanation of the grant. Upon this evidence, the counsel for the plaintiff requested the court to inform the jury, that the said demarcation was not sufficient in law to locate the grant to the spot included in the said lines; and that the locality of the said lines could not legally be ascertained, either by the plat annexed to the grant or by the entry or general plan; but the court instructed the jury, that the said demarcation, entry, and general plan, might be used by them for that purpose.

The counsel for the plaintiffs excepted to this direction of the court; and, a verdict and judgment having been given for the defendants, the cause is brought by writ of error before this court.

As the first patentee was a fair purchaser of the quantity of land specified in his grant, and has placed his warrant, which was the evidence of that purchase, in the hands of the **[\*362]** surveyor, a public officer designated by the state to survey the land intended to be granted; and as the land claimed under this grant was actually surveyed and marked out before the



plaintiff made his entry, so as to give him full knowledge of the title of the defendants, whatever that title might be, the plaintiff can put himself only on the strict law of his case. But to that strict law he is entitled.

It is contended that the Circuit Court erred, 1st. Because the grant under which the defendants claim is absolutely void for uncertainty; and, consequently, no testimony whatsoever ought to have been admitted to give it locality.

That disposition which all courts ought to feel, to support a grant fairly made for a valuable consideration, receives additional force from the situation in which the titles to land in Tennessee are placed; and the courts of that state have invariably carried construction as far as could be justified to effect this purpose.

It is undoubtedly essential to the validity of a grant that there should be a thing granted, which must be so described as to be capable of being distinguished from other things of the same kind. But it is not necessary that the grant itself should contain such description as, without the aid of extrinsic testimony, to ascertain precisely what is conveyed. Almost all grants of land call for natural objects which must be proved by testimony consistent with the grant, but not found in it. Cane Creek, and its west fork, are to be proved by witnesses. So the hickory which is to constitute the beginning of a survey of a tract of land to lie on the west fork of Cane Creek. If, in the nature of things, it be impossible to find this hickory, all will admit the grant must be void. But if it is not impossible, if we can imagine testimony which will show any particular hickory to be that which is called for in the grant, then it is not absolutely void for uncertainty, whatever difficulty may attend the location of it.

Now, suppose this grant to have been founded on actual survey; suppose the surveyor and chain carriers to go to the hickory claimed by the defendants as their beginning, to show it marked as a beginning, to trace a line of marked trees from this beginning around the land, and to prove that this is the very land which was surveyed for the person in whose favor the grant issued. In such a case, the right of the defendants to hold the land would scarcely be questioned. Yet if the patent was void upon its face, these circumstances could not make it good. The grant purports to have been made on an actual survey; and the non-existence of that survey, though it may increase the difficulty of ascertaining the land granted, does not change the face of the instrument.

It has been said that this patent does not call for a marked hickory, and, therefore, no means exist of distinguishing it from any other hickory. But it may have been marked by the surveyor, as corner trees are generally marked, without noticing the fact in the grant; and it is identity, not notoriety, which is the subject of inquiry.

**364\*]** \*Could it even have been known by the patentee, or by those who might purchase from him, that the land had not been surveyed, yet a beginning corner might have been marked, and if the beginning be established, the whole tract is easily found.

We think, then, that testimony might exist

to give locality to this grant, and, therefore, that it is not void on its face for uncertainty.

2d. We are next to inquire, whether improper testimony was admitted, and whether the court misdirected the jury.

It has been determined in this court, that the plat and certificate of survey, annexed to the patent, may be given in evidence; and it has been determined in the courts of Tennessee that a copy of the entry on which the survey was made is also admissible. In admitting these papers, then, there was no error. But the court also admitted what is called a general plan, and a survey made prior to the plaintiff's entry of the land as claimed by the defendants.

The bill of exceptions does not so describe this general plan as to enable the court to say, with certainty, what it is. If it is a plan made by authority, in conformity with any act of the legislature, it may be submitted, with other evidence, to the consideration of a jury, to avail, as much as it may, in ascertaining boundary. But the court has also permitted what is denominated a demarcation, which we understand to be a private survey made by direction of a party interested under the grant, and assented to by the defendants, to be given in evidence.

\*This private survey might have **[\*365]** been made on any other part of the west fork of Cane Creek, with as much propriety as on that where it has been made. It would have been equally admissible if placed anywhere else on that stream. To allow it any weight, would be to allow the grantee to appropriate, by force of a grant, lands not originally appropriated by that grant. This would subvert all those principles relative to conveyances of land which we have been accustomed to consider as constituting immutable rules of property.

The legislature of Tennessee has certainly not supposed that any individual possessed this power of fixing vagrant grants. In the act of 1807, ch 2, they have enacted that any person claiming under a grant from the state of North Carolina, issued "on a good and valid warrant, the locality of which said grant cannot be ascertained, on account of the vagueness of the calls by the surveyor, or from the calls and corners of the said survey becoming lost or destroyed, or on account of the surveyor and chain carriers being deceased, so that the marks and corners cannot be established, shall be entitled to obtain a grant for the same quantity of land called for in said grant."

This liberal provision would have been totally unnecessary if the grantee might have remedied every uncertainty in his patent by his own act. If under his patent he might survey any vacant land he chose, the privilege of obtaining a new patent would be a very useless one.

\*It is obvious that the legislature **[\*366]** did not suspect the existence of this power to make new boundaries where none before had been made, or where none could be found. Neither, as we understand the cases, has this principle been established by the courts of Tennessee. The case relied on for this purpose, is the heirs and devisees of *Williamson v. Buchanan* (2 Ten. Rep., 278).



In this case Judge White was of opinion that the land was ascertained by the calls of the patent, without resorting to the survey and marks made subsequent to its emanation. Both his argument, and his language, in coming to this conclusion, indicate the opinion that Buchanan's claim to the land in controversy depended on it. After having come to this conclusion, however, he throws out some hints calculated to suggest the idea that these modern marks might possibly have been considered, had the case required it, as the renewal of ancient ones which had been destroyed. But these hints seem rather to have been intended to alarm those who were taking up land held by others under ancient grants, whose boundaries were not accurately defined, except by those modern marks, than to give any positive opinion on the point. At any rate, these suggestions were made in a case where the patent, as construed by the judge, called to adjoin the upper line of another tract, and its general position was consequently ascertained. In such a case, where the body of the land was placed, its particular boundaries might be ascertained by testimony which would not be deemed **367** \*sufficient where the patent contained no description which would fix its general position.

Judge Overton, who also sat in this cause, gave more importance to the marks newly made; yet, his opinion, too, seems to be founded on the fact that the body of the land was fixed by the description contained in the patent. "Before the plaintiffs made their entry," he said, "new marks for a corner were shown, running from which the courses of the grant, land would be included, sufficiently notorious in point of conformity with the calls of the grant. The general description, both of the entry and the grant, reasonably agrees with the locality of the land by these new marks." He then argues that these new marks may be considered as replacing others which had been originally made.

The case, however, did not depend on this point, and it was not decided. Had it ever been decided, this court would have felt much difficulty in considering a decision admitting marks as auxiliary evidence to prove precise boundary, in a case where the patent was admitted to contain a description sufficiently certain to place the body of the land, as authority for the admission of marks made by the party himself, in a case where the patent only places the land on a stream, with the length of which we are unacquainted.

We think, then, that the Circuit Court erred in instructing this jury that they might use this demarcation for the purpose of ascertaining the land contained in the grant under which the defendants claimed, and for this error the judgment must be reversed.

**368** \**Mr. Justice JOHNSON* dissented. The principal difficulties in this case arise from the equivocal nature of the language in which the bill of exceptions is expressed. In that part of it which details the evidence offered, the words are, "that in 1806, or early in 1807, a corner hickory, and a white oak, and lines around said tract, as now claimed and represented in said plat, were marked." The word *marked*, may Wheat. 5.

be taken either as an adjective or a participle, and in the former sense it would mean, it was then a marked line. If this be its proper sense, it is impossible to doubt that the evidence was altogether unexceptionable. In this sense, I am inclined to think, the word ought to be taken, from reference to the context. For, one general object was to prove notoriety, or notice to the plaintiff, in order to affect him with the charge of obstinacy or folly in running a line which had already been surveyed. And the same inference results from its being stated a few lines after, "that no proof was given of any lines or corners having been marked before 1806." A passage which would have been nugatory, if the word *marked* had been used as a participle of the verb *to mark*; for, the affirmance of the action at a specified time, would have implied a negation as to any other time.

But taking this word with its grammatical effect as a participle, then an ambiguity arises on a comparison of the charge prayed and the charge given, as expressed in the subsequent part of the bill of exceptions. For, the prayer is, "that the judge instruct the jury that said demarcation was not in law \*sufficient [**369** to locate said grant to the spot included in said lines; and, also, that the locality of said lands could not legally be ascertained, either wholly or in part, by the plat annexed to the grant, or by said entry, a copy whereof is annexed as aforesaid, or by said general plan; but the said judge instructed the jury that the said demarcation might be used for that purpose by the jury, and, also, that the plat aforesaid might be used by them, and the said entry, also, and the said general plan for the same purpose."

If the instruction prayed was, that the demarcation, as it is called, considering it as the act of an indifferent person, had not the effect of an original survey, in defining, or laying off to the defendant the land which it embraced, there cannot be a doubt that he was entitled to that charge, and it was error in the court not to have given it. But I am of opinion that it cannot be so understood; for, there is no refusal to give the instruction prayed, and a different instruction given; but the words of the instruction are calculated to express a direct negation of the proposition maintained by the plaintiff. It is obvious, from the language of the charge, that the court considers the instruction prayed as in the same degree applicable to every item of the evidence tendered; and I am, therefore, sanctioned in assuming that the charge did not go to the legal effect of the demarcation, but asserted, that evidence of its having been made, and where it was made, with reference to the conflicting lines of the parties, was proper to go to the jury. Under this view of the subject, I \*cannot see [**370** how it was possible, unless the grant was void, to withhold it from the jury, when pursuing the inquiry into which they were called to enter. The grant conveys a specified quantity of land, and the *locus in quo* is the only question to be decided. A reference is made by the grant to a plat annexed, and the defendant must prove that the land he holds conforms in description to the original plat. He must, of course, show what land he does hold, and this can only be done by reference to his marked line. The conformity of the demarcation to



the original plat is a subsequent and subordinate question, and one which the jury must decide on, according to the evidence which shall be adduced to that point. But how to introduce it without referring to the defendant's line I cannot perceive.

I cannot subscribe to the opinion that the idea is for a moment to be tolerated that there is anything fictitious or unreal in the plat attached to the solemn grant of the state. It bears upon its face the only evidence which ought to be required, and evidence, in my opinion, which ought not to be contradicted, that a survey actually was made. Nor are marked trees or boundaries indispensable to such a survey; though the lines had been traced out on the soil, or stepped off to the grantee, the grant would attach to the designated spot with all the force that would have been given to it by a fence or wall. Identity is the only question to be decided by a jury, and if they can be satisfied that the land held by the defendant is the same land which was granted to him, it is all that should be required. At **371\*** least, early \*grants should have the benefit of these principles as against those who interfere with existing lines. And this I understand to be the received doctrine of the courts of Tennessee. (*Smith v. Buchanan*, 2 Tenn. Rep., 308.)

It will be perceived that the sufficiency of the evidence in this case to establish the *locus in quo* is not in the question. If the verdict was founded on evidence which could not support it, that might have been considered below, on a motion for a new trial. But the single question which the case presents is, whether the evidence here tendered was proper circumstantial evidence to go to the jury, in order to establish the *locus in quo*. The answer of the court is, that it may be used for that purpose. And, in my opinion, unless it ought to have been rejected altogether on the ground of invalidity of the grant, it was all properly admitted for that purpose; not on the idea that the demarcation operated at all in conveying the estate, but as a necessary preliminary to the whole evidence. Respecting the entry, there can be no doubt; and all the rest was calculated to prove that these lines were marked at an early day, and engrafted upon a general survey of the county, made under an act of the legislature, for the purpose of exhibiting the relative position of estates claimed in the county. This showed the early and continued claim of the defendant; and whether his possession was of the same land which had been granted to him by the state, remained for the jury to decide, upon such evidence as the nature of the case required. Facts may have existed in their **372\*** own knowledge of the \*country, or been brought to their notice from the testimony of others, or may even have been gathered from the face of the plat, and reference to natural objects.

We know the manner in which this country has been sold and settled, and the necessity of yielding a liberal acquiescence to the claims of early grants. So strongly am I impressed with this opinion, that I see no reason why a grant may not have the effect of a standing warrant of survey, as long as the land, purporting to have been surveyed, shall remain unoccupied.

It is doing no injury to the individual right; and the state having received a compensation, and pledged itself for the conveyance of a certain quantity of land, sustains no injury, where the survey is reasonable, and bearing a subsequent conformity to the grant and survey under which the claim is asserted.

In the case before us, it is obvious that the survey offered in evidence was made with reference to the creek, as placed upon the original plat. It does not, it is true, conform to the entry in commencing at the mouth of the west fork, which is obviously the true construction of the entry, but it embraces the mouth of the west fork, and conforms to natural objects. And this appears to be sufficient under the decisions of this court, and the liberal principles admitted in Tennessee in surveying upon entries. (*M'Ivers Lessee v. Walker and Lassiter*, 9 Cranch, 173, and 2 Ten. Rep., 66, *et passim*.) At least, I presume the evidence in this case was all properly used toward establishing the right to that part of \*the defendant's [**373** land which lay above the mouth of the west branch of Cane Creek, with reference to which part the survey might well be supported by his entry; and if it was legally admitted as to any part, the instruction of the judge ought to be sustained.

It has been urged that this idea precludes the necessity of those statutory provisions of Tennessee which permit the holders of grants on which the lands cannot be located to lay their warrants upon other land.

I confess I cannot see the force of this argument; for it is not contended that an individual survey will give any strength to a title otherwise defective, or cure any inherent vice in the original survey. If the plat attached to the grant has reference to nothing from which its locality can be determined, it is not pretended that an individual or private survey will make it better. On the contrary, the defense is founded upon the supposition that the cases provided for by those laws is not this case; that the land admits of being identified, and is that which the defendant has marked off. It would be curious if other courts should decide that the defendant's case was not provided for because it had locality, while we are deciding that it is provided for because it has no locality. He would then have no consolation for the necessity of abandoning his "*dulcia arva*," and becoming the "*novus hospes*" of some other resting place.

*Judgment reversed.*

\*JUDGMENT.—This cause came on to [**374** be heard on the transcript of the record of the Circuit Court for the District of West Tennessee, and was argued by counsel. On consideration whereof, this court is of opinion that the Circuit Court for the District of West Tennessee erred in instructing the jury that they might use the demarcation, in the bill of exceptions and opinion of the court mentioned, for the purpose of ascertaining the land contained in the grant under which the defendant claimed. It is therefore adjudged and ordered, that the judgment of the said Circuit Court in this case be, and the same is hereby reversed and annulled. It is further ordered, that the said cause be remanded to the said

Circuit Court, with directions to issue a *venire facias de novo*.

[LOCAL LAW.]

HANDLY'S LESSEE v. ANTHONY ET AL.

The boundary of the state of Kentucky extends only to low water-mark on the western or north-western side of the river Ohio; and does not include a peninsula, or island, on the western or north-western bank, separated from the main land by a channel or bayou, which is filled with water only when the river rises above its banks, and is at other times dry.

When a river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as *375\** in this case, one state (Virginia) is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-erected state extends to the river only, and the low water-mark is its boundary.

THIS cause was argued by the Attorney-General for the plaintiff, and by Mr. B. Hardin for the defendants in error.

Mr. Chief Justice MARSHALL delivered the opinion of the court: This was an ejectment brought in the Circuit Court of the United States for the District of Kentucky, to recover land which the plaintiff claims under a grant from the state of Kentucky, and which the defendants hold under a grant from the United States, as being part of Indiana. The title depends upon the question whether the lands lie in the state of Kentucky or in the state of Indiana.

At this place, as appears from the plat and surveyor's certificate, the Ohio turns its course, and runs southward for a considerable distance, and then takes a northern direction, until it approaches within less than three miles, as appears from the plat, of the place where its southern course commences. A small distance above the narrowest part of the neck of land which is thus formed, a channel, or what is commonly termed in that country a bayou, makes out of the Ohio, and enters the same river a small distance below the place where it resumes its westward course. This channel, or bayou, is about nine miles by its meanders, three miles and a half in a straight line, and from four to five poles wide. The circuit made *376\** by the river appears to be from fifteen to twenty miles. About midway of the channel, two branches empty into it from the north-west, between six and seven hundred yards from each other; the one of which runs along the channel at low water, eastward, and the other westward, until they both enter the main river. Between them is ground over which the waters of the Ohio do not pass until the river has risen about ten feet above its lowest state. It rises from forty to fifty feet, and all the testimony proves that this channel is made by the waters of the river, not of the creeks which empty into it. The people who inhabit this peninsula, or island, have always paid taxes to Indiana, voted in Indiana, and been considered as within its jurisdiction, both while it was a territory and since it has become a state. The jurisdiction of Kentucky has never been extended over them.

The question whether the lands in controversy lie within the state of Kentucky or of Indiana, depends chiefly on the land law of Virginia, and on the cession made by that state to the United States.

Both Kentucky and Indiana were supposed to be comprehended within the charter of Virginia at the commencement of the war of our revolution. At an early period of that war, the question whether the immense tracts of unsettled country which lay within the charters of particular states ought to be considered as the property of those states, or as an acquisition made by the arms of all, for the benefit of all, convulsed our confederacy, and threatened its existence. It was probably with a view to this question that Virginia, in 1779, when she opened her land-office, prohibited the location or entry of any land "on the north-west side of the river Ohio."

In September, 1780, Congress passed a resolution, recommending "to the several states, having claims to waste and unappropriated lands in the western country, a liberal cession to the United States, of a portion of their respective claims, for the common benefit of the Union." And in January, 1781, the commonwealth of Virginia yielded to the United States "all right, title, and claim, which the said commonwealth had to the territory north-west of the river Ohio, subject to the conditions annexed to the said act of cession." One of these conditions is, "that the ceded territory shall be laid out and formed into States." Congress accepted this cession, but proposed some small variation in the conditions, which was acceded to; and in 1783 Virginia passed her act of confirmation, giving authority to her members in Congress to execute a deed of conveyance.

It was intended then by Virginia, when she made this cession to the United States, and most probably when she opened her land-office, that the great river Ohio should constitute a boundary between the states which might be formed on its opposite banks. This intention ought never to be disregarded in construing this cession.

At the trial, the counsel for the defendants moved the court to instruct the jury,

1. That the lessor of the plaintiff cannot recover, the land in contest not being at any time subject to the laws of Kentucky, but to those of Indiana.

\*2. Because the evidence does not *378* show that the land is within the limits of the state of Kentucky.

The court instructed the jury that, admitting that the western and north-western boundary of Kentucky included all the islands of the Ohio, and extended to the western and north-western bank of the Ohio, yet no land could be called an island of that river unless it was surrounded by the waters of the Ohio at low water-mark; and to low water-mark only, on the western or north-western side of the Ohio, did the boundaries of the state of Kentucky extend.

The counsel for the plaintiff excepted to this opinion, and then moved the court to instruct the jury, that if they found the land in question was covered by the grant to the lessor of the plaintiff, and that it was surrounded by a regular water channel of the Ohio on the north-



western side, and was, at the middle and usual state of the water in the Ohio, embraced and surrounded by the water of the Ohio, flowing in said channel, it was an island, and within the state of Kentucky. But the court refused to give the instructions aforesaid, but instructed the jury, that if the water did not run through said channel at low water, but left part thereof dry, it was not an island, nor within the state of Kentucky.

To this opinion, also, the counsel for the plaintiff excepted. The jury found a verdict for the defendants, on which the court rendered judgment; which judgment is now before this court on a writ of error.

The two exceptions present substantially the same questions to the court, and may therefore **379\*** be considered \*together. They are, whether land is properly denominated an island of the Ohio unless it be surrounded with the water of the river, when low; and whether Kentucky was bounded on the west and north-west by the low water-mark of the river, or at its middle state; or, in other words, whether the state of Indiana extends to low water-mark, or stops at the line reached by the river when at its medium height.

In pursuing this inquiry, we must recollect that it is not the bank of the river, but the river itself, at which the cession of Virginia commences. She conveys to Congress all her right to the territory "situate, lying, and being, to the north-west of the river Ohio." And this territory, according to express stipulation, is to be laid off into independent states. These states, then, are to have the river itself, wherever that may be, for their boundary. This is a natural boundary, and in establishing it, Virginia must have had in view the convenience of the future population of the country.

When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one state is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created state extends to the river only. The river, however, is its boundary.

"In case of doubt," says Vattel, "every country lying upon a river, is presumed to have **380\*** no other \*limits but the river itself; because nothing is more natural than to take a river for a boundary, when a state is established on its borders; and wherever there is a doubt, that is always to be presumed which is most natural and most probable."

"If," says the same author, "the country which borders on a river has no other limits than the river itself, it is in the number of territories that have natural or indetermined limits, and it enjoys the right of alluvion."<sup>1</sup>

Any gradual accretion of land, then, on the Indiana side of the Ohio, would belong to Indiana, and it is not very easy to distinguish between land thus formed and land formed by the receding of the water.

If, instead of an annual and somewhat irregular rising and falling of the river, it was a daily and almost regular ebbing and flowing of

the tide, it would not be doubted that a country bounded by the river would extend to low water-mark. This rule has been established by the common consent of mankind. It is founded on common convenience. Even when a state retains its dominion over a river which constitutes the boundary between itself and another state, it would be extremely inconvenient to extend its dominion over the land on the other side, which was left bare by the receding of the water. And this inconvenience is not less where the rising and falling is annual, than where it is diurnal. Wherever the river is a boundary between states, it is the main, the permanent river, which constitutes that boundary; and the mind will find \*itself em- **[381]** barrased with insurmountable difficulty in attempting to draw any other line than the low water-mark.

When the state of Virginia made the Ohio the boundary of states, she must have intended the great river Ohio, not a narrow bayou into which its waters occasionally run. All the inconvenience which would result from attaching a narrow strip of country lying on the north-west side of that noble river to the states on its south-eastern side, would result from attaching to Kentucky, the state on its south-eastern border, a body of land lying north-west of the real river, and divided from the main land only by a narrow channel, through the whole of which the waters of the river do not pass, until they rise ten feet above the low water-mark.

The opinions given by the court must be considered in reference to the case in which they were given. The sole question in the cause respected the boundary of Kentucky and Indiana; and the title depended entirely upon that question. The definition of an island which the court was requested to give, was either an abstract proposition, which it was unnecessary to answer, or one which was to be answered according to its bearing on the facts in the cause. The definition of an island was only material so far as that definition might aid in fixing the boundary of Kentucky. In the opinion given by the court on the motion made by the counsel for the defendants, they say, that "no land can be called an island of the Ohio unless it be surrounded by the waters of that river at low water-mark." We \*are not satisfied **[382]** that this definition is incorrect, as respected the subject before the court; but it is rendered unimportant by the subsequent member of the sentence, in which they say, "that to low water-mark only, on the western and north-western side of the Ohio, does the state of Kentucky extend."

So, in the motion made by the counsel for the plaintiff, the court was requested to say, that if the waters of the Ohio flowed in the channel, in its middle and usual state, it was not only an island, but "within the state of Kentucky."

If the land was not within the state of Kentucky, the court could not give the direction which was requested. The court gave an instruction substantially the same with that which had been given on the motion of the defendant's counsel.

If it be true that the river Ohio, not its ordinary bank, is the boundary of Indiana, the limits of that state can be determined only by

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1.—L. 1, c. 22, sec. 268.

the river itself. The same tract of land cannot be sometimes in Kentucky, and sometimes in Indiana, according to the rise and fall of the river. It must be always in the one state or the other.

There would be little difficulty in deciding, that in any case other than land which was sometimes an island, the state of Indiana would extend to low water-mark. Is there any safe and secure principle, on which we can apply a different rule to land which is sometimes, though not always, surrounded by water?

So far as respects the great purposes for which the river was taken as a boundary, the two cases **383\*** seem to be within the same reason, and to require the same rule. It would be as inconvenient to the people inhabiting this neck of land, separated from Indiana only by a bayou or ravine, sometimes dry for six or seven hundred yards of its extent, but separated from Kentucky by the great river Ohio, to form a part of the last-mentioned state, as it would for the inhabitants of a strip of land along the whole extent of the Ohio, to form a part of the state on the opposite shore. Neither the one nor the other can be considered as intended by the deed of cession.

If a river, subject to tides, constituted the boundary of a state, and at flood the waters of the river flowed through a narrow channel, round an extensive body of land, but receded from that channel at ebb, so as to leave the land it surrounded at high water, connected with the main body of the country this portion of territory would scarcely be considered as belonging to the state on the opposite side of the river, although that state should have the property of the river. The principle that a country bounded by a river extends to low water-mark, a principle so natural, and of such obvious convenience as to have been generally adopted, would, we think, apply to that case. We perceive no sufficient reason why it should not apply to this.

The case is certainly not without its difficulties; but in great questions which concern the boundaries of states, where great natural boundaries are established in general terms, with a view to public convenience, and the avoidance of controversy, we think the great object, where **384\*** it can be distinctly perceived, \*ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals. The state of Virginia intended to make the great river Ohio, throughout its extent, the boundary between the territory ceded to the United States and herself. When that part of Virginia which is now Kentucky became a separate state, the river was the boundary between the new states erected by Congress in the ceded territory and Kentucky. Those principles and considerations which produced the boundary, ought to preserve it. They seem to us to require that Kentucky should not pass the main river, and possess herself of lands lying on the opposite side, although they should, for a considerable portion of the year, be surrounded by the waters of the river flowing into a narrow channel.

It is a fact of no inconsiderable importance in this case that the inhabitants of this land have uniformly considered themselves, and

have been uniformly considered, both by Kentucky and Indiana, as belonging to the last-mentioned state. No diversity of opinion appears to have existed on his point. The water on the north-western side of the land in controversy seems not to have been spoken of as a part of the river, but as a bayou. The people of the vicinage, who viewed the river in all its changes, seem not to have considered this land as being an island of the Ohio, and as a part of Kentucky, but as lying on the north-western side of the Ohio, and being a part of Indiana.

\*The compact with Virginia, under [**385**] which Kentucky became a state, stipulates, that the navigation of, and jurisdiction over, the river, shall be concurrent between the new states and the states which may possess the opposite shores of the said river. This term seems to be a repetition of the idea under which the cession was made. The shores of a river border on the water's edge.

*Judgment affirmed with costs.*

Cited—12 Pet. 437, 727, 729, 733; 14 Pet. 413; 5 How. 481; 13 How. 412, 424, 425; 23 How. 514; 23 Wall. 63; 3 Mason, 150; 1 Wood. & M. 483; 4 Wash. 384.

[PRIZE.]

## LA AMISTAD DE RUES.

ALMIRAL, *Libelant.*

*Quære*, Whether, where a prize has been taken by a privateer fitted out in violation of our neutrality, the vessels of the United States have a right to recapture the prize and bring it into our ports for adjudication.

In cases of marine torts, the probable profits of a voyage are not a fit rule for the ascertainment of damages.

In cases of violation of our neutrality by any of the belligerents, if the prize comes voluntarily within our territory, it is restored to the original owners by our courts. But their jurisdiction for this purpose, under the law of nations, extends only to restitution of the specific property, with costs and expenses, during the pendency of the suit, and does not extend to the infliction of vindictive damages as in ordinary cases of marine torts.

Where the original owner seeks for restitution in our courts upon the ground of a violation of our neutrality by the captors, the *onus probandi* rests upon him, and if there be reasonable doubt respecting the facts, the court will decline to exercise jurisdiction.

**A**PPPEAL from the District Court of Louisiana.

\*This was the case of a Spanish ship [**386**] captured by the Venezuelan privateer *La Guerriere*, on the high seas, in November, 1817, and afterwards forcibly taken possession of near the mouth of the Mississippi, by a detachment from the United States ketch, *Surprise*, and brought into the port of New Orleans. A libel was there filed in the District Court, in behalf of the original Spanish owners, claiming restitution of the property, upon the ground (among other things) that the privateer had augmented her crew in the United States, during the cruise, and before the capture. A claim was given in by the original captors, denying the allegations in the libel, and praying restitution of the property as lawfully captured. At the hearing in the District Court, the cause turned almost en-



tirely upon the question of the augmentation of the crew, and the court decreed restitution of the property to the original Spanish owners with damages, which were ordered to be ascertained by assessors. The assessors reported damages as follows:

To the owners of the ship	
for loss by plunder,	\$ 625 00
And to the owners of the cargo	
for loss of market by the capture,	4,000 00
And loss by plunder,	575 00
<hr/>	
In the whole,	\$5,200. 00

The report was confirmed by the court, and damages decreed accordingly. From this decree, the captors appealed to this court.

**387\*]** *Mr. C. J. Ingersoll*, for the appellants, argued upon the facts, to show that there was no sufficient evidence to prove that the privateer had augmented her force in the ports of the United States. He insisted that the burthen of proof to establish this fact rested with the original Spanish owners, who claimed restitution upon it; and that they had not shown, beyond all reasonable doubt, to the satisfaction of the court, that the captors had increased their armament in violation of our neutrality. He also argued, that supposing the misconduct on the part of the captors ever so clearly established by the evidence, the jurisdiction of our courts does not extend to the infliction of vindictive damages for their offense, but is limited by the law of nations to restitution of the specific property illegally captured. To carry it further, would be to assume the entire prize jurisdiction with all its incidents, which is exclusively vested in the courts of the captor's country. At all events, it is well established that the probable profits of a voyage is not a fit rule for the assessment of damages in cases of marine torts, and even upon that ground alone the decree must be reversed.

The *Attorney-General*, contra, insisted, that the evidence of an illegal augmentation of the force of the privateer in our ports was sufficiently established by the evidence. He argued, that where the neutrality of our ports is violated in this manner, and the property captured is brought within our territory, the courts of this country, proceeding *in rem*, are bound not merely to restore the specific property **388\*]** erty \*to the original owners, but to restore it with costs and damages, as in an ordinary case of illegal seizure. Being possessed of the principal question of prize or no prize, that necessarily draws after it all incidental questions; and the one is no more an invasion of the exclusive jurisdiction of the belligerent prize courts than the other. The neutral tribunal having taken jurisdiction for the purpose of vindicating the neutrality of its own country, by placing things in the same state they would have been in, had not that neutrality been violated, can only do complete justice between the parties by inflicting upon the captors such damages as will afford the original owners an indemnity for the loss they have sustained.

*Mr. Justice STORY* delivered the opinion of the court, and, after stating the facts, proceeded as follows: We pass over the question whether, supposing there was an illegal augmentation of the crew of the privateer in our

ports, the American captors had any right forcibly to bring in the prize for adjudication. It is an important question, and when it shall be necessary to decide it, it will deserve serious consideration. The present cause may well be disposed of without any discussion concerning it.

Two questions have been made at the bar: 1. Whether, in point of fact, the illegal augmentation of the crew is so established as to entitle the Spanish libelants to restitution. 2. If so, whether the damages were rightfully awarded.

\*The last question will be first consid- **[389]** ered. And as to the item of damages for loss of market, we are all of opinion that it is clearly inadmissible. In cases of marine torts, this court have deliberately settled that the probable profits of a voyage are not a fit mode for the ascertainment of damages.<sup>1</sup> It is considered that the rule is too uncertain in its own nature, and too limited in its applicability, to entitle it to judicial sanction. The same principle must govern in the present case.

But a more general objection is to the allowance of any damages in cases of this sort, as between the belligerents. The doctrine heretofore asserted in this court is, that whenever a capture is made by any belligerent in violation of our neutrality, if the prize come voluntarily within our jurisdiction, it shall be restored to the original owners. This is done upon the footing of the general law of nations; and the doctrine is fully recognized by the act of Congress of 1794. But this court have never yet been understood to carry their jurisdiction, in cases of violation of neutrality, beyond the authority to decree restitution of the specific property, with the costs and expenses during the pending of the judicial proceedings. We are now called upon to give general damages for plunderage, and if the particular circumstances of any case shall hereafter require it, we may be called upon to inflict exemplary damages to the same extent as in the ordinary cases of marine torts. We entirely disclaim any right to inflict such \*damages; and con- **[390]** sider it no part of the duty of a neutral nation to interpose, upon the mere footing of the law of nations, to settle all the rights and wrongs which may grow out of a capture between belligerents. Strictly speaking, there can be no such thing as a marine tort between the belligerents. Each has an undoubted right to exercise all the rights of war against the other; and it cannot be a matter of judicial complaint, that they are exercised with severity, even if the parties do transcend those rules which the customary laws of war justify. At least, they have never been held within the cognizance of the prize tribunals of neutral nations. The captors are amenable to their own government exclusively, for any excess or irregularity in their proceedings; and a neutral nation ought no otherwise to interfere, than to prevent captors from obtaining any unjust advantage by a violation of its neutral jurisdiction. Neutral nations may, indeed, inflict pecuniary, or other penalties, on the parties for any such violation; but it then does it professedly in vindication of its own rights, and not by way of compensa-

1.—The *Amiable Nancy*, 3 Wheat. 546.

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tion to the captured. When called upon by either of the belligerents to act in such cases, all that justice seems to require is, that the neutral nation should fairly execute its own laws, and give no asylum to the property unjustly captured. It is bound, therefore, to restore the property if found within its own ports; but beyond this it is not obliged to interpose between the belligerents. If, indeed, it were otherwise, there would be no end to the difficulties and embarrassments of neutral prize **391**\*] tribunals. They would be compelled to decide in every variety of shape upon marine trespasses *in rem* and *in personam*, between belligerents, without possessing adequate means of ascertaining the real facts, or of compelling the attendance of foreign witnesses; and thus they would draw within their jurisdiction almost every incident of prize. Such a course of things would necessarily create irritations and animosities, and very soon embark neutral nations in all the controversies and hostilities of the conflicting parties. Considerations of public policy come, therefore, in aid of what we consider the law of nations on this subject; and we may add, that Congress in its legislation has never passed the limit which is here marked out. Until Congress shall choose to prescribe a different rule, this court will, in cases of this nature, confine itself to the exercise of the simple authority to decree restitution, and decline all inquiries into questions of damages for asserted wrongs. The decree for damages is therefore unhesitatingly reversed.

The other question presents more difficulty. It must be admitted that there is positive testimony directly to the point of the illegal augmentation of the crew of the privateer; and if it stood uncontradicted, and were liable to no deduction, the libelant would certainly be entitled to restitution. But the testimony as to the augmentation come chiefly from very obscure persons, and is, in itself, in many respects, loose and equivocal; and that of one, at least, of the principal witnesses, is, in a most **392**\*] material fact, directly contradicted by a written document, whose verity has not been questioned. It is proved, by the report of an inspector made to the custom-house, that at the arrival of the privateer in port, she had on board forty-nine men; yet, the witness alluded to, expressly alleges, that at the time of her arrival at New Orleans, she had not more than ten or twelve persons on board. It appears, too, that the crew of the privateer was wholly composed of foreigners, principally persons from the Spanish Main, and from St. Domingo. Being arrived at New Orleans in the course of a cruise, which is not proved to have ended there, the natural presumption is, that her original crew continued attached to her; and this presumption is considerably fortified by the fact, that though the officers of the custom-house of that port vigilantly inquire into cases of this nature, there is nothing in their testimony that in the slightest degree affects the conduct of the privateer in an unfavorable manner. It certainly cannot be said that the evidence is free from all reasonable doubt. And, in cases of this nature, where the libelant seeks the aid of a neutral court to interpose itself against a belligerent capture, on account of a supposed violation of neutrality, we think

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the burden of proof rests upon him. To justify a restitution to the original owners, the violation of neutrality should be clearly made out. If it remains doubtful, the court ought to decline the exercise of its jurisdiction, and leave the property where it finds it. We cannot say that the present case is clear from reasonable doubt; and, \*therefore, we re- **393**verse the decree of the District Court, and order restitution to be made to the original captors; but, under all the circumstances, the parties are to bear their own costs.

*Decree reversed.*

DECREE.—This cause came on to be heard on the transcript of the record of the District Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is decreed and ordered, that the decree of the said District Court, in this case, be, and the same is hereby reversed and annulled. And this court, proceeding to pass such decree as the said District Court should have passed, it is further decreed and ordered, that the libel be dismissed, and the said ship *La Amistad*, her tackle, apparel and furniture, and cargo, be restored to the claimants. And it is further ordered, that each party pay their own costs.

Cited—11 Otto, 42; 1 Bald. 144; 5 Mason, 76.

\*[COMMON LAW.] **394**

LYLE ET AL. v. RODGERS.

Where claims against a party, both in his own right, and in a representative character, are submitted to the award of arbitrators, it is a valid objection to the award; that it does not precisely distinguish between moneys which are to be paid by him in his representative character, and those for which he is personally bound.

An award may be void in part, and good for the residue. But if the part which is void be so connected with the rest as to affect the justice of the case between the parties, the whole is void.

**E**RROR to the Circuit Court for the District of Columbia.

This was an action of debt against the defendant, on a bond given by Jerusha Dennison, and the defendant, to the plaintiffs, with a condition to perform the award of certain persons chosen to arbitrate all differences, &c., between the plaintiffs and Jerusha Dennison, either as administratrix of Gideon Dennison, deceased, or in any other capacity. The condition of the obligation is in these words: "Whereas the said Jerusha Dennison, and the said James Lyle and Joshua B. Bond, have agreed to refer all matters in dispute between them, to the award and arbitrament of David Winchester and Thomas Tenant, of the city of Baltimore; and in case they differ in opinion, then to them and such third person as the said David Winchester and Thomas Tenant shall choose and appoint. Now, the condition of the obligation is such, that if the above bound Jerusha Dennison, her heirs, executors and administrators, do, and shall well and truly stand to, abide by, and keep the award and arbitrament of the said Da-



**395\***] vid \*Winchester and Thomas Tenant, arbiters, indifferently named and appointed by them to arbitrate, award, and adjudge of, and concerning all actions and causes of actions, debts, dues, controversies, claims or demands whatsoever, both at law and in equity, which the said James Lyle and Joshua B. Bond have, or either of them hath, against her, the said Jerusha Dennison, as administratrix of Gideon Dennison, or in any other capacity. Or in case the said arbitrators shall differ in opinion, if then the said Jerusha Dennison, her heirs, executors and administrators, and every of them, do, and shall stand to, abide by, perform and keep the award and arbitrament of them, the said David Winchester and Thomas Tenant, or either of them, and of such discreet and indifferent person as they shall elect and appoint as a third person as aforesaid; then this obligation to be void, and of none effect; otherwise to be and remain in full force and virtue."

Upon this submission, the following award was made: "Whereas certain differences have arisen between Joshua B. Bond and James Lyle, of the city of Philadelphia, in the state of Pennsylvania, of the one part, and Jerusha Dennison, of Harford county, in the state of Maryland, of the other part; and whereas, for the purpose of putting an end to the said differences, the said parties, by their several bonds, bearing date the fifteenth day of November last past, have reciprocally become bound, each to the other, in the penal sum of \$12,000, current money of the United States, to stand to, abide by, perform, and keep the award of David Winchester and Thomas Tenant, arbiters indifferently named and appointed to arbitrate, adjudge, and award of, and concerning all actions, or causes of actions, debts, dues or demands, whatsoever, both of law and in equity, which the said Joshua B. Bond, and James Lyle, or either of them, have against the said Jerusha Dennison, as administratrix of Gideon Dennison, or in any other capacity:

"Whereupon, we, the above-named arbitrators, after having heard the allegations of the parties, proceeded to an examination of the accounts, documents and proofs, by them respectively produced, and having maturely considered the same, do adjudge and award in manner and form following:

"First. We do adjudge and award, that there is due from Jerusha Dennison to Joshua B. Bond and James Lyle, the sum of \$8,726.41, with interest from this date, until paid; upon the payment whereof, all suits at law and in equity, between them, shall cease and determine. And,

"Second. We do adjudge and award, that upon the payment by the said Jerusha Dennison of the sum above awarded, with interest, as aforesaid, the said Joshua B. Bond and James Lyle shall execute to the said Jerusha Dennison, a good and sufficient release of all claims against her, both in her private capacity and as administratrix of the late Gideon Dennison; and, also, that they shall reconvey, or release, as the case may require, all lands heretofore conveyed or pledged to them by the late Gideon Dennison, as a collateral security; and further, **397\***] that they shall deliver \*to the said Jerusha Dennison, or account for on oath, all bonds, notes, bills, or other securities heretofore

given to them by the late Gideon Dennison, as collateral security. And,

"Lastly. We do adjudge and award, that this award shall be conclusive between the parties."

The sum awarded by the arbitrators not having been paid, this suit was instituted. The defendant, after praying oyer of the bond, and of the condition, pleaded no award. The plaintiffs, in their replication, set forth the award, and assigned as a breach of it, the non-payment of the sum of \$8,726.46, with interest, awarded to be due to them from the said Jerusha Dennison. The defendant rejoined, that among the matters in dispute between the parties, was a dispute relating to certain lands conveyed in fee-simple by Gideon Dennison, the intestate of the said Jerusha Dennison, to the plaintiffs, in his life-time, without any condition or defeasance expressed therein, but with an understanding and agreement between them that the same should be held by the plaintiffs as a collateral security for the payment of whatever debt was due from the said Gideon Dennison to the plaintiffs. And, also, as to certain other lands and land titles, pledged in like manner as a collateral security for the said debt. But because the said matters in dispute are left unsettled by the said award, and for other causes appearing on the face of the said submission and award, the arbitrators made thereon no award, &c.

To this rejoinder the plaintiffs demurred, and the defendants joined in demurrer. It was, however, \*afterwards agreed between [**398**] the parties, that instead of arguing the demurrer, the matter contained in the foregoing pleadings, and the law arising thereon, should be subject to the opinion of the court, on a statement of facts made by the parties, and the questions stated as arising thereon.

This statement admits the submission, the appearance of the parties before the arbitrators, the award, due notice thereof, a demand of the sum awarded to be due, and a refusal to pay the same. The statement also contains certain letters which passed between the plaintiffs and Jerusha Dennison, and Samuel Hughes, acting for and in behalf of the said Jerusha, dated in 1799 and 1800; and, also, a letter from the plaintiffs, dated in 1800, addressed to Mr. Hollingsworth, a lawyer of Baltimore, containing a copy of the correspondence above mentioned, and transmitting him a note for \$5,568, drawn by Gideon Dennison in his life-time, of which the plaintiffs were holders, and which had been regularly protested. On this note, Mr. Hollingsworth was requested to take the proper means to obtain payment. The correspondence admitted that "grants of lands in North Carolina and Tennessee had been given as security, without any acknowledgment or receipt for the same;" but contained no information whatever ascertaining what grants were so given, although full information on that subject had been requested on the part of Jerusha Dennison.

Mr. Jones, for the plaintiffs, stated, 1. That the first objection made to the award by the defendant was, \*that the arbitrators [**399**] had not determined all the matters in controversy between the parties. But the only evidence to support this allegation is inadmissible and insufficient for that purpose; and the arbitrators have done enough if they decide all

that the parties submit to them. 2. It is also objected, that the administratrix could not submit differences relative to her intestate's estate to arbitration. But the right of executors and administrators to submit to arbitration is well established by authorities, and the submission is an admission of assets to the extent which may be awarded; or, rather, it is a personal engagement to pay whatever the arbitrators may direct, without regard to the question of assets.<sup>1</sup> 3. But it is again objected, that the award is void for uncertainty. To which it is answered, that the universality of the award is advantageous to the defendant, and that a general release, such as the award contemplates, is the best release for him. In the old cases, the judges employed all their astuteness to defeat awards; but in the progress of society, they have been justly viewed with more favor, and many things are now deemed certain which were formerly considered incurably bad. It is not necessary that everything should be stated with positive certainty in the award itself. It may be rendered certain by reference *aliunde*. The question is, whether the party has a certain and definite remedy. Here the defendant may show that certain deeds have been executed, and are not re-**400** leased. It is sufficiently certain \*what bonds, &c., may be delivered up. It is within the knowledge of the parties. If the plaintiffs should attempt to sue upon other securities, the award might be pleaded in bar, with an averment that they were meant to be included.<sup>2</sup> As to the alternative part of the award, to deliver up the papers, or account for them on oath; an alternative award is good, if certain.<sup>3</sup> This is sufficiently certain. They shall deliver them up, or disclose where they are. Why might not the arbitrators direct the bonds, &c., to be accounted for on oath, instead of being actually delivered up?

*Mr. Pinkney* and *Mr. Key*, contra, contended, 1. That the award was of a controversy about lands, which the administratrix, in her representative character, was not competent to submit to arbitration. That this was the nature of the controversy appears from the letters offered in evidence, which are competent evidence of what was in dispute. It appears also from the award itself. But this award is no proof of assets. That question was referred to the arbitrators. If they say the money shall be paid, it finds assets; otherwise, if they only decide that so much is due. But they have not decided either, as to *J. Dennison* in her representative character. 2. The award finds a sum due from *J. Dennison*, but does not say that she shall pay it. Now, the arbitrators may have intended merely to liquidate the claim, leaving it to her to pay it or not, as **401** she might, or might \*not be satisfied with the restoration by the plaintiffs of the property pledged. The court will not intend that it was meant that she should pay, whether they offered to restore the pledges or not. And even if this were doubtful, it adds

another objection upon the ground of uncertainty. 3. There are several other uncertainties. It is uncertain what "lands" are meant; and they are to be reconveyed or released "as the case may require." Who is to judge what the case may require? If the arbitrators had said who should judge, it would even then be void; for it is a judicial act which they could not delegate to any one.<sup>4</sup> The lands are to be "released." But to whom? The award does not state. They are to deliver "all bonds," &c., heretofore given to them by the late *G. Denuison* as collateral security." But they are not specified, and this is a fatal defect.<sup>5</sup> Again, they are required to deliver them, or account for them "on oath." Here it is left uncertain how they are to account for them on oath. It is said that it means that they shall disclose where they are. But what good will this do the administratrix, if she does not get them? If the plaintiffs knew where the securities were, the arbitrators ought to have compelled their production. If they do not know, what good will their oath do us? But perhaps it may be said, that it means that they shall account on oath for their value. This, indeed, would be more reasonable than \*merely telling us where they were; [**402** and if this was the intention of the arbitrators, they ought to have valued them, and could delegate this power to no other person, much less to a party. Suppose it to mean either, the award is void. And it is void for uncertainty, because it may mean either. It is admitted, on the other side, that an award must be certain on its face, or refer to something by which it may be made certain. Now, this award is full of uncertainties on its face, and refers to nothing by which they can be explained. It is said that it refers us to a knowledge of the parties. But that is not sufficient. The case cited from Lord Raymond<sup>6</sup> was between mortgagee and mortgagee, who may be presumed to know, and there was no dispute as to facts; but here it is the case of an administratrix who did not know, and a part of the dispute was what was pledged. All these uncertainties are left to be determined by the plaintiffs, who are to return whatever they may choose. But we have the same right to the pledges which they have to the debt, and the value or amount of neither should be left to the parties. Suppose the award had been, that one party should return all the pledges, and the other should pay all the money borrowed. Here would have been the same uncertainty, but it would have been reciprocal; and if an award that one party should pay all that was lent, or account on oath for all that was lent, would be a nullity; an award that the other party shall return all the pledges, or account for them \*on oath, is equally [**403** void. The rules relative to awards have been derived from the civil law, and that law deems them void upon the same ground of uncertainty.<sup>7</sup> This award decides nothing, or what is the same thing, it decides what was unim-

1.—*Barry v. Rush*, 1 T. R. 691; *Pearson v. Pearson*, 5 T. R. 6.

2.—*Kyd on Awards*, 205, and the cases there cited.

3.—*Id.* 203.

*Wheat.* 5.

4.—*Kyd on Awards*, 127.

5.—*Pope v. Brett*, 2 Saund. 292; *Ross v. Hodges*, 1 Ld. Raym. 234.

6.—*Ld. Raym.* 234.

7.—*Dig.*, l. 4, t. 8, s. 21, n. 3.



portant, and leaves all that was material to be taken *ad referendum*. It does not state in what character J. Dennison is indebted to the plaintiffs. The award ought to show the character in which she is chargeable. It is impossible to charge the debt on the estate. If this award had been against her in her representative character, and it had simply declared a debt due from her intestate, specifying the amount, she might have pleaded *plene administravit*. Otherwise, if it had declared that she should pay a certain sum. But it has done neither, and the award is therefore void for uncertainty. The great object of the arbitration was, to ascertain what deeds were in fact mortgages, though purporting to be absolute conveyances; and what bonds, &c., were pledged, the plaintiffs not having admitted them. It was designed to ascertain the doubtful equitable circumstances of the case; everything, in short, which the arbitrators have forborne to decide. The award recognizes the existence of these conveyances and pledges, but does not ascertain them, nor provide any mode of ascertaining them. It was not general, but specific relief, which was expected from the award. We admit that an alternative award is valid, if entirely good; but if either branch of the alternative **404\*** be bad, the whole is *void*.<sup>1</sup> The award here does not entitle the administratrix to a disclosure on oath. If the plaintiffs adopted the alternative of delivering up the securities, they were not to perform the other—that is, to take the oath. The acts were not conjunctive, but disjunctive; and one part being void, the whole is void. The same argument applies to other parts of the award. There is an intimate connection between those which are certain (if there are any such) and those which are uncertain. The whole is therefore void.

*Mr. Hopkinson*, in reply, argued, that all the objections to the award in this case were merely technical. It was not attempted to impeach it upon the ground of partiality or misconduct in the arbitrators; nor could it be denied that the debt liquidated by it was justly due to the plaintiffs. As to the objection that administrators and executors have no power to submit to arbitration the title to lands, it does not appear by the submission bond that the title to any lands was in dispute, or was submitted. No question as to lands ever came before the arbitrators. And if the arbitrators had awarded as to lands, it might be rejected as surplusage. The alternatives of reconveying or releasing, as the case might require, the lands pledged, would be determined in each particular case by the fact, whether the conveyance was absolute on its face or conditional. If the former, then it was to be reconveyed; if the latter, it **405\*** was to be released. But it is said that the arbitrators ought to have distinguished the character in which J. Dennison was indebted. This was unnecessary, as she had assumed the whole liability upon herself in her individual capacity. In the bond she has bound herself personally to perform the award, and she has mixed her individual accounts with those of the estate. *Non constat*, that any part of the debt is due from the estate. The award to reconvey all lands, and to return all bonds, &c.,

pledged as collateral security, is good; because the arbitrators could not tell what lands were conveyed as collateral security, nor what bonds, &c., were pledged for the same purpose. Both were within the knowledge of the parties, and neither were within the knowledge of the arbitrators. It is denied that if one part of the alternative, as to the securities, is void, the other is so. We do not contend that the arbitrators have decided what was not submitted to them; but we say it was not submitted to them to determine what conveyances were made as pledges, and what were absolute on the face of them. The award is good unless the arbitrators were bound to give a list of the conveyances and security. This they could not do, because they had no means of ascertaining them specifically. But they ascertain them sufficiently by classification, which it is in the power of the parties to apply to each individual case.

*Mr. Chief Justice MARSHALL*, delivered the opinion of the court: The questions submitted to the \*court on the statement of facts [**406** made by the parties were, 1st. "Whether the said letters so offered by the defendants, or any of them, are competent and sufficient evidence to prove what matters of dispute or controversy were submitted to the said arbitrators under the said bond."

2d. "Whether the said award in the terms aforesaid, or taken in connection with the evidence so offered by the defendant (if such evidence be decided by the court to be competent and admissible), is valid, and sufficient in law."

The matter contained in the letters was pleaded by the defendant in his rejoinder, as being part of the subject in controversy, and is, consequently, confessed by the demurrer. Had the demurrer been argued, therefore, the first question could not have arisen. But as a statement of facts has been substituted for the demurrer, we presume the question respecting the admissibility of the evidence offered by the defendant is to be considered as if issue had been joined on the fact stated in the rejoinder. So considering it, there is, we think, no doubt of the admissibility of the testimony nor of its competency, taken in connection with the award itself, to prove that a dispute existed respecting the lands mentioned in those letters, which was brought before the arbitrators.

We proceed to the second question, which respects the validity of the award.

The first exception taken to this award is, that it omits to state whether the sum due from Jerusha Dennison was due from her in her own right or as *\*administratrix* of [**407** Gideon Dennison. The claims upon her in both characters are submitted to the referees; and they ought to have decided upon all, and to have distinguished between those which she was required to pay in her representative character, and those for which she was bound personally. Had this case been depending in chancery, where alone the two claims could have been united in one suit, the Chancellor would unquestionably have discriminated between them; and would, in his decree, have ascertained in what character the whole sum was to be paid, or how much was to be paid in each. If this award was made against Mrs. Dennison as administratrix, she would not only

1.—2 Saund. 292, Sergeant Williams's note.

be deprived by its form of the right to plead a full administration (a defense which might have been made before the arbitrators, and on which their award does not show certainly that they have decided), but also of the right to use it in the settlement of her accounts as conclusive evidence that the money was paid in her representative character. If this objection to the award is to be overruled, it must be on the supposition that it is made against her personally; yet the statement of facts shows the claim against her to be in her representative character. There is certainly a want of precision in this part of the award, which exposes it to solid objection, and might subject Mrs. Dennison to serious inconvenience.

The second exception to which the court will advert, affects still more deeply the merits of the award, as well as its justice.

It is apparent from the pleadings in the cause, **408\*** from the facts stated, and from the award itself, that titles to land were deposited by Gideon Dennison, in his life-time, with the plaintiffs, as collateral security for the debt claimed by them; and that the conveyances purported to be absolute. Not only was there uncertainty as to the right of redemption; but it was, so far as the court can discover, absolutely uncertain what lands had been so conveyed.

This subject appears to have been brought before the arbitrators, and they have awarded upon it. Is their award sufficiently certain to give Jerusha Dennison the benefit they intended her? They have awarded "that the said Joshua B. Bond and James Lyle shall reconvey or release, as the case may require, all lands heretofore conveyed or pledged to them by the late Gideon Dennison as a collateral security." The award does not determine what lands were so conveyed. If the arbitrators had directed that all the lands conveyed or pledged by Gideon Dennison should be reconveyed, there would have been some difficulty in ascertaining what lands had been conveyed or pledged, from the uncertainty where deeds might have been recorded, and whether grants might not have been deposited without a conveyance; but they have directed that those lands only shall be reconveyed which had been conveyed or pledged as collateral security. No one of these deeds exhibited on its face any mark of its being made as a collateral security. The question, whether a conveyance was absolute, or as a security only, was a material question, which ought to have been decided by the arbitrators. **409\*** They have not decided \*it, but have left it open to be decided by the parties themselves, or by some other tribunal. This is a very important part of the award, and with respect to this subject, it is incomplete. It is obviously as uncertain now as it was before the award was made, what lands had been conveyed or pledged to Gideon Dennison as collateral security. This part of the award, then, is void, and the question is, whether that part which directs the payment of money be void also.

That an award may be void in part, and good for the residue, will be readily admitted; but if that part which is void be so connected

with the rest as to affect the justice of the case between the parties, the whole is void.<sup>1</sup> There is great good sense in this distinction. If A be directed to pay B \$100, and also to do some other act not well enough defined to be obligatory, there is no reason why B should not have his \$100, because he cannot also get that other thing which was intended for him. But if A be directed to pay B \$100, and B to do something for the benefit of A, which is not so defined as to enable A to obtain it, there is much reason why A should not pay the \$100; since he cannot obtain that which the arbitrators as much intended he should receive as that he should pay the sum awarded against him.

The cause in 2 Saunders, 292, is in point. In that case the arbitrators awarded that William Pope \*should be satisfied and paid by [**\*410** John Brett, the money due and payable to the said William Pope, as well for task-work as for day-work, and then the said William should pay to the said John the sum of £25 lawful money of England. Mutual releases were also awarded.

It was admitted that so much of the award as directed payment to be made for task-work and day-work was void for uncertainty, inasmuch as the arbitrator had not ascertained how much was to be paid on those accounts; but it was contended that the award was good for the residue, inasmuch as enough remained to make it mutual. But the court said, "that if the clause of task-work and day-work be void, as it is admitted to be, the whole award is void, for it appears that William Pope was awarded to pay the £25, and to give a general release, upon a supposition by the arbitrator that he should be paid the task-work and day-work by virtue of that award; and that not being so, it was not the intention of the arbitrators, as appears by the award itself, that he should pay the money, and give a general release, and yet receive nothing for the task-work and day-work, as by reason of the uncertainty of the award in that part he could not."

The application of this case to that under consideration is complete. The award to reconvey all lands heretofore conveyed or pledged to the plaintiffs by Gideon Dennison, in his life-time, as collateral security, is as uncertain as the award to pay for task-work and day-work already performed; it was as much the \*intention of the arbitrators that the [**\*411** parts of their award which were favorable to the different parties should be dependent on each other in this case as in the case of *Pope v. Brett*. The arbitrators never could have designed that Bond and Lyle should get their money, and retain their deposits.

In his note upon this case, Sergeant Williams says: "If, by the nullity of the award in any part, one of the parties cannot have the advantage intended for him as a recompense or consideration, for that which he is to do to the other, the award is void in the whole."

This just principle must always remain a part of the law of awards.

The objection to the part of the award which has been considered, applies equally to that part of it which respects bonds, notes, bills, or other securities.

*Judgment affirmed.*

Cited—1 Pet. 229; 18 How. 252; 3 Cliff. 53.

1.—Kyd. 246.  
Wheat. 5.



**412\*]** [\*LAW OF NATIONS. CONSTITUTIONAL LAW.]

**THE UNITED STATES v. HOLMES ET AL.**

The courts of the United States have jurisdiction under the act of the 30th of April, 1790, ch. 36, of murder or robbery committed on the high seas, although not committed on board a vessel belonging to citizens of the United States, as if she had no national character, but was held by pirates, or persons not lawfully sailing under the flag of any foreign nation.

In the same case, and under the same act, if the offense be committed on board of a foreign vessel by a citizen of the United States, or on board a vessel of the United States by a foreigner, or by a citizen or foreigner on board of a piratical vessel, the offense is equally cognizable by the courts of the United States.

It makes no difference in such a case, and under the same act, whether the offense was committed on board of a vessel or in the sea, as by throwing the deceased overboard and drowning him, or by shooting him when in the sea though he was not thrown overboard.

**T**HE prisoners were indicted at the Circuit Court of Massachusetts, at the October term of said court, 1818, for that the prisoners being citizens of the United States, on the fourth day of July then last past, with force and arms, upon the high seas, out of the jurisdiction of any particular state, in and on board a certain schooner or vessel, the name whereof being to the jurors unknown, in and upon a person known, and commonly called by the name of Reed, a mariner, in and on board said vessel, in the peace of God, and of the said United States, then and there being, piratically, &c., did make an assault; and that they, the said William Holmes, Thomas War-**413\*]** rington, \*otherwise called Warren Fawcett, and Edward Rosewain, with a certain steel dagger, &c., which he, the said William Holmes, in his right hand, then and there had and held, the said person commonly called Reed, in and upon the arms and breast of him, the said Reed, upon the high seas, and on board the vessel aforesaid, and out of the jurisdiction of any particular state, piratically, &c., did strike and thrust, giving to the said person commonly called Reed, in and upon the arms and breast of him, the said Reed, upon the high seas, in and on board the vessel aforesaid, and out of the jurisdiction of any particular state, 'piratically, &c., him, the said person commonly called Reed, cast and threw from out of said vessel into the sea, and plunge, sink and drown him, in the sea aforesaid, of which said grievous wounds, casting, throwing, plunging, sinking and drowning, the said person commonly called Reed, upon the high seas aforesaid, out of the jurisdiction of any particular state, then and there instantly died.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said William Holmes, &c., him, the said person commonly called Reed, then and there, upon the high seas as aforesaid, and out of the jurisdiction of any particular state, piratically, &c., did kill and murder, against the peace and dig-

nity of the said United States, and against the form of the \*statute of the said United [**\*414** States, in such case made and provided, &c. Upon which indictment the prisoners were found guilty of the offense charged therein. And, thereupon, the counsel for the prisoners moved the court for a new trial for the misdirection of the court upon the points of law which had been raised at the trial. And upon arguing the said motion for a new trial, the several questions occurred before the Circuit Court, which are stated in the opinion of this court, upon which the opinions of the judges of the Circuit Court were opposed.

From the evidence it appeared that a vessel, apparently Spanish (whose national character, however, was not distinctly proved by any documentary evidence, or by the testimony of any person conusant of its character), was captured by two privateers from Buenos Ayres, a prize crew put on board, and the prisoners were of that prize crew. One of the prisoners was a citizen of the United States, and the other prisoners were foreigners. The crime was committed by the prisoners on the person whose death was charged in the indictment, by drowning him on the high seas, he being, at the time, a prize-master of the captured vessel, and thrown or driven overboard by the prisoners. There was no proof who were the owners of the privateers, nor where they resided, nor what were the ships' papers or documents, nor where, nor at what time, they were armed or equipped for war. The privateers had been at Buenos Ayres, and openly kept a rendezvous there, and shipped the crews there. The crews consisted chiefly of Englishmen, Frenchmen, and Americans. \*The commander of [**\*415** one of the privateers was, by birth, a citizen of the United States, and had a family domiciled at Baltimore. The commander of the other was by birth an Englishman, but had long been domiciled at Baltimore. There was no proof that either of them had ever lived at Buenos Ayres, or been naturalized there. All the witnesses agreed that both the privateers were built at Baltimore. They had been at Buenos Ayres, before their sailing on this cruise, but a short time, one about six weeks, the other a few days only.

And the said judges being so opposed in opinion upon the questions aforesaid, the same were then and there, at the request of the district attorney for the United States, stated, under the direction of the judges, and ordered by the court to be certified under the seal of the court to this court, to be finally decided.

This case was argued by the *Attorney-General* for the United States, and by *Mr. Webster* for the prisoners, upon the same grounds which are stated in the argument of the preceding cases of *The United States v. Klintonck*,<sup>1</sup> *The United States v. Smith*,<sup>2</sup> and *The United States v. Furlong et al.*<sup>3</sup>

*Mr. Justice WASHINGTON* delivered the opinion of the court: This case comes before the court upon a division of opinion of the judges of the Circuit Court for the District of Massa-

1.—*Ante*, p. 144.

2.—*Ante*, p. 153.

3.—*Ante*, p. 184.

chusetts. The defendants are indicted for **416\***] murder committed on the \*high seas; and the questions adjourned to this court are,

1. Whether the Circuit Court had jurisdiction of the offense charged in the indictment, unless the vessel on board of which the offense was committed was, at the time, owned by a citizen, or citizens of the United States, and was lawfully sailing under its flag.

2. Whether the court had jurisdiction of the offense charged in the indictment, if the vessel on board of which it was committed, at the time of the commission thereof, had no real national character, but was possessed and held by pirates, or by persons not lawfully sailing under the flag, or entitled to the protection of any government whatever.

3. Whether it made any difference as to the point of jurisdiction, whether the prisoners, or any of them, were citizens of the United States, or that the offense was consummated, not on board of any vessel, but in the high seas.

4. Whether the burthen of proof of the national character of the vessel on board of which the offense was committed was on the United States, or, under the circumstances stated in the charge of the court, was on the prisoner.

The two first questions have been decided by this court at its present session. In *Klintock's* case,<sup>1</sup> it was laid down, that to exclude the jurisdiction of the courts of the United States, in cases of murder or robbery committed on the high seas, the vessel in which the offender is, **417\***] or to which he belongs, must \*be, at the time, in fact, as well as in right, the property of a subject of a foreign state, and in virtue of such property, subject, at that time, to his control. But if the offense be committed in a vessel, not at the time belonging to subjects of a foreign state, but in possession of persons acknowledging obedience to no government or flag, and acting in defiance of all law, it is embraced by the act of the 30th of April, 1790. It follows, therefore, that murder or robbery committed on the high seas may be an offense cognizable by the courts of the United States, although it was committed on board of a vessel not belonging to citizens of the United States, as if she had no national character, but was possessed and held by pirates, or persons not lawfully sailing under the flag of any foreign nation.

The third question contains two propositions: 1. As to the national character of the offender, and of the person against whom it is committed; and, 2. As to the place where the offense is committed.

In respect to the first, the court is of opinion, and so it has been decided during the present term, that it makes no difference whether the offender be a citizen of the United States or not. If it be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, the offender is to be considered, *pro hac vice*, and in respect to this subject, as belonging to the nation under whose flag he sails. If it be committed either by a citizen or a foreigner, on board of a piratical vessel, the offense is equally cognizable by the courts of the United **418\***] \*States, under the above-mentioned

law. 2. Upon this point, the court is of opinion that it makes no difference whether the offense was committed on board of a vessel or in the sea, as by throwing the deceased overboard and drowning him, or by shooting him when in the sea, though he was not thrown overboard. The words of the above act of Congress are general, and speak of certain offenses committed upon the high seas, without reference to any vessel whatsoever on which they should be committed; and no reason is perceived why a more restricted meaning should be given to the expressions of the law than they literally import. In the case of *Furlong* for the murder of Sunley, decided during the present term of the court, it was certified, that murder committed from on board an American vessel, by a mariner sailing on board an American vessel, by a foreigner on a foreigner, in a foreign vessel, is within the act of the 30th of April, 1790.<sup>2</sup> It follows from this, and the principles laid down in *Klintock's* case, that the same offense committed by any person from on board a vessel having no national character, as by throwing a person overboard, and drowning him, is within the same law.

It is stated, in the charge of the court below, that it did not appear by any legal proof that the privateers had commissions from Buenos Ayres, or any ship's papers or documents from that government, or that they were ever recognized as ships of that nation, or of its subjects; or who were the owners, where they resided, or when or where the privateers were armed or equipped. But it did appear \*in proof [**419**] that the captains and crew were chiefly Englishmen, Frenchmen, and American citizens; that the captains were both domiciled at Baltimore, where the family of one of them resided, and that he was by birth an American citizen. It was also proved that the privateers were Baltimore built.

Under these circumstances, the court is of opinion that the burthen of proof of the national character of the vessel on board of which the offense was committed, was on the prisoners.

CERTIFICATE.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Massachusetts, and on the questions on which the judges of that court were divided in opinion, and was argued by counsel. On consideration whereof, this court is of opinion:

1. That the said Circuit Court had jurisdiction of the offense charged in the indictment, although the vessel on board of which the offense was committed was not, at the time, owned by a citizen, or citizens of the United States, and was not lawfully sailing under its flag.

2. The said Circuit Court had jurisdiction of the offense charged in the indictment, if the vessel, on board of which it was committed, had, at the time of the commission thereof, no real national character, but was possessed and held by pirates, or by persons not lawfully sailing under the flag, or entitled to the protection of any government whatsoever.

3. That it made no difference, as to the point of jurisdiction, whether the prisoners, or any

1.—*Ante*, p. 144.  
Wheat. 5.

2.—*Ante*, p. 184.



420\*] of them, \*were citizens of the United States, or whether the deceased was a citizen of the United States, or that the offense was committed not on board any vessel, but on the high seas.

4. That the burthen of proof of the national character of the vessel, on board of which the offense was committed, was, under the circumstances stated in the charge of the court, on the prisoners.<sup>1</sup>

Cited—9 How. 572; 1 Bald. 28, 29; 2 Sumn. 485; 3 Cliff. 53.

#### [CONSTITUTIONAL LAW.]

#### OWINGS v. SPEED, ET AL.

The present constitution of the United States did not commence its operation until the first Wednesday in March, 1789, and the provision in the constitution, that "no state shall make any law impairing the obligation of contracts," does not extend to a state law enacted before that day, and operating upon rights of property vested before that time.

The books of a corporation, established for public purposes, are evidence of its acts and proceedings.

THIS cause was argued by *Mr. B. Hardin* for the defendants, no counsel appearing for the plaintiff.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court: This was an ejectment brought by the plaintiff in the Circuit Court of the United States for the District of Kentucky, to recover a lot of ground lying in Bardstown. 421\*] \*This town was laid off in 1780, on a tract of land consisting of 1,000 acres, for which, in 1785, a patent was issued by the commonwealth of Virginia to Bard and Owings. In 1788 the legislature of Virginia passed an act vesting 100 acres—part of this tract—in trustees, to be laid off in lots, some of them to be given to settlers, and others to be sold for the benefit of the proprietors. The cause depends, mainly, on the validity of this act. It is contended to be a violation of that part of the constitution of the United States which forbids a state to pass any law impairing the obligation of contracts.

Much reason is furnished by the record for presuming the consent of the proprietors to this law; but the Circuit Court has decided the question independently of this consent, and that decision is now to be reviewed.

Before we determine on the construction of the constitution in relation to a question of this description, it is necessary to inquire whether the provisions of that instrument apply to any acts of the state legislatures which were of the date with that which it is now proposed to consider.

This act was passed in the session of 1788. Did the constitution of the United States then operate upon it?

In September, 1787, after completing the great work in which they had been engaged, the convention resolved that the constitution should be laid before the Congress of the United States, to be submitted by that body to

conventions of the several states, to be convened by their respective legislatures, \*and [\*422 expressed the opinion, that as soon as it should be ratified by the conventions of nine states, Congress should fix a day on which electors should be appointed by the states, a day on which the electors should assemble to vote for President and Vice-President, "and the time and place for commencing proceedings under this constitution."

The conventions of nine states having adopted the constitution, Congress, in September or October, 1788, passed a resolution in conformity with the opinions expressed by the convention, and appointed the first Wednesday in March of the ensuing year as the day, and the then seat of Congress as the place, "for commencing proceedings under the constitution."

Both governments could not be understood to exist at the same time. The new government did not commence until the old government expired. It is apparent that the government did not commence on the constitution being ratified by the ninth state; for these ratifications were to be reported to Congress, whose continuing existence was recognized by the convention, and who were requested to continue to exercise their powers for the purpose of bringing the new government into operation. In fact, Congress did continue to act as a government until it dissolved on the first of November by the successive disappearance of its members. It existed potentially until the 2d of March, the day preceding that on which the members of the new Congress were directed to assemble.

The resolution of the convention might originally \*have suggested a doubt [\*423 whether the government could be in operation for every purpose before the choice of a President; but this doubt has been long solved, and were it otherwise, its discussion would be useless, since it is apparent that its operation did not commence before the first Wednesday in March, 1789, before which time Virginia had passed the act which is alleged to violate the constitution.

In the trial of the cause, the defendant produced a witness to prove that the lot for which the suit was instituted, was a part of the 100 acres vested in trustees by the act of assembly. To this testimony the plaintiff objected, because the witness stated that he had sold a lot in Bardstown, with warranty, and was in possession of another. He added, that no suit had been brought for the said lot, and that he was not interested in this suit. The court admitted the witness, and to this opinion also a bill of exceptions was taken.

It is so apparent that the witness had no interest in the suit in which he was examined, and it is so well settled that only an interest in that suit could affect his competency, as to make it unnecessary to say more than that the court committed no error in permitting his testimony to go to the jury.

There was also an exception taken to the opinion of the court in allowing the book of the board of trustees, in which their proceedings were recorded, and other records belonging to the corporation, to be given in evidence.

The book was proved by the present clerk, who also proved the handwriting of the first

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1.—*Vide* Appendix, note IV.

**424\***] clerk, and of \*the President, who were dead. The trustees were established by the legislature for public purposes. The books of such a body are the best evidence of their acts, and ought to be admitted whenever those acts are to be proved. There was no error in the opinion admitting them.

There is the less necessity in this case for entering more fully into this question, because the record contains other evidence of the facts, which the testimony, to which exceptions were taken, was adduced to prove.

*Judgment affirmed with costs.*

Cited—5 How. 377, 379; 1 Wood. & M. 106, 430; 2 McLean, 425; 6 Otto, 436.

[CHANCERY.]

CONN. ET AL. v. PENN..

In appeals to this court, from the circuit courts, in chancery cases, the parol testimony which is heard at the trial, in the court below, ought to appear in the record.

A final decree in equity, or an interlocutory decree, which, in a great measure, decides the merits of the cause, cannot be pronounced until all the parties to the bill, and all the parties in interest, are before the court.

THIS cause was argued by *Mr. Pinkney* and *Mr. Jones* for the appellants, and by the *Attorney-General* and *Mr. Sergeant* for the respondent.

**425\***] \**Mr. Chief Justice MARSHALL* delivered the opinion of the court: This is an appeal from a decree of the Circuit Court for the District of Pennsylvania, dismissing the bill of the plaintiffs.

Without going into the merits of the case, the counsel for the plaintiffs contend that the decree ought to be reversed, because it appears to have been pronounced in part on parol testimony, which has not been introduced into the record, and because the decree was made when the parties interested were not all before the court.

The laws of the United States have always proceeded on the supposition, that in revising decrees in chancery, the facts, as well as the law, should be laid before this court. The judiciary act, which directs that the mode of proof shall be by oral testimony, and that witnesses shall be examined, in open court, also directs that a statement of facts shall be placed on the record. The act of 1802 leaves it to the discretion of the courts in those states where testimony in chancery is taken by depositions, to order, on the request of either party, the testimony of the witnesses to be taken by depositions.

The act of 1803 repeals those parts of the judiciary act which authorize a writ of error, and a statement of facts in chancery cases; allows an appeal from the decrees of a Circuit Court sitting in chancery; and directs that a copy of the bill, answer, depositions, and all other proceedings, of what kind soever, in the cause, shall be transmitted to this court, and that no new evidence shall be heard.

Wheat. 5.

\*Previous to this act, the facts were [**426** brought before this court by the statement of the judge. The depositions are substituted for that statement; and it would seem, since this court must judge of the fact, as well as the law, that all the testimony which was before the Circuit Court ought to be laid before this court. Yet the section which directs that witnesses shall be examined in open court, is not, in terms, repealed.

The court has felt considerable doubts on this subject, but thinks it the safe course to require that all the testimony on which the judge founds his opinion, should, in cases within the jurisdiction of this court, appear in the record. The parties may certainly waive testimony by consent, but if this consent does not appear, it cannot be presumed; and where it is shown on the record that witnesses were examined in open court, this court cannot say how much the opinion of the Circuit Court was influenced, and ought to have been influenced, by their testimony.

In this case an interlocutory decree was rendered which decided, to a great extent, the merits of the cause, at a time when one of the defendants named in the bill was not before the court, and when it appeared that a person not made a defendant was deeply concerned in interest. This decree granted relief on certain conditions, to certain classes of the plaintiffs, and directed them to appear before commissioners, and to exhibit their proof that they came within the descriptions of persons who were entitled to relief. They refused to appear before these commissioners; \*and upon [**427** the coming in of the report, stating this fact, their bill was dismissed with costs.

The object of this bill was to obtain conveyances from John and William Penn of certain lands which they were supposed to hold as tenants in common, and to which the plaintiffs asserted an equitable title. It was irregular to make the decree which was made respecting the title, until both the defendants were before the court. But it is the fault of the plaintiffs that they were not. The bill prays conveyances of the legal title on the payment of so much money as was still due on certain principles on which they allege their equitable title to have been acquired. It was referred to commissioners to ascertain the amount of these sums, as well as to class the respective claimants according to the interlocutory decree. They refuse to appear before the commissioners, and to exhibit either their equitable titles, or to show the payments they have made. On what pretense can such plaintiffs claim the aid of a court of equity? What is a court to do in such a state of things? Where a party asking its aid refuses to comply with the conditions on which that aid must depend, a court is certainly correct in refusing its aid, and may dismiss the bill. But in such a case, we think it would be harsh to make the decree of dismissal a bar to a future action. It is not certain that this decree is on such a hearing as to be a bar to a future action; and this point is not positively decided. It is unnecessary to decide it, because we think the interlocutory decree was irregular, and ought not to have been made until William Penn, a tenant in common \*with John [**428** Penn, was before the court. The defendants



are left at liberty to proceed with their legal title, and this must be sufficient to prevent the plaintiffs from practicing unnecessary delays.

For the irregularities which have been stated, we think the decree ought to be reversed, and the cause remanded, that the proper proceedings may be had therein.

DECREE.—This cause came on to be heard on the transcript of the record, and was argued by counsel. On consideration whereof, this court is of opinion that the parol testimony stated by the Circuit Court, in the interlocutory decree to have been heard at the trial, ought to have appeared in the record, and that the interlocutory decree ought not to have been pronounced until William Penn was before the court by his answer, or otherwise. This court is therefore of opinion that the decree of the Circuit Court for the District of Pennsylvania, dismissing the bill of the plaintiffs, ought to be reversed, and the same is hereby reversed, and the cause is remanded, that farther proceedings may be had therein, according to equity. All which is ordered and decreed accordingly.

Rev'g.—Pet. C. C. 496.

Cited—5 Pet. 449; 2 Otto, 4.

429\*]

[\*CHANCERY.]

CAMPBELL v. PRATT ET AL.

Explanation of the former decree of this court in the same case, 9 Cranch, 500.

THIS cause was argued by *Mr. Key* for the appellant, and by *Mr. Jones* for the respondents.

*Mr. Justice JOHNSON* delivered the opinion of the court: The principal question in this case is, whether the Circuit Court has executed the decrees formerly pronounced between these parties,<sup>1</sup> according to their true intent and meaning. Some obscurity has been thrown over the meaning of those decrees, from an obvious error in copying them into the minutes. The primary object of this court was, to give to Law the benefit of a foreclosure in all the lots included in the mortgage from Morris, Nicholson & Greenleaf, in whose right Pratt, Francis & Company founded their claim. But being called upon by the equity of intervening interests (in creating which Law himself had had some agency), they decreed a distribution of the whole amount due to Law, between that class of lots, still held by the mortgageor, and 430\*] that which had passed into the hands \*of the present appellants. This class was again subject to another discrimination, inasmuch as thirteen of the thirty-two purchased by the appellant were subject to a second mortgage, executed by Morris, Nicholson & Greenleaf, to one Duncanson, and the equitable interest in which was adjudged to the assignee of Greenleaf. The sum which thirty-two lots were decreed to contribute to the payment of Law, was

to be determined by the ratio which these lots bore to the whole of the mortgaged premises.

It is now contended, that another distribution of the sum thus charged is to be made between the lots thus mortgaged to Duncanson, and the remaining lots of this class. And it is ascertained, that the consequence will be, putting a considerable sum in the pocket of this appellant, to the prejudice of Duncanson's mortgage, as the sale of those thirteen lots falls considerably short of satisfying the sum decreed on that mortgage. That is, that these thirteen lots shall be charged rateably with the sum charged upon the whole class, so as to contribute to relieve the remaining lots, and by thus contributing to the satisfaction of Law's mortgage, leave the larger sum from the sale of the remaining lots to be paid over to this appellant. This, it is contended, is both conformable to the decree and to general principles.

If conformable to the decree, it is in vain to refer to general principles. But we think the purport of the decree is obviously otherwise. Campbell, claiming \*as purchaser at [\*431 sheriff's sales, under an attachment of the interest of the mortgageors, filed his bill for a redemption of the whole of this class of lots, and the court decreed that he be permitted to redeem, on payment, first, of the ratio of Law's mortgage, charged on this class, secondly, on payment of two-thirds of the amount of principal and interest of the debt due to Duncanson. And as the opposite claimants had filed their bill for a foreclosure, a sale is ordered of the whole of this class of lots to raise the money, to be applied in the same manner, if Campbell should fail in six months to redeem. The application of the amount of sales must then be regulated by the right of redemption as decreed to Campbell; and that is, that he pay, first, the contribution to Law, secondly, the amount due to Duncanson, upon which conditions only he could hold the lots discharged of the mortgages, and, consequently, after those payments only could he receive the balance of the money, the representative of his remaining interest in the land.

And this exposition of the decree is perfectly consonant with general principles. All the doubt in the case has been raised by the effort to exhibit this appellant as the holder of an independent interest, that is, as a third incumbrancer. But this is by no means his relative character. He is nothing more than the legal representative of the interests of Morris, Nicholson & Greenleaf, in the lots attached and sold to him. The attachment was levied upon the equity of redemption existing in those mortgageors; \*and the decision of this court, in [\*432 supporting his right, was placed upon the decision of the courts of Maryland (in which the land then lay), which maintained the validity of an attachment levied upon an equity of redemption. He was, then, nothing more than the assignee of an equity of redemption, and could claim no greater equity as against either Duncanson or Law. That he was not to be considered as a subsequent incumbrancer is conclusively determined by this consideration, that there would then have been no equity of redemption outstanding in anyone. In the relation of the assignee of an equity of redemption, he appeared first in this court, and it is

Wheat. 5.

1.—S. C. 9 Cranch, 500.

obvious, from the former decree, that in that light only did this court view him. In this light, he could lay claim to no rights inconsistent with those of the creditor; and as far as the proceeds of the 13 lots were adequate to satisfying Duncanson, he could be entitled to nothing until that debt was paid. Any other application of the proceeds of those lots would be preferring the mortgageor to the mortgagee, or the debtor to the creditor; and confer on the assignee of the equity of redemption, a greater equity against the mortgagee than could have been decreed to the original mortgageor.

That part of the decision of the Circuit Court will therefore be affirmed. But of the remaining two points, it will be necessary to refer the subject, in order to have the statements and evidence in this record compared, upon which a conclusion must be formed. If this appellant has been charged with a greater amount than 433\*] his just ratio of the debt due to \*Law, he is entitled to relief. But the principles being established, this becomes a mere matter of numerical calculation.

*Decree accordingly.*

[PRIZE.]

THE ATALANTA. FAUSSAT, *Claimant.*

A question of proprietary interest on further proof. Condemnation pronounced.

THIS cause was continued at February term, 1818,<sup>1</sup> for further proof, but the further proof received at the last term being unsatisfactory, it was again continued, on account of some peculiar circumstances in the case, to the present term, when no further proof being produced, condemnation was pronounced.

*Decree reversed.*

1.—*Vide ante*, Vol. III., p. 409.  
Wheat. 5.

\*[PRACTICE.]

[\*434

THE UNITED STATES v. LANCASTER.

The district judge cannot sit in the Circuit Court in a cause brought by writ of error from the District to the Circuit Court, and the cause cannot in such a case be brought from the Circuit to this court upon a certificate of a division of opinion of the judges.

ERROR to the Circuit Court of Pennsylvania.

This was an action of debt originally brought in the District Court, and carried by writ of error to the Circuit Court, from which it was brought to this court, upon a case agreed by the parties, and a certificate that the opinions of the judges were opposed upon a question arising in the cause.

The cause was argued by *Mr. C. J. Ingersoll* for the plaintiffs, and by *Mr. Sergeant* for the defendant.

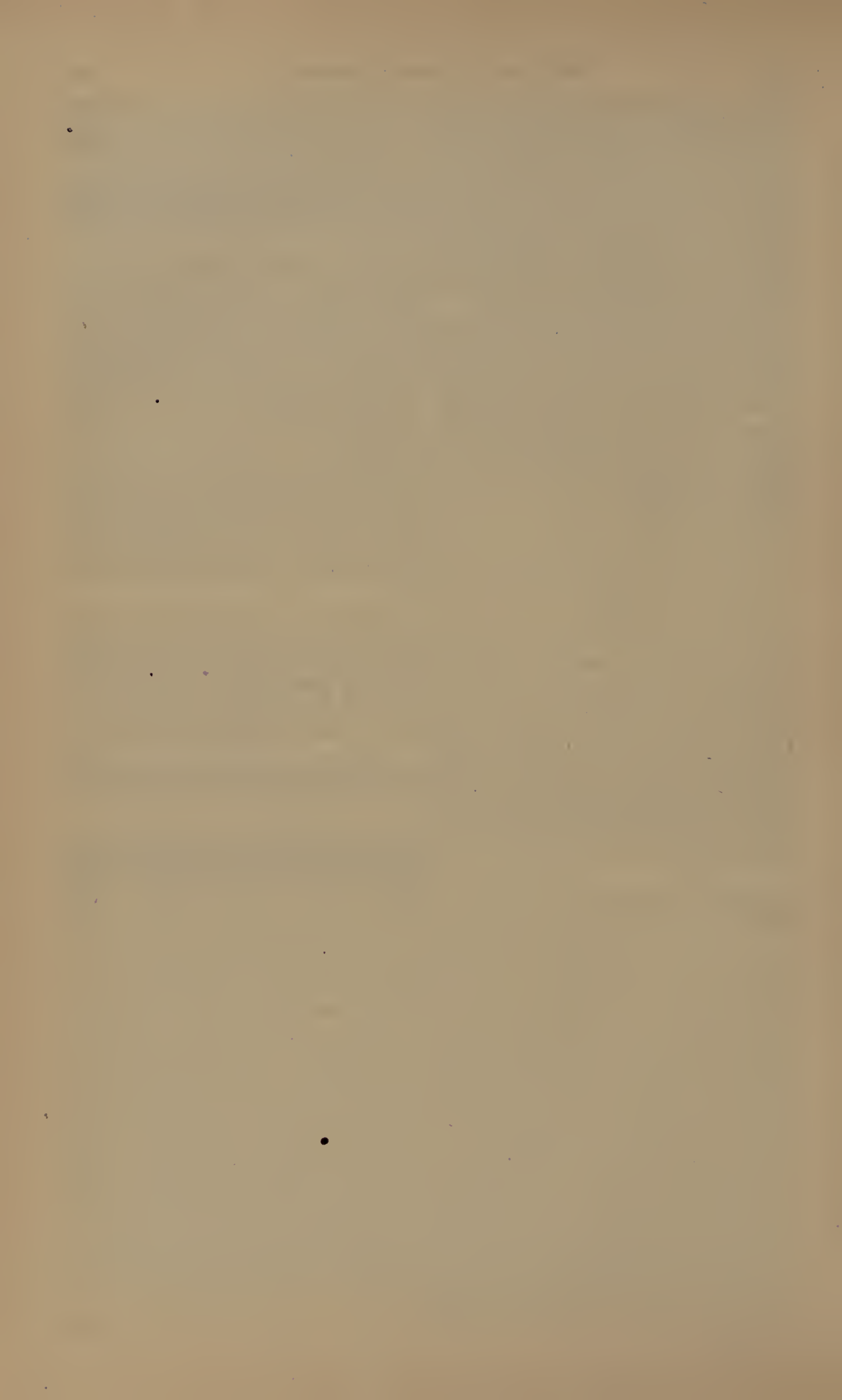
*Mr. Chief Justice MARSHALL* delivered the opinion of the court, that it had no jurisdiction of the cause, as the district judge could not sit in the Circuit Court on a writ of error from his own decision, and consequently there could be no division of opinion to be certified to this court.<sup>1</sup>

\*JUDGMENT.—This cause came on to [\*435 be heard on the transcript of the record of the Circuit Court for the District of Pennsylvania, and was argued by counsel. On consideration whereof, it was adjudged and ordered, that the said cause be remanded to the said Circuit Court, it not appearing from the said transcript that this court has jurisdiction in said cause.

1.—Neither can a cause be brought to this court by writ of error, which has been carried from the District to the Circuit Court by writ of error. *The United States v. Barker, ante*, Vol. II., p. 395.

NOTE.—When the death of the Justice of the Supreme Court authorized to hold the Circuit Court in a particular circuit, the district judge may hold a circuit court alone. *Pollard v. Dwight*, 4 Cranch, 421.





## APPENDIX.

3\*]

[\*NOTE I.]

*Speech of the Honorable JOHN MARSHALL, delivered in the House of Representatives of the United States, on the Resolutions of the Honorable Edward Livingston, relative to Thomas Nash, alias Jonathan Robins.*

Mr. MARSHALL said: Believing as he did most seriously, that in a government constituted like that of the United States, much of the public happiness depended, not only on its being rightly administered, but on the measures of administration being rightly understood: on rescuing public opinion from those numerous prejudices with which so many causes might combine to surround it: he could not but have been highly gratified with the very eloquent, and what was still more valuable, the very able, and very correct argument, which had been delivered by the gentleman from Delaware (Mr. Bayard) against the resolutions now under consideration. He had not expected that the effect of this argument would have been universal, but he had cherished the hope, and in this he had not been disappointed, that it would be very extensive. He did not flatter himself with being able to shed much new light on the subject; but as the argument in opposition to the resolutions had been assailed, with considerable ability, by gentlemen of great talents, he trusted the house would not think the time misapplied which would be devoted to the re-establishment of the principles contained in that argument, and to the refutation of those advanced in opposition to it. In endeavoring to do this, he should notice the observations 4\*] in support of the resolutions, not in the precise order in which they were made, but as they applied to the different points he deemed it necessary to maintain, in order to demonstrate that the conduct of the executive of the United States could not justly be charged with the errors imputed to it by the resolutions.

His first proposition, he said, was, that the case of Thomas Nash, as stated to the President, was completely within the twenty-seventh article of the treaty of amity, commerce, and navigation, entered into between the United States of America and Great Britain.

He read the article, and then observed: The *casus fœderis* of this article occurs, when a person, having committed murder or forgery within the jurisdiction of one of the contracting parties, and having sought an asylum in the country of the other, is charged with the crime, and his delivery demanded, on such proof of his guilt as, according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial, if the offense had there been committed.

The case stated is, that Thomas Nash, having committed a murder on board a British frigate, navigating the high seas under a commission

from His Britannic Majesty, had sought an asylum within the United States, and on this case his delivery was demanded by the minister of the King of Great Britain.

It is manifest that the case stated, if supported by proof, is within the letter of the article, provided a murder committed in a British frigate, on the high seas, be committed within the jurisdiction of that nation.

That such a murder is within their jurisdiction, has been fully shown by the gentleman from Delaware. The principle is, that the jurisdiction of a nation extends to the whole of its territory, and to its own citizens in every part of the world. The laws of a nation are rightfully obligatory on its own citizens in every situation, where those laws are really extended to them. This principle is founded on the nature of civil union. It is supported everywhere by public opinion, and is recognized by writers on the law of nations. Rutherford, in his second volume (p. 180), says: "The jurisdiction which a civil society has \*over the [\*5 persons of its members, affects them immediately, whether they are within its territories or not."

This general principle is especially true, and is particularly recognized with respect to the fleets of a nation on the high seas. To punish offenses committed in its fleet, is the practice of every nation in the universe; and consequently the opinion of the world is, that a fleet at sea is within the jurisdiction of the nation to which it belongs. Rutherford (Vol. II., p. 491), says: "There can be no doubt about the jurisdiction of a nation over the persons which compose its fleets, when they are out at sea, whether they are sailing upon it, or are stationed in any particular part of it."

The gentleman from Pennsylvania (Mr. Gallatin), though he has not directly controverted this doctrine, has sought to weaken it by observing that the jurisdiction of a nation at sea could not be complete even in its own vessels; and in support of this position, he urged the admitted practice of submitting to search for contraband; a practice not tolerated on land, within the territory of a neutral power. The rule is as stated, but is founded on a principle which does not affect the jurisdiction of a nation over its citizens or subjects in its ships. The principle is, that in the sea itself no nation has any jurisdiction. All may equally exercise their rights, and consequently the right of a belligerent power to prevent aid being given to his enemy, is not restrained by any



superior right of a neutral in the place. But if this argument possessed any force, it would not apply to national ships of war, since the usage of nations does not permit them to be searched.

According to the practice of the world, then, and the opinions of writers on the law of nations, the murder committed on board a British frigate, navigating the high seas, was a murder committed within the jurisdiction of the British nation.

Although such a murder is plainly within the letter of the article, it has been contended not to be within its just construction; because, at sea, all nations have a common jurisdiction, and the article correctly construed, will not embrace a case of concurrent jurisdiction.

It is deemed unnecessary to controvert this [6\*] construction, because \*the proposition, that the United States had no jurisdiction over the murder committed by Thomas Nash, is believed to be completely demonstrable.

It is not true that all nations have jurisdiction over all offenses committed at sea. On the contrary, no nation has any jurisdiction at sea, but over its own citizens or vessels, or offenses against itself. This principle is laid down in 2 Ruth. 488, 491.

The American government has, on a very solemn occasion, avowed the same principle. The first minister of the French republic asserted and exercised powers of so extraordinary a nature as unavoidably to produce a controversy with the United States. The situation in which the government then found itself was such as necessarily to occasion a very serious and mature consideration of the opinions it should adopt. Of consequence, the opinions then declared deserve great respect. In the case alluded to, Mr. Genet had asserted the right of fitting out privateers in the American ports, and of manning them with American citizens, in order to cruise against nations with whom America was at peace. In reasoning against this extravagant claim, the then Secretary of State, in his letter of the 17th of June, 1793, says: "For our citizens, then, to commit murders and depredations on the members of nations at peace with us, or to combine to do it, appeared to the executive and to those whom they consulted, as much against the laws of the land as to murder or rob, or combine to murder or rob, its own citizens; and as much to require punishment, if done within their limits, where they have a territorial jurisdiction, or on the high seas, where they have a personal jurisdiction, that is to say, one which reaches their own citizens only; this being an appropriate part of each nation, on an element where all have a common jurisdiction."

The well-considered opinion, then, of the American government on this subject is, that the jurisdiction of a nation at sea is "personal," reaching its "own citizens only," and that this is "the appropriate part of each nation" on that element.

This is precisely the opinion maintained by the opposers of the resolutions. If the jurisdiction of America at sea be personal, reaching its own citizens only; if this be its appropriate [7\*] part, then the jurisdiction of the nation cannot extend to a murder committed by a British sailor, on board a British frigate navi-

gating the high seas, under a commission from His Britannic Majesty.

As a further illustration of the principle contended for, suppose a contract made at sea, and a suit instituted for the recovery of money which might be due thereon. By the laws of what nation would the contract be governed? The principle is general, that a personal contract follows the person, but is governed by the law of the place where it is formed. By what law, then, would such a contract be governed? If all nations had jurisdiction over the place, then the laws of all nations would equally influence the contract; but certainly no man will hesitate to admit that such a contract ought to be decided according to the laws of that nation to which the vessel or contracting parties might belong.

Suppose a duel attended with death, in the fleet of a foreign nation, or in any vessel which returned safe to port, could it be pretended that any government on earth, other than that to which the fleet or vessel belonged, had jurisdiction in the case; or that the offender could be tried by the laws or tribunals of any other nation whatever.

Suppose a private theft by one mariner from another, and the vessel to perform its voyage and return in safety, would it be contended that all nations have equal cognizance of the crime, and are equally authorized to punish it?

If there be this common jurisdiction at sea, why not punish desertion from one belligerent power to another, or correspondence with the enemy, or any other crime which may be perpetrated? A common jurisdiction over all offenses at sea, in whatever vessel committed, would involve the power of punishing the offenses which have been stated. Yet all gentlemen will disclaim this power. It follows, then, that no such common jurisdiction exists.

In truth, the right of every nation to punish is limited, in its nature, to offenses against the nation inflicting the punishment. This principle is believed to be universally true.

It comprehends every possible violation of its laws on its \*own territory, and it extends [\*8] to violations committed elsewhere by persons it has a right to bind. It extends also to general piracy.

A pirate, under the law of nations, is an enemy of the human race. Being the enemy of all, he is liable to be punished by all. Any act which denotes this universal hostility is an act of piracy. Not only an actual robbery therefore, but cruising on the high seas without commission, and with intent to rob, is piracy. This is an offense against all and every nation, and is therefore alike punishable by all. But an offense which in its nature affects only a particular nation, is only punishable by that nation.

It is by confounding general piracy with piracy by statute, that indistinct ideas have been produced, respecting the power to punish offenses committed on the high seas.

A statute may make any offense piracy, committed within the jurisdiction of the nation passing the statute, and such offense will be punishable by that nation. But piracy under the law of nations, which alone is punishable by all nations, can only consist in an act which is an offense against all. No particular nation

can increase or diminish the list of offenses thus punishable.

It had been observed by his colleague (Mr. Nicholas), for the purpose of showing that the distinction taken on this subject by the gentleman from Delaware (Mr. Bayard) was inaccurate, that any vessel robbed on the high seas could be the property only of a single nation, and being only an offense against that nation, could be, on the principle taken by the opposers of the resolutions, no offense against the law of nations; but in this his colleague had not accurately considered the principle. As a man, who turns out to rob on the highway, and forces from a stranger his purse with a pistol at his bosom, is not the particular enemy of that stranger; but alike the enemy of every man who carries a purse, so those who, without a commission, rob on the high seas, manifest a temper hostile to all nations, and therefore become the enemies of all. The same inducements which occasion the robbery of one vessel, exist to occasion the robbery of others, and therefore 9\*] the single offense is an offense \*against the whole community of nations, manifests a temper hostile to all, is the commencement of an attack on all, and is consequently, of right, punishable by all.

His colleague had also contended, that all the offenses at sea, punishable by the British statutes, from which the act of Congress was in a great degree copied, were piracies at common law, or by the law of nations, and as murder is among these, consequently murder was an act of piracy by the law of nations, and therefore punishable by every nation. In support of this position, he had cited 1 Hawk., P. C. 267, 271; 3 Inst. 112, and 1 Woodeson, 140.

The amount of these cases is, that no new offense is made piracy by the statutes; but that a different tribunal is created for their trial, which is guided by a different rule from that which governed previous to those statutes. Therefore, on an indictment for piracy, it is still necessary to prove an offense which was piracy before the statutes. He drew from these authorities a very different conclusion from that which had been drawn by his colleague. To show the correctness of his conclusion, it was necessary to observe, that the statute did not, indeed, change the nature of piracy, since it only transferred the trial of the crime to a different tribunal, where different rules of decision prevailed; but having done this, other crimes committed on the high seas, which were not piracy, were made punishable by the same tribunal; but certainly this municipal regulation could not be considered as proving that those offenses were, before, piracy by the law of nations. Mr. Nicholas insisted that the law was not correctly stated; whereupon Mr. Marshall called for 3 Inst. and read the statute.

"All treasons, felonies, robberies, murders, and confederacies, committed in or upon the seas, &c., shall be inquired, tried, heard, determined and judged in such shires, &c., in like form and condition as if any such offense had been committed on the land, &c."

"And such as shall be convicted, &c., shall have and suffer such pains of death, &c., as if they had been attainted of any treason, felony, robbery, or other the said offenses done upon the land."

Wheat. 5.

\*This statute, it is certain, does not [\*10 change the nature of piracy; but all treasons, felonies, robberies, murders and confederacies committed in or upon the sea, are not declared to have been, nor are they, piracies. If a man be indicted as a pirate, the offense must be shown to have been piracy before the statute; but if he be indicted for treason, felony, robbery, murder, or confederacy committed at sea, whether such offense was or was not a piracy, he shall be punished in like manner as if he had committed the same offense on land. The passage cited from 1 Woodeson, 140, is a full authority to this point. Having stated that offenses committed at sea were formerly triable before the Lord High Admiral, according to the course of the Roman civil law, Woodeson says, "but by the statute 27 H. VIII., ch. 4, and 28 H. VIII., ch. 15, all treasons, felonies, piracies, and other crimes committed on the sea, or where the admiral has jurisdiction, shall be tried in the realm as if done on land. But the statutes referred to affect only the manner of the trial so far as respects piracy. The nature of the offense is not changed. Whether a charge amounts to piracy or not, must still depend on the law of nations, except where, in the case of British subjects, express acts of Parliament have declared that the crimes therein specified shall be adjudged piracy, or shall be liable to the same mode of trial and degree of punishment."

This passage proves not only that all offenses at sea are not piracies by the law of nations, but also that all indictments for piracy must depend on the law of nations, "except where, in the case of British subjects, express acts of Parliament have changed the law. Why do not these "express acts of Parliament" change the law as to others than "British subjects?" The words are general; "all treasons, felonies," &c. Why are they confined in construction to British subjects? The answer is a plain one. The jurisdiction of the nation is confined to its territory and to its subjects.

The gentleman from Pennsylvania (Mr. Gallatin) abandons, and very properly abandons, this untenable ground. He admits that no nation has a right to punish offenses against another nation, and that the United States can only punish offenses against \*their own [\*11 laws, and the law of nations. He admits, too, that if there had only been a mutiny (and consequently if there had only been a murder) on board the *Hermione*, that the American courts could have taken no cognizance of the crime. Yet mutiny is punishable as piracy by the law of both nations. That gentleman contends that the act committed by Nash was piracy according to the law of nations. He supports his position by insisting that the offense may be constituted by the commission of a single act; that unauthorized robbery on the high seas is this act, and that the crew having seized the vessel, and being out of the protection of any nation, were pirates.

It is true that the offense may be completed by a single act; but it depends on the nature of that act. If it be such as manifests general hostility against the world—an intention to rob generally—then it is piracy; but if it be merely a mutiny and murder in a vessel, for the purpose of delivering it up to the enemy, it seems



to be an offense against a single nation, and not to be piracy. The sole object of the crew might be to go over to the enemy, or to free themselves from the tyranny experienced on board a ship of war, and not to rob generally.

But should it even be true that running away with the vessel to deliver her up to an enemy was an act of general piracy, punishable by all nations, yet the mutiny and murder was a distinct offense. Had the attempt to seize the vessel failed after the commission of the murder, then, according to the argument of the gentleman from Pennsylvania, the American courts could have taken no cognizance of the crime. Whatever, then, might have been the law respecting the piracy, of the murder there was no jurisdiction. For the murder, not the piracy, Nash was delivered up. Murder, and not piracy, is comprehended in the twenty-seventh article of the treaty between the two nations. Had he been tried then, and acquitted on an indictment for the piracy, he must still have been delivered up for the murder, of which the court could have no jurisdiction. It is certain that an acquittal of the piracy would not have discharged the murder; and, therefore, in the so much relied on trials at Trenton, a separate indictment for murder was filed after an indictment for piracy. Since, then, if acquitted for piracy, he must have been delivered to the British government on the charge of murder, the President of the United States might, very properly, without prosecuting for the piracy, direct him to be delivered up on the murder.

All the gentlemen who have spoken in support of the resolutions, have contended that the case of Thomas Nash is within the purview of the act of Congress which relates to this subject, and is by that act made punishable in the American courts. This is, that the act of Congress designed to punish crimes committed on board a British frigate.

Nothing can be more completely demonstrable than the untruth of this proposition.

It has already been shown that the legislative jurisdiction of a nation extends only to its own territory, and to its own citizens, wherever they may be. Any general expression in a legislative act must, necessarily, be restrained to objects within the jurisdiction of the legislature passing the act. Of consequence, an act of Congress can only be construed to apply to the territory of the United States comprehending every person within it, and to the citizens of the United States.

But independent of this undeniable truth, the act itself affords complete testimony of its intention and extent. (See Laws of the U. S., Vol. I., p. 10.)

The title is, "An act for the punishment of certain crimes against the United States." Not against Britain, France, or the world, but singly "against the United States."

The first section relates to treason, and its objects are, "any person or persons owing allegiance to the United States." This description comprehends only the citizens of the United States, and such others as may be on its territory or in its service.

The second section relates to misprision of treason, and declares, without limitation, that any person or persons, having knowledge of

any treason, and not communicating the same, shall be guilty of that crime. Here, then, is an instance of that limited description of persons in one section, and of that general description in another, which has been relied on to support the construction contended for by the friends of the resolutions. But will it be pretended that a person can commit misprision of \*treason, who cannot commit treason it- [\*13 self? That he would be punishable for concealing a treason, who could not be punished for plotting it? Or can it be supposed that the act designed to punish an Englishman or a Frenchman, who, residing in his own country, should have knowledge of treasons against the United States, and should not cross the Atlantic to reveal them?

The same observations apply to the sixth section, which makes "any person or persons" guilty of misprision of felony, who, having knowledge of murder or other offenses enumerated in that section, should conceal them. It is impossible to apply this to a foreigner, in a foreign land, or to any person not owing allegiance to the United States.

The eighth section, which is supposed to comprehend the case, after declaring, that if any person or persons shall commit murder on the high seas, he shall be punishable with death, proceeds to say, that if any captain or mariner shall piratically run away with a ship or vessel, or yield her up voluntarily to a pirate, or if any seaman shall lay violent hands on his commander, to prevent his fighting, or shall make a revolt in the ship, every such offender shall be adjudged a pirate and a felon.

The persons who are the objects of this section of the act are all described in general terms, which might embrace the subjects of all nations. But is it to be supposed, that if, in an engagement between an English and a French ship of war, the crew of the one or the other should lay violent hands on the captain, and force him to strike, that this would be an offense against the act of Congress, punishable in the courts of the United States? On this extended construction of the general terms of the section, not only the crew of one of the foreign vessels forcing their captain to surrender to another, would incur the penalties of the act, but if, in the late action between the gallant *Truxton* and a French frigate, the crew of that frigate had compelled the captain to surrender while he was unwilling to do so, they would have been indictable as felons in the courts of the United States. But surely the act of Congress admits of no such extravagant construction.

His colleague, Mr. Marshall said, had cited and particularly relied on the ninth section of the act. That section declares, \*that if [\*14 a citizen shall commit any of the enumerated piracies, or any act of hostility on the high seas against the United States, under color of a commission from any foreign prince or state, he shall be adjudged a pirate, felon, and robber, and shall suffer death.

This section is only a positive extension of the act to a case which might otherwise have escaped punishment. It takes away the protection of a foreign commission from an American citizen, who on the high seas robs his countrymen. This is no exception from any preceding part of the law, because there is no

part which relates to the conduct of vessels commissioned by a foreign power; it only proves that, in the opinion of the legislature, the penalties of the act could not, without this express provision, have been incurred by a citizen holding a foreign commission.

It is then most certain that the act of Congress does not comprehend the case of a murder committed on board a foreign ship of war.

The gentleman from New York has cited 2 Woodeson, 428, to show that the courts of England extend their jurisdiction to piracies committed by the subjects of foreign nations.

This has not been doubted. The case from Woodeson is a case of robberies committed on the high seas by a vessel without authority. There are ordinary acts of piracy, which, as has been already stated, being offenses against all nations, are punishable by all. The case from 2 Woodeson, and the note cited from the same book, by the gentleman from Delaware, are strong authorities against the doctrines contended for by the friends of the resolutions.

It has also been contended, that the question of jurisdiction was decided at Trenton, by receiving indictments against persons there arraigned for the same offense, and by retaining them for trial after the return of the *habeas corpus*.

Every person in the slightest degree acquainted with judicial proceedings, knows that an indictment is no evidence of jurisdiction; and that in criminal cases, the question of jurisdiction will seldom be made but by arrest of judgment after conviction.

**15\*]** \*The proceedings after the return of the *habeas corpus* only prove that the case was not such a case as to induce the judge immediately to decide against his jurisdiction. The question was not free from doubt, and therefore might very properly be postponed until its decision should become necessary.

It has been argued by the gentleman from New York that the form of the indictment is, itself, evidence of a power in the court to try the case. Every word of that indictment, said the gentleman, gives the lie to a denial of the jurisdiction of the court.

It would be assuming a very extraordinary principle indeed, to say that words inserted in an indictment for the express purpose of assuming the jurisdiction of a court should be admitted to prove that jurisdiction. The question certainly depended on the nature of the fact, and not on the description of the fact. But as an indictment must necessarily contain formal words in order to be supported, and as forms often denote what a case must substantially be to authorize a court to take cognizance of it, some words in the indictments, at Trenton, ought to be noticed. The indictments charge the persons to have been within the peace, and the murder to have been committed against the peace, of the United States. These are necessary averments, and, to give the court jurisdiction, the fact ought to have accorded with them. But who will say that the crew of a British frigate on the high seas are within the peace of the United States, or a murder committed on board such a frigate against the peace of any other than the British government.

It is then demonstrated, that the murder with which Thomas Nash was charged was not committed within the jurisdiction of the United States, and, consequently, that the case stated was completely within the letter and the spirit of the twenty-seventh article of the treaty between the two nations. If the necessary evidence was produced, he ought to have been delivered up to justice. It was an act to which the American nation was bound by a most solemn compact. To have tried him for the murder would have been mere mockery. To have condemned and executed him, the court having no jurisdiction, would have been murder; to have acquitted and discharged him, would have been a breach of faith and a violation of national duty.

\*But it has been contended, that al- [\***16** though Thomas Nash ought to have been delivered up to the British minister, on the requisition made by him in the name of his government, yet the interference of the President was improper.

This, Mr. Marshall said, led to his second proposition, which was,

That the case was a case for executive and not judicial decision. He admitted implicitly the division of powers stated by the gentleman from New York, and that it was the duty of each department to resist the encroachments of the others.

This being established, the inquiry was, to what department was the power in question allotted?

The gentleman from New York had relied on the second section of the third article of the constitution, which enumerates the cases to which the judicial power of the United States extends, as expressly including that now under consideration. Before he examined that section, it would not be improper to notice a very material misstatement of it made in the resolutions offered by the gentleman from New York. By the constitution, the judicial power of the United States is extended to all cases in law and equity, arising under the constitution, laws and treaties of the United States; but the resolutions declare the judicial power to extend to all questions arising under the constitution, treaties and laws of the United States. The difference between the constitution and the resolutions was material and apparent. A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every question under the constitution, it would involve almost every subject proper for legislative discussion and decision; if to every question under the laws and treaties of the United States, it would involve almost every subject on which the executive could act. The division of power which the gentleman had stated, could exist no longer, and the other departments would be swallowed up by the judiciary. But it was apparent that the resolutions had essentially misrepresented the constitution. He did not charge the gentleman from New York with intentional misrepresentation; he would not attribute to \*him [\***17** such an artifice in any case, much less in a case where detection was so easy and so certain. Yet this substantial departure from the consti-



tution, in resolutions affecting substantially to unite it, was not less worthy of remark for being unintentional. It manifested the course of reasoning by which the gentleman had himself been misled, and his judgment betrayed into the opinions those resolutions expressed.

By extending the judicial power to all cases in law and equity, the constitution had never been understood to confer on that department any political power whatever. To come within this description, a question must assume a legal form for forensic litigation and judicial decision. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit.

A case in law or equity proper for judicial decision may arise under a treaty, where the rights of individuals acquired or secured by a treaty are to be asserted or defended in court. As under the fourth or sixth article of the treaty of peace with Great Britain, or under those articles of our late treaties with France, Prussia, and other nations, which secure to the subjects of those nations their property within the United States; or, as would be an article which, instead of stipulating to deliver up an offender, should stipulate his punishment, provided the case was punishable by the laws and in the courts of the United States. But the judicial power cannot extend to political compacts; as, the establishment of the boundary line between the American and British dominions; the case of the late guarantee in our treaty with France, or the case of the delivery of a murderer under the twenty-seventh article of our present treaty with Britain.

The gentleman from New York has asked, triumphantly asked, what power exists in our courts to deliver up an individual to a foreign government? Permit me, said Mr. Marshall, but not triumphantly, to retort the question—By what authority can any court render such a judgment? What power does a court possess to seize any individual, and determine that he [18\*] shall be \*adjudged by a foreign tribunal? Surely our courts possess no such power, yet they must possess it, if this article of the treaty is to be executed by the courts.

Gentlemen have cited and relied on that clause in the constitution which enables Congress to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations, together with the act of Congress declaring the punishment of those offenses, as transferring the whole subject to the courts. But that clause can never be construed to make to the government a grant of power, which the people making it did not themselves possess. It has already been shown that the people of the United States have no jurisdiction over offenses committed on board a foreign ship against a foreign nation. Of consequence, in framing a government for themselves, they cannot have passed this jurisdiction to that government. The law, therefore, cannot act upon the case. But this clause of the constitution cannot be considered, and need not be considered, as affecting acts which are piracy under the law of nations. As the judicial power of the United States extends to all cases of admiralty and marine jurisdiction,

and piracy under the law of nations is of admiralty and maritime jurisdiction, punishable by every nation, the judicial power of the United States, of course, extends to it. On this principle the courts of admiralty under the confederation took cognizance of piracy, although there was no express power in Congress to define and punish the offense.

But the extension of the judicial power of the United States to all cases of admiralty and maritime jurisdiction must necessarily be understood with some limitation. All cases of admiralty and maritime jurisdiction which, from their nature, are triable in the United States, are submitted to the jurisdiction of the courts of the United States. There are cases of piracy by the law of nations, and cases within the legislative jurisdiction of the nation. The people of America possessed no other power over the subject, and could, consequently, transfer no other to their courts; and it has already been proved, that a murder committed on board a foreign ship of war is not comprehended within this description.

The consular convention with France has also been relied on, as proving the act of [\*19] delivering up an individual to a foreign power, to be in its nature judicial, and not executive.

The ninth article of that convention authorizes the consuls and vice-consuls of either nation to cause to be arrested all deserters from their vessels, "for which purpose the said consuls and vice-consuls shall address themselves to the courts, judges, and officers competent."

This article of the convention does not, like the twenty-seventh article of the treaty with Britain, stipulate a national act, to be performed on the demand of a nation; it only authorizes a foreign minister to cause an act to be done, and prescribes the course he is to pursue. The contract itself is, that the act shall be performed by the agency of the foreign consul, through the medium of the courts; but this affords no evidence that a contract of a very different nature is to be performed in the same manner.

It is said that the then President of the United States declared the incompetency of the courts, judges, and officers, to execute this contract, without an act of the legislature. But the then President made no such declaration. He has said that some legislative provision is requisite to carry the stipulations of the convention into full effect. This, however, is by no means declaring the incompetency of a department to perform an act stipulated by treaty, until the legislative authority shall direct its performance.

It has been contended, that the conduct of the executive on former occasions, similar to this in principle, has been such as to evince an opinion, even in that department, that the case in question is proper for the decision of the courts.

The fact adduced to support this argument, is the determination of the late President on the case of prizes made within the jurisdiction of the United States, or by privateers fitted out in their ports.

The nation was bound to deliver up those prizes, in like manner as the nation is now bound to deliver up an individual demanded under the twenty-seventh article of the treaty with Britain. The duty was the same, and devolved on the same department.

\*In quoting the decision of the execu- [\*20]

tive on that case, the gentleman from New York has taken occasion to bestow a high encomium on the late President, and to consider his conduct as furnishing an example worthy the imitation of his successor.

It must be cause of much delight to the real friends of that great man, to those who supported his administration while in office from a conviction of its wisdom and its virtue, to hear the unqualified praise which is now bestowed on it by those who had been supposed to possess different opinions. If the measure now under consideration shall be found, on examination, to be the same in principle with that which has been cited by its opponents as a fit precedent for it, then may the friends of the gentleman now in office indulge the hope, that when he, like his predecessor, shall be no more, his conduct, too, may be quoted as an example for the government of his successors.

The evidence relied on to prove the opinion of the then executive on the case, consists of two letters from the Secretary of State—the one of the 29th of June, 1793, to Mr. Genet, and the other of the 16th of August, 1793, to Mr. Morris.

In the letter to Mr. Genet, the Secretary says, that the claimant having filed his libel against the ship *William* in the Court of Admiralty, there was no power which could take the vessel out of court until it had decided against its own jurisdiction; that having so decided, the complaint is lodged with the executive, and he asks for evidence to enable that department to consider and decide finally on the subject.

It will be difficult to find in this letter an executive opinion, that the case was not a case for executive decision. The contrary is clearly avowed. It is true, that when an individual claiming the property as his, had asserted that claim in court, the executive acknowledges in itself a want of power to dismiss or decide upon the claim thus pending in court. But this argues no opinion of a want of power in itself to decide upon the case, if, instead of being carried before a court as an individual claim, it is brought before the executive as a national demand. A private suit instituted by an individual, asserting his claim to property, can only be controlled by that individual. The executive can give no direction concerning it. But a public prosecution, \*carried on in the name of the United States, can without impropriety be dismissed at the will of the government. The opinion, therefore, given in this letter is unquestionably correct; but it is certainly misunderstood, when it is considered as being an opinion that the question was not in its nature a question for executive decision.

In the letter to Mr. Morris, the secretary asserts the principle, that vessels taken within our jurisdiction ought to be restored, but says it is yet unsettled whether the act of restoration is to be performed by the executive or judicial department.

The principle, then, according to this letter, is not submitted to the courts—whether a vessel captured within a given distance of the American coast was or was not captured within the jurisdiction of the United States, was a question not to be determined by the courts, but by the executive. The doubt expressed is, not what tribunal shall settle the principle, but what tri-

bunal shall settle the fact. In this respect a doubt might exist in the case of prizes, which could not exist in the case of a man. Individuals on each side claimed the property, and therefore their rights could be brought into court, and there contested as a case in law or equity. The demand of a man made by a nation stands on different principles.

Having noticed the particular letters cited by the gentleman from New York, permit me now, said Mr. Marshall, to ask the attention of the house to the whole course of executive conduct on this interesting subject.

It is first mentioned, in a letter from the Secretary of State to Mr. Genet, of the 25th of June, 1793. In that letter, the secretary states a consultation between himself and the secretaries of the treasury and war (the President being absent), in which (so well were they assured of the President's way of thinking in those cases) it was determined, that the vessels should be detained in the custody of the consuls in the ports, "until the government of the United States shall be able to inquire into, and decide on the fact."

In his letter of the 12th of July, 1793, the secretary writes, the President has determined to refer the questions concerning prizes "to persons learned in the laws." And he requests that "certain vessels enumerated in the [\*22] letter should not depart "until his ultimate determination shall be made known."

In his letter of the 7th of August, 1793, the secretary informs Mr. Genet, that the President considers the United States as bound "to effectuate the restoration of, or to make compensation for, prizes which shall have been made of any of the parties at war with France, "subsequent to the 5th day of June last, by "privateers fitted out of our ports." That it is consequently expected that Mr. Genet will cause restitution of such prizes to be made. And that the United States "will cause restitution" to be made "of all such prizes as shall be hereafter "brought within their ports by any of the said "privateers."

In his letter of the 10th of November, 1793, the secretary informs Mr. Genet, that, for the purpose of obtaining testimony to ascertain the fact of capture within the jurisdiction of the United States, the governors of the several states were requested, on receiving any such claim, immediately to notify thereof the attorneys of their several districts, whose duty it would be to give notice "to the principal agent of both parties, "and also to the consuls of the nations interested, and to recommend to them to appoint by "mutual consent arbiters to decide whether the "capture was made within the jurisdiction of "the United States, as stated in my letter of "the 8th instant, according to whose award the "governor may proceed to deliver the vessel "to the one or the other party." "If either "party refuse to name arbiters, then the attorney is to take depositions on notice, which he "is to transmit for the information and decision "of the President." "This prompt procedure "is the more to be insisted on, as it will enable "the President, by an immediate delivery of "the vessel and cargo to the party having title, "to prevent the injuries consequent on long "delay."

In his letter of the 22d of November, 1793,



the secretary repeats, in substance, his letter of the 12th of July and 7th of August, and says, that the determination to deliver up certain vessels, involved the brig Jane, of Dublin, the brig Lovely Lass, and the brig Prince William Henry. He concludes with saying: "I have it in charge to inquire of you, sir, whether these three brigs have been given up according to 23\*] "the determination \*of the President, "and if they have not, to repeat the requisition "that they may be given up to their former "owners."

Ultimately it was settled that the fact should be investigated in the courts, but the decision was regulated by the principles established by the executive department.

The decision, then, on the case of vessels captured within the American jurisdiction, by privateers fitted out of the American ports, which the gentleman from New York has cited with such merited approbation; and which he has declared to stand on the same principles with those which ought to have governed in the case of Thomas Nash; which deserves the more respect, because the government of the United States was then so circumstanced as to assure us, that no opinion was lightly taken up, and no resolution formed but on mature consideration. This decision, quoted as a precedent, and pronounced to be right, is found, on fair and full examination, to be precisely and unequivocally the same with that which was made in the case under consideration. It is a full authority to show, that, in the opinion always held by the American government, a case like that of Thomas Nash is a case for executive, and not judicial decision.

The clause in the constitution, which declares, that "the trial of all crimes, except in "cases of impeachment, shall be by jury," has also been relied on as operating on the case, and transferring the decision on a demand for the delivery of an individual from the executive to the judicial department.

But certainly this clause in the constitution of the United States cannot be thought obligatory on, and for the benefit of, the whole world. It is not designed to secure the rights of the people of Europe and Asia, or to direct and control proceedings against criminals throughout the universe. It can then be designed only to guide the proceedings of our own courts, and to prescribe the mode of punishing offenses committed against the government of the United States, and to which the jurisdiction of the nation may rightfully extend.

It has already been shown, that the courts of the United States were incapable of trying the crime for which Thomas Nash was delivered up to justice; the question to be determined was, not how his crime should be tried and 24\*] punished, but whether he \*should be delivered up to a foreign tribunal which was alone capable of trying and punishing him. A provision for the trial of crimes in the courts of the United States, is clearly not a provision for the performance of a national compact for the surrender to a foreign government of an offender against that government.

The clause of the constitution declaring that the trial of all crimes shall be by jury, has never even been construed to extend to the trial of crimes committed in the land and naval

forces of the United States. Had such a construction prevailed, it would most probably have prostrated the constitution itself, with the liberties and the independence of the nation, before the first disciplined invader who should approach our shores. Necessity would have imperiously demanded the review and amendment of so unwise a provision. If, then, this clause does not extend to offenses committed in the fleets and armies of the United States, how can it be construed to extend to offenses committed in the fleets and armies of Britain or of France, or of the Ottoman or Russian empires?

The same argument applies to the observations on the seventh article of the amendments to the constitution. That article relates only to trials in the courts of the United States, and not to the performance of a contract for the delivery of a murder not triable in those courts.

In this part of the argument, the gentleman from New York has presented a dilemma of a very wonderful structure indeed. He says that the offense of Thomas Nash was either a crime or not a crime. If it was a crime, the constitutional mode of punishment ought to have been observed. If it was not a crime, he ought not have been delivered up to a foreign government, where his punishment was inevitable.

It had escaped the observation of that gentleman, that if the murder committed by Thomas Nash was a crime, yet it was not a crime provided for by the constitution, or triable in the courts of the United States; and that if it was not a crime, yet it is the precise case in which his surrender was stipulated by treaty. Of this extraordinary dilemma, then, the gentleman from New York is, himself, perfectly at liberty to retain either form.

\*The gentleman is incorrect in every part [\*25 of his statement. Murder on board a British frigate is not a crime created by treaty. It would have been a crime of precisely the same magnitude, had the treaty never been formed. It is not punished by sending the offender out of the United States. The experience of this unfortunate criminal, who was hung and gibbeted, evinced to him that the punishment of his crime was of a much more serious nature than mere banishment from the United States.

The gentleman from Pennsylvania and the gentleman from Virginia have both contended, that this was a case proper for the decision of the courts, because points of law occurred, and points of law must have been decided in its determination.

The points of law which must have been decided are stated by the gentleman from Pennsylvania to be, first, a question whether the offense was committed within the British jurisdiction; and, secondly, whether the crime charged was comprehended within the treaty.

It is true, sir, these points of law must have occurred, and must have been decided; but it by no means follows, that they could only have been decided in court. A variety of legal questions must present themselves in the performance of every part of executive duty, but these questions are not therefore to be decided in court. Whether a patent for land shall issue or not is always a question of law, but not a question which must necessarily be carried into court. The gentleman from Pennsylvania



seems to have permitted himself to have been misled by the misrepresentation of the constitution made in the resolutions of the gentleman from New York; and, in consequence of being so misled, his observations have the appearance of endeavoring to fit the constitution to his arguments, instead of adapting his arguments to the constitution.

When the gentleman has proved that these are questions of law, and that they must have been decided by the President, he has not advanced a single step toward proving that they were improper for executive decision. The questions whether vessels captured within three miles of the American coast, or by privateers **26\*]** \*fitted out in the American ports, were legally captured or not, and whether the American government was bound to restore them, if in its power, were questions of law, but they were questions of political law, proper to be decided, and they were decided by the executive, and not by the courts.

The *casus federis* of the guaranty was a question of law, but no man would have hazarded the opinion that such a question must be carried into court, and can only be there decided. So the *casus federis* under the twenty-seventh article of the treaty with Britain is a question of law, but of political law. The question to be decided is, whether the particular case proposed be one in which the nation has bound itself to act, and this is a question depending on principles never submitted to courts.

If a murder should be committed within the United States, and the murderer should seek an asylum in Britain, the question whether the *casus federis* of the twenty-seventh article had occurred, so that his delivery ought to be demanded, would be a question of law, but no man would say it was a question which ought to be decided in the courts.

When, therefore, the gentleman from Pennsylvania has established, that in delivering up Thomas Nash, points of law were decided by the President he has established a position which in no degree whatever aids his argument.

The case was in its nature a national demand made upon the nation. The parties were the two nations. They cannot come into court to litigate their claims, nor can a court decide on them. Of consequence, the demand is not a case for judicial cognizance.

The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him.

He possesses the whole executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.

He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it.

**27\*]** \*The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed—

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the force of the nation—are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress unquestionably may prescribe the mode; and Congress may devolve on others the whole execution of the contract; but till this be done, it seems the duty of the executive department to execute the contract by any means it possesses.

The gentleman from Pennsylvania contends that, although this should be properly an executive duty, yet it cannot be performed until Congress shall direct the mode of performance. He says, that although the jurisdiction of the courts is extended by the constitution to all cases of admiralty and maritime jurisdiction, yet if the courts had been created without any express assignment of jurisdiction, they could not have taken cognizance of causes expressly allotted to them by the constitution. The executive, he says, can, no more than courts, supply a legislative omission.

It is not admitted that in the case stated, courts could not have taken jurisdiction. The contrary is believed to be the correct opinion. And although the executive cannot supply a total legislative omission, yet it is not admitted or believed that there is such a total omission in this case.

The treaty, stipulating that a murderer shall be delivered up to justice, is as obligatory as an act of Congress making the same declaration. If, then, there was an act of Congress in the words of the treaty, declaring that a person who had committed murder within the jurisdiction of Britain, and sought an asylum within the territory of the United States, should be delivered up by the United States, on the demand of His Britannic Majesty, and such evidence of his criminality as would have justified his commitment for trial, had the offense been here committed; could the President, who is bound to execute the laws, have justified a \*refusal to deliver up the criminal, by [**\*28** saying that the legislature had totally omitted to provide for the case.

The executive is not only the constitutional department, but seems to be the proper department to which the power in question may most wisely and most safely be confided.

The department which is entrusted with the whole foreign intercourse of the nation, with the negotiation of all its treaties, with the power of demanding a reciprocal performance of the article, which is accountable to the nation for the violation of its engagements with foreign nations, and for the consequences resulting from such violation, seems the proper department to be entrusted with the execution of a national contract like that under consideration.

If at any time policy may temper the strict execution of the contract, where may that political discretion be placed so safely as in the department whose duty it is to understand precisely the state of the political intercourse and connection between the United States and foreign nations, to understand the manner in which the particular stipulation is explained and performed by foreign nations, and to understand completely the state of the Union?

This department, too, independent of judicial aid, which may, perhaps, in some instances be



called in, is furnished with a great law-officer, whose duty it is to understand and to advise when the *casus fœderis* occurs. And if the President should cause to be arrested under the treaty an individual who was so circumstanced as not to be properly the object of such an arrest, he may perhaps bring the question of the legality of his arrest before a judge by a writ of *habeas corpus*.

It is then demonstrated, that according to the practice, and according to the principles of the American government, the question whether the nation has or has not bound itself to deliver up any individual, charged with having committed murder or forgery within the jurisdiction of Britain, is a question, the power to decide which rests alone with the executive department.

It remains to inquire, whether in exercising this power, and in performing the duty it enjoins, the President has committed \*an unauthorized and dangerous interference with judicial decisions.

That Thomas Nash was committed originally at the instance of the British consul at Charleston, not for trial in the American courts, but for the purpose of being delivered up to justice in conformity with the treaty between the two nations, has been already so ably argued by the gentleman from Delaware, that nothing further can be added to that point. He would, therefore, Mr. Marshall said, consider the case as if Nash, instead of having been committed for the purposes of the treaty, had been committed for trial. Admitting even this to have been the fact, the conclusions which have been drawn from it were by no means warranted.

Gentlemen had considered it as an offense against judicial authority, and a violation of judicial rights, to withdraw from their sentence a criminal against whom a prosecution had been commenced. They had treated the subject as if it was the privilege of courts to condemn to death the guilty wretch arraigned at their bar, and that to intercept the judgment was to violate the privilege. Nothing can be more incorrect than this view of the case. It is not the privilege, it is the sad duty of courts to administer criminal judgment. It is a duty to be performed at the demand of the nation, and with which the nation has a right to dispense. If judgment of death is to be pronounced, it must be at the prosecution of the nation, and the nation may at will stop that prosecution. In this respect the President expresses constitutionally the will of the nation, and may rightfully, as was done in the case at Trenton, enter a *nolle prosequi*, or direct that the criminal be prosecuted no further. This is no interference with judicial decisions, nor any invasion of the province of a court. It is the exercise of an indubitable and a constitutional power. Had the President directed the judge at Charleston to decide for or against his own jurisdiction, to condemn or acquit the prisoner, this would have been a dangerous interference with judicial decisions, and ought to have been resisted. But no such direction has been given, nor any such decision been required. If the President determined that Thomas Nash ought to have been delivered up

to the British government \*for a murder [\*30 committed on board a British frigate, provided evidence of the fact was adduced, it was a question which duty obliged him to determine, and which he determined rightly. If in consequence of this determination he arrested the proceedings of a court on a national prosecution, he had a right to arrest and to stop them, and the exercise of this right was a necessary consequence of the determination of the principal question. In conforming to this decision, the court has left open the question of its jurisdiction. Should another prosecution of the same sort be commenced, which should not be suspended but continued by the executive, the case of Thomas Nash would not bind as a precedent against the jurisdiction of the court. If it should even prove that in the opinion of the executive, a murder committed on board a foreign fleet was not within the jurisdiction of the court, it would prove nothing more; and though this opinion might rightfully induce the executive to exercise its power over the prosecution, yet if the prosecution was continued, it would have no influence with the court in deciding on its jurisdiction.

Taking the fact, then, even to be as the gentleman in support of the resolutions would state it, the fact cannot avail them.

It is to be remembered, too, that in the case stated to the President, the judge himself appears to have considered it as proper for executive decision, and to have wished that decision. The President and judge seem to have entertained on this subject the same opinion; and in consequence of the opinion of the judge, the application was made to the President.

It has then been demonstrated:

1st. The case of Thomas Nash, as stated to the President, was completely within the twenty-seventh article of the treaty between the United States of America and Great Britain.

2d. That this question was proper for executive and not for judicial decision; and,

3d. That in deciding it, the President is not chargeable with an interference with judicial decisions.

After trespassing so long, Mr. Marshall said, on the patience of the house, in arguing what had appeared to him to be the \*material [\*31 points growing out of the resolutions; he regretted the necessity of detaining them still longer for the purpose of noticing an observation, which appeared not to be considered by the gentleman who made it as belonging to the argument.

The subject introduced by this observation, however, was so calculated to interest the public feelings, that he must be excused for stating his opinion on it.

The gentleman from Pennsylvania had said, that an impressed American seaman, who should commit homicide for the purpose of liberating himself from the vessel in which he was confined, ought not to be given up as a murderer. In this, Mr. Marshall said, he concurred entirely with that gentleman. He believed the opinion to be unquestionably correct, as were the reasons that gentleman had given in support of it. He had never heard any American avow a contrary sentiment, nor did he believe a contrary sentiment could find a

place in the bosom of any American. He could not pretend, and did not pretend, to know the opinion of the executive on the subject, because he had never heard the opinions of that department; but he felt the most perfect conviction, founded on the general conduct of the government, that it could never surrender an impressed American to the nation, which, in making the impressment, had committed a national injury.

This belief was in no degree shaken by the conduct of the executive in this particular case.

In his own mind, it was a sufficient defense of the President from an imputation of this kind, that the fact of Thomas Nash being an impressed American was obviously not contemplated by him in the decision he made on the principles of the case. Consequently, if a new circumstance occurred, which would essentially change the case decided by the President, the judge ought not to have acted under that decision, but the new circumstance ought to have been stated. Satisfactory as this defense might appear, he should not resort to it, because to some it might seem a subterfuge. He defended the conduct of the President on other and still stronger ground.

The President had decided that a murder committed on board a British frigate on the high seas was within the jurisdiction of that 32\*] \*nation, and consequently within the twenty-seventh article of its treaty with the United States. He therefore directed Thomas

Nash to be delivered to the British minister, if satisfactory evidence of the murder should be adduced. The sufficiency of the evidence was submitted entirely to the judge. If Thomas Nash had committed a murder, the decision was, that he should be surrendered to the British minister; but if he had not committed a murder, he was not to be surrendered.

Had Thomas Nash been an impressed American, the homicide on board the *Hermoine* would, most certainly, not have been a murder.

The act of impressing an American is an act of lawless violence. The confinement on board a vessel is a continuation of that violence, and an additional outrage. Death committed within the United States, in resisting such violence, would not have been murder, and the person giving the wound could not have been treated as a murderer. Thomas Nash was only to have been delivered up to justice on such evidence as, had the fact been committed within the United States, would have been sufficient to have induced his commitment and trial for murder. Of consequence, the decision of the President was so expressed as to exclude the case of an impressed American liberating himself by homicide.

He concluded with observing, that he had already too long availed himself of the indulgence of the house to venture further on that indulgence, by recapitulating, or reinforcing, the arguments which had already been urged.

## [NOTE II.]

### ON THE LAWS OF LOUISIANA.

In a note to a former volume of these reports (Vol. III., p. 202, note 1), the editor attempted to give a slight sketch of the sources from which the local laws of Louisiana have been derived. 33\*] \*From that statement, the learned reader will perceive, that they mainly spring from the Spanish law, with the following valuable history of which, the editor has been favored by Mr. Alexander Porter, Jun., of Attakapas, in the state of Louisiana, by whom it was translated and compiled from the original Spanish writers. The editor has taken the liberty of subjoining a few explanatory remarks to those made by Mr. Porter, and intended to illustrate the facts stated in the history.

#### *History of the Spanish Law.*

The laws of Spain, in common with all the

kingdoms of modern Europe, seem to have suffered a variety of changes, in the revolutions that took place at different times in her government, and in the gradual advances that the nation made from barbarism and poverty, to the comparative wealth and civilization, which distinguish her present condition. Spain, while a part of the Roman Empire, was governed, like all the other provinces, by the laws of Rome; and those principles of jurisprudence which now preserve their influence there, from the superiority of their wisdom, and the respect which is due to the immutable dictates of justice and truth on which they are founded, once had force and authority, from being promulgated and acted on by the ruling power of the state.<sup>1</sup>

On the conquest of Spain by the Goths, it

1.—No one can contemplate without emotion the great fortune and fame of the Roman people. "Comme si les grandes destinées de Rome n'étoient pas encore accomplies: Elle règne dans toute la terre par sa raison, après avoir cessé d'y régner par son autorité. On droit en effet que la justice n'ait dévoilé pleinement ses mystères qu'aux Jurisconsultes Romains. Législateurs encore plus que Jurisconsultes, de simples particuliers dans l'obscurité d'une vie privée ont mérité par la supériorité de leurs lumières de donner des loix à toute la postérité." Wheat. 5.

rité. Lois aussi entendues que durables toutes les nations les interrogent encore à présent et chacune en reçoit des réponses d'une éternelle vérité. C'est peu pour eux d'avoir interprété la loi de douze tables et l'édit du Préteur, ils sont les plus sûrs interprètes de nos lois memes; ils pretent, pour ainsi dire, leur esprit à nos usages, leur raison à nos coutumes, et par les principes qu'ils nous donnent, ils nous servent de guides lors meme que nous marchons dans une route qui leur étoit inconnue." Œuvres de d'Aguesseau, tome 1, p. 157, ed. 1787.



may be readily supposed, that a barbarous people, such as we know them to have been, were badly calculated to relish or adopt laws befitting **34\*** the condition of a rich and polished people. Hence we find on the establishment of these invaders in that country, the Imperial or Roman jurisprudence fell immediately into disuse; and for a considerable period after the conquest, the usages and customs of the Goths were the only rule of action. A settled residence, however, in the country, producing a state of society widely different from the migrating and ever changing condition to which they had formerly been accustomed, created the necessity of something better calculated to meet the wants of their new situation; and laws and decrees of various kinds began to be passed at their national councils. At these meetings the clergy assisted; and it may readily be conceived, from their education and ability, that they were the sole persons in those ages capable of putting them in a shape by which they could be transmitted to posterity.

From these decisions of their national councils, and from various edicts of the Gothic kings, a work was promulgated in the 693d year of the Christian era, which bears the name of "*Fuero Juzgo*."<sup>1</sup> This first code of the nation was divided into twelve books, and subdivided into various titles. The first books treated of the elections of kings,<sup>2</sup> and of legis- **35\*** lators, and the \*mode of passing laws.<sup>3</sup> The second, of judges, civil judgments, and the manner of prosecuting actions. The third, of marriages, successions, &c. The fourth and fifth, of the alienation of property belonging to the church, donations, contracts. The three following books are occupied with criminal law; the form of accusations, and the penalties attached to various crimes. The ninth contains the rules respecting fugitive slaves, deserters, &c. The tenth treats of partitions of lands, prescriptions. The eleventh, of the

violation of sepulchres, of the sick, of physicians, of merchants. In the twelfth and last, of equity, of heretics, and of injuries.

This code, say the Spanish writers, though excellent in many of its parts, was better calculated for an elective monarchy than for that which now exists in Spain; and more conformable to the necessities of a warlike people, among whom, arts, agriculture, and commerce, had made little progress, than to a nation which (according to them) has made such eminent progress in them all.

\*This code, however defective it may [**36** have been, formed the political constitution of the kingdom, until the invasion of the Moors in the year 714 nearly annihilated the Spanish Monarchy. The Goths who saved themselves from the storm were obliged to retire to the mountains of Asturias. Cooped up in this narrow part of the kingdom, and engaged in continual wars waged with their invaders to preserve their existence, or extend their dominions, it is not to be presumed that the improvement of their laws could occupy much of their attention, or any great progress be made in a science which owes a great part of its perfection in every country to the quiet and blessings of peace. Accordingly, we find that during the time the monarchy remained in that situation, their government and their laws partook in a great measure of that feudal system which about this period began to obtain so much force in all the countries of Europe, acting in some with more, and in others with less vigor, according as the circumstances of the particular country were in a greater or less degree favorable to its progress. The king, it appears, during this period, on making conquests from the Moors, distributed the lands among the nobles who assisted him in person and with their vassals during the wars. To the large cities and towns, various privileges were extended from time to time, as they were

1.—This is among the earliest, though not the first code, published by those nations who, after destroying the Roman Empire, settled themselves in the south of Europe. The most ancient is the Salic law, thought to derive its appellation from the Salians, who inhabited the country from the Leser to the Carbonian wood, on the confines of Brabant and Hainault. It was written in the Latin language, about the beginning of the fifth century, by Wisogastus, Bordogastus, Sologastus, and Widowgastus, chiefs of the nation. The Burgundian and Ripuarian codes are nearly of as great antiquity. That of the Lombards, the most famous of all the systems of laws published by those barbarians, was written in Teutonic Latin, in the 643d year of the Christian era, about half a century before the "*Fuero Juzgo*." This first effort of Spain in jurisprudence is totally overlooked, or rather seems to have been unknown to Butler, the learned author of the *Horæ Juridicæ*. Gibbon observes of this code, that it had been treated by the President Montesquieu (*Esprit des Loix*, l. 28, c. 1) with excessive severity. But he (Gibbon) says of it: "I dislike the style; I detest the superstition; but I shall presume to think, that the civil jurisprudence displays a more civilized and enlightened state of society than that of the Burgundians, or even of the Lombards." Gibbon's *Decline and Fall of the Roman Empire*, Vol. VI., c. 38, note 125.

2.—In Castile, the people, or rather the nobility, asserted the right of trying and deposing their kings; in Castile and Arragon, the kings were long elective; and in all the Gothic monarchies of Spain, the power of the crown was extremely limited. Robertson, *Hist. of Charles V.*, Vol. I., sec. 3, notes 31, 32, 33.

3.—The legislative authority in the Spanish monarchy was long vested jointly in the King and the Cortes, the latter consisting of the nobility, the dignified clergy, and the deputies or *procuradores* of the cities and towns. Even after the Cortes ceased to be regularly assembled, and the government assumed the form of an absolute monarchy, it continued to be the usage to convene the Cortes in the life-time of the reigning king, in order that they might take an oath of fidelity to his eldest son as heir-apparent of the crown. This ceremony was performed during the reign of the late King, Charles IV., in 1788, when the Cortes were assembled for the sole purpose of swearing fidelity to his son, Ferdinand VII., the present monarch. Under the ancient constitution, no duties or taxes could be exacted from the cities and towns except what were freely granted in Cortes by the deputies of these communities. The law establishing this privilege was enacted in 1328, not many years after the celebrated English statute *de tallagio non concedendo*, securing the same right to the English people. "It is a curious fact, that this law, though violated in practice, was still retained in the Spanish Recopilacion till the reign of Charles IV., when it was expunged in the insolence of despotism, within a few years of that revolution which precipitated the degraded monarch from his throne, and restored to his people, not that only, but all the ancient rights of their fathers." The constitution which was established in consequence of this revolution, was abolished by Ferdinand VII. on his return to Spain in 1814; but has again been restored by another revolution, the accounts of which have just reached us; and which, it is to be hoped, may establish the liberties of the Spanish people on a permanent basis.



conquered and annexed to the Spanish Monarchy.<sup>1</sup>

This change of situation in the condition of the people, the increase of power given to the nobles by the division of conquered lands, and the privileges extended to the cities, created a necessity for new regulations. Accordingly, in the year 992, a code was published entitled *Fuero Viejo*. This work was divided into five books, each comprehending various titles. The first contained the laws by which the extent of the relative duties flowing from the king to the people, and from the people to the king, were ascertained; the obligation of vassals to their lords, and the extent of protection which the latter owed to the former; rules for the **37\*** government of judicial \*combats; the prohibition of the use of armed force by individuals; of vassals attached to the soil; of the inhabitants of free towns and their laws; and concludes with a title of the penalties inflicted on the powerful (*Los Poderosos*) who vexed or oppressed their vassals in towns by unjustly seizing their provisions from them. In the second book, were included the penal laws against various classes of crimes. In the third, titles directing the formalities which parties should observe who present their plaints in justice; of the various kinds of proofs and sentences; and this book concludes with titles which treat of debts and suretyship. In the fourth are given the laws which govern contracts; the manner of acquiring the dominion of things; of public works, and the construction of mills. In the fifth and last are found dispositions relative to the portion settled by the husband on his wife ("*Las Arras*"), inheritances, partition of lands which were given to rent; and it concludes with the titles appertaining to tutors, disinheritances, legitimate and illegitimate children, with an appendix to the whole.

In this work, say the modern Spanish writers, were found the same defects as in the "*Fuero Juzgo*." There is the same want of good and wholesome regulations for the protection of agriculture, arts and commerce; and the various titles which speak of judicial combats, the use of armed force by private individuals, with various regulations of a similar nature, plainly show, that the king at this period had not sufficient power to curb the haughty and licentious nobles, and restrain their actions within limits compatible with private security and public order.

A knowledge, however, of this code is even now considered as highly necessary in that country to those who aspire to the exalted ranks of their profession; it being regarded as eminently useful to the perfect understanding of many modern laws which treat of vassalage—the dominion of things considered as appendages to landed estate—the prerogatives of nobles, grandees, &c.

However justly this code of laws, as well as that of the "*Fuero Juzgo*," may be entitled to

the censure of the Spanish writers of the present day, and although provisions compatible with such a state of society as then existed would be found \*totally inconsistent [**\*38** with the well being of any of the kingdoms of modern Europe, yet it may be questioned if any other of the nations at present existing in that portion of the globe can boast of codes of equal antiquity and value; and from the date of the promulgation of them it would appear that while England and the other nations of Europe were yet in the darkest stages of confusion and ignorance, Spain, by reducing her laws to a permanent form, was making no inconsiderable progress toward civilization.

Between the date of the promulgation of the *Fuero Viejo* in the year 992 and the year 1255, at which period was promulgated the "*Fuero Real*," two circumstances occurred which occasioned a material change, not only in the laws of Spain, but indeed of all the nations of Europe. The one was the discovery at Amalfi of the Code and Pandects of Justinian, a work which astonished Europe, just emerging from barbarism, and which, as it contained the collected wisdom of the Roman jurists, became at once an object of study and admiration to all men whose education placed it within their reach. The other was the collection of the decretals of the church, privately executed by a monk called Gratian, in the year 1151, and subsequently enlarged and improved by a compilation of authorities made in the year 1236, in virtue of an order to that effect made by Pope Gregory IX.

During the period of time that intervened between the discovery of the Pandects in 1137, and the publication of the "*Fuero Real*" in 1255, it is rather difficult to ascertain what authority the former code obtained in Spain. The modern Spanish writers state (perhaps from a laudable feeling of national pride), that the Roman jurisprudence has never been considered as the law of the land on the peninsula; and it is not at this time binding as an authority. However true this may be when applied to the present state of jurisprudence in that country, matured and improved as it has been, by the experience of a long succession of ages; and enriched as it must be by the incorporation of all that is most valuable in the Roman law; yet it may be fairly questioned if it had not during the interval we speak of nearly superseded the use of the old Spanish \*codes. This con- [**\*39** clusion may be safely drawn, first, from its acknowledged superiority over the ill digested and barbarous laws of Spain, and indeed of every other nation then existing; a superiority so striking as to be recognized even by the rudest and most uncivilized people to whom it was known. Second, from the influence of the clergy in that age; their well-known attachment to this system of laws; the zeal with which they labored for its introduction in every country of Europe, and their almost invariable success.<sup>2</sup> Lastly, from the very laws of the

1.—Robertson, Hist. of Charles V., Vol. I., sec. 3, note 34. Municipal corporations are of greater antiquity in Spain than in any other European country, except Italy. It was the prerogative of the crown to erect them; but the right was often delegated to the clergy and nobility. Their immunities were very extensive.

Wheat. 5.

2.—These observations on the authority which the Roman law had in Spain, are not translated from the Spanish writers, but are my own ideas on the subject, introduced in the text, instead of a note, as better keeping up a connected view of the whole subject. The conclusions which I have drawn as to the influence of the civil law, are quite



Spanish kings themselves, the codes published by their directions, viz., the "*Fuero Real*" in the year 1255, and the "*Partidas*" in 1260. Nearly all that is excellent in each of these compilations, seems to have been borrowed from the Roman law, and hence the presumption strongly arises, that the sovereigns of that country, finding the use of the latter becoming general, it was thought more politic to sanction it by the authority of the state; accomplishing at once two useful objects by this measure—soothing national pride, and rejecting all those laws which were inconsistent with the then state of society in Spain.

Of the collection of Decretals (or decrees of the pope before mentioned), viz., those made by the monk Gratian in his private capacity, and those made by Rayamundo De Penafort in pursuance of an order of Pope Gregory IX., the latter only are received as authority in Spain.

In the work executed by De Penafort, the method of the Roman Pandects is very closely pursued. It is divided into five books, each of which are again subdivided into various titles. In the first, after various preliminaries <sup>40\*</sup>] connected with a canonical \*collection, it treats of the dignities of persons, of Ecclesiastical judgments; which latter form also the subject-matter of the second book. In the third, after treating again of the persons of Ecclesiastics and their benefices and prebendaries, some titles are subjoined upon the rules applicable to the construction of various contracts—how those ought to be interpreted which have for their object church property, or which appertain to its jurisdiction by reason of the personal privilege of the party defendant. The remainder of this book is occupied with the immunity of churches, of the regular clergy, and other matters of this nature. The fourth book is entirely occupied with the laws of the church respecting marriage, its antecedents, and consequences. And the fifth and last treats of criminal jurisprudence, and of the penalties affixed to Ecclesiastical crimes, such as simony and other offenses committed by persons belonging to the church. It also contains provisions respecting church censures, and concludes, in imitation of the Pandects, with the titles, the signification of words, and maxims of law. (*Reglas del Derecho.*) As the sixth, and other later collections, pursue the same method with that above mentioned, a particular account of them is deemed unnecessary.

In this state of the civil, criminal and canonical jurisprudence of Spain, the Holy King Ferdinand the III., about the middle of the 13th century, gave much more force, extension and solidity to the Spanish Monarchy than it possessed in former periods; as well by the glorious conquest of the kingdoms of Cordova and Seville, as by the prudence and sagacity with which he governed the countries he inherited and subdued. This prince, and his son Alonzo (surnamed the Wise), feeling that the multitude of particular jurisdictions, and the exorbitant privileges conceded to the nobility and gentry,

divided and weakened the kingdom, determined, for the purpose of avoiding its entire desolation, to form a general body of laws, or code, which by its operation might unite all classes of society, and at the same time preserve a regular graduation of rank—prevent or destroy the dangerous and horrible effects of feudal anarchy—confine the powerful nobles within the limits due to the prince—terminate the factions and discords between the families \*of the <sup>41</sup>] great and their respective vassals—and finally establish good order by a judicious and correct administration of justice.

The death of Ferdinand III., which took place a short period after the conquest of Seville in 1252, prevented him from carrying into effect his salutary and necessary projects. His son, however (Alonzo the Wise), who inherited his kingdoms, and as it appears, all his father's views on this subject, carried his predecessor's intentions into complete operation by the formation of two codes, the first called the "*Fuero Real*," and the second the *Partidas*; the former was executed in the year 1255, and was designed as a precursor to the great work of the *Partidas*.

The "*Fuero Real*" is divided into four books, each composed of different titles. The first commences with the laws which direct the observance of the Christian faith—the preservation of the king and his children—presenting all the obligations of a Christian and a subject as forming the basis of sound morals and correct conduct in private life. Afterwards follow the titles respecting the alienation of church property; and it concludes with those respecting public officers; V. G. alcades, lawyers, notaries public, &c., &c.

The second book is altogether taken up with rules respecting judicial proceedings—of the competent tribunals—of the commencement of suits—the "*Litis Contestatio*," or joining issue—the modes of proof, and exceptions thereto; and concludes with the mode of regulating final judgments. The third book is principally occupied with the regulations respecting matrimony, jointures ("*Las Arras*"), acquiesces and gains, and the division of lands which are rented out (*se dan a Plazos*); afterwards of legacies, and estates in trust, inheritances, tutorships, and other points incident to these matters. From the tenth to the twentieth and last title of this book, are to be found the laws concerning various classes of contracts. The fourth and last book treats principally of Apostles, Jews, Saracens and their slaves.

These regulations are followed by an enumeration of various penalties affixed to different crimes; and it concludes with the law respecting adoptions, emancipations, pilgrims, and ships.

\*From this analysis it will be seen, that <sup>42</sup>] the "*Fuero Real*" is a code enacted for the correct administration of civil and criminal jurisprudence among the different classes of the people, and the various provinces of the kingdom. In a word, it may be compared, as to its nature and object, to the institutes of Justi-

in opposition to the declarations of many Spanish authors; but they appear to me, for the reasons above stated, fair and natural. The immense influence of the clergy, in Europe, during the middle ages, is well known. They had at one time nearly

succeeded in supplanting the common law in England, and contributed essentially to the establishment of the civil law all over the continent, either as the only municipal code, or as supplementary to it in all cases where it was silent or defective.

nian, the primary object of which is the rights of persons and things ("*Dericho particular*"), in which point of view its excellence has been long admired. But as the public law makes no part of its object, it has not touched on it; or, if mentioned at all, merely as incident to, or connected with, the subjects of which the said code professedly treats.

The *Partidas*, which was concluded and published by the direction, and under the auspices, of Don Alonzo the Wise, in 1260, is a complete body of law (*El cuerpo completo*) which combines the public with the private law, all digested and prepared, says the author (from which the account of this code is taken), in a most scientific, just, solid, Christian, and equitable manner; and which has not, perhaps, its equal in all Europe. The first *Partidas* is an exact compendium of the canon law as it existed at that epoch. The second is a refined summary of the ancient laws and customs of the nation, comprising in itself, and combining the greatest political wisdom with a perfect legal history. The third, fifth, and sixth *Partidas*, contain an abridgment of all that is most valuable in the Roman law, respecting judgments, contracts, and last wills and testaments, each of which are well accommodated to the state of the monarchy at that time; and to the deciding and settling doubtful points of the civil law.<sup>1</sup>

The fourth is a compendium of the civil and canon laws appertaining to espousals, matrimony, and their material incidents; \*and the seventh and last is, that which treats of crimes and their penalties, concluding in the manner of the pandects and decretals, with titles of the signification of words and rules of law.

This work, for the praise of which it has been a subject of regret to the Spanish writers, that their language is inadequate, comprehends so many rules of religion and justice, and of pure and Christian policy, that a volume would be necessary to state (according to them) even the principal ones. For in truth, they add, what regulations can be conceived better adapted to national happiness than that which points out the mode of succession to the kingdom? What more convenient and honorable than that which prescribes that the king ought to honor all classes of useful subjects, including even laborers and artizans, by reason of their utility to the state? Where can anything be found more conformable to true religion, and the spirit of the evangelist, than that which directs that he who is recently converted to the Holy Catholic Church should be honored and respected; what more honorable and equitable, than that which confines the punishment of crimes to the true delinquents, abolishing attainders and corruption of blood? and what more congenial to population than that which promotes matrimony by the most cogent and persuasive reasons?

Notwithstanding its various and superlative merits, on account of the jealousy of the nobles, and of the fatal wound they found it would in-

flict on their privileges, and from other causes which began to operate after its formation, this code was not published until the year 1348, in the celebrated cortes held in the (*Alcala de Henares*), under the reign of Alonzo XI. And even then it is probable the death of this monarch, which took place in the year 1350, impeded, in a considerable degree, the effect it would otherwise have had. Its complete and beneficial operation may be dated from the year 1505, under the reigns of the celebrated Don Fernando and Donna Juana, in the famous cortes held in the city of Toro.

During the time that intervened from the formation of the *Partidas*, to its first publication in the cortes of *Alcala*, were \*promul- [\*44 gated in the year 1310, *Las Leyes De Estilo*, which amount in number to 252, without any division into books or other parts. The greater part of these treat of judgments, civil as well as criminal; then follows a description of the persons who may appear in court, and the proofs necessary to adduce them. Others again treat of contracts and last wills.

As there are forms or mode of proceedings before the judges and tribunals, in the order in which the judgements are obtained, it is a natural consequence, that the said laws should include all that was practiced at that time in litigating causes in the courts of justice—following as a rule of action, that which was contained in the laws or *Fuero*, and even in some particular cases against the provisions of the latter; as a special custom, legitimately introduced, derogates from the general laws. Finally these laws of *Estilo* are taken notice of in our subsequent laws, and observed whenever it appears that they have been generally practiced on.

From this statement of the various codes, it will be seen that until the middle of the fourteenth century the jurisprudence of Spain consisted in the general and ancient usages and customs of the nation; reduced to codes which were called the *Fueros*, and that which belonged to the practice of the courts formed the *Leyes De Estilo*. For although the *Partidas* were then composed, which included a considerable number of civil and canonical decisions corresponding to all the branches of private and public law, yet as they were not published until the year 1348, in the cortes of *Alcala*, there could not consequently be any authority attached to them on contracts or in courts of justice.

From this epoch, and particularly from the period of the cortes, held at Toro, in the year 1505, the aspect of the national law gradually changed: 1st. Because the *Partidas* being then published, they applied to all cases where there was not a particular statute (*fuero*) on the subject. 2d. Because the professors of the law in these ages, being passionately inclined, as well to the study of the canon as of the civil law, a great many of the principles of the former system were introduced, and remain in force, with certain modifications, to this day.

1.—An historical commentary upon the *Partidas* was published, at Madrid, in 1808, by Marina, the celebrated historian of Spain, in which valuable work he gives an account of the institutions of Leon and Castile; relates the efforts of Ferdinand III. and Alonzo the Wise, in municipal legislation;

and analyses the *Partidas*, showing in what respects that celebrated code deviates from the ancient common law of Spain, and in what manner it was corrupted (according to him), from its primitive simplicity by an absurd imitation of the canon and civil law.



45\*] \*Some changes were made in these, and several new laws or ordinances were published, under the name of "Pragmaticas," from time to time, as necessity or the situation of the state required them. When they amounted to a considerable number, they were collected into one or more volumes by virtue of a royal ordinance, and acquired legislative force. Of this class was the first code of the ordinance of Alcavala, made and authorized in the year 1348. It is divided into 32 titles, each composed of different laws, relative to the manner of conducting suits, regulations on the subject of contracts and testaments, and penalties affixed to the commission of certain crimes.

The second is that which comprehends the 83 laws which were made and published in the celebrated cortes, held at Toro, in the year 1505, providing for the solemnities of testaments—the right of succeeding, *ab intestato*, and by will. The legacies of the third and fifth, given by the testator to one heir in preference to another—the order of succession for the nobles of Spain—the support or aliment which fathers owe to their natural children—the penalties of adultery, and other incidental titles, which are inserted in the correspondent titles of the Recopilacion.<sup>1</sup>

Before and after the cortes of Toro, there were made several collections of ordinances, proclamations, and other royal determinations; which were published, from time to time, as the circumstances of the monarchy required it. The first of which is known by the name of the "Ordenamiento Real," authorized and published by the Catholic King and Queen, Ferdinand and Isabella, in the year 1496, distributed into eight books, and then into different titles, in which were contained the entire or partial repeals that had been made of the Fueros, or ancient laws; also a few of the new provisions 46\*] introduced. But \*as these are all inserted in the Recopilacion, with corresponding titles, a further explanation is unnecessary under this head.<sup>2</sup>

The Recopilacion was first published in the year 1567, in virtue of an order made by Phillip II. It includes the laws which are not repealed by the Ordenamiento Real, and the Ordenamiento del Alcavala; all those of Toro and others, which had been published in the *interim*. From the year 1567 to 1777, there have been published various editions of this work with some short additions. But under the latter denomination we do not include the "Autos acordados," or resolutions or decrees of the council authorized and published by the king, who by a royal order united them in one volume, divided them into books and titles corresponding to those of the Recopilacion, and published them for the first time in the year 1745. They now form the

third and last volume of this work, and are always printed with the original collection.

This work is divided into nine books, and composed of divers titles. The method used in it is well calculated to attain the object which the very name it bears would seem to imply; and, without any great labor, it is easy to find in it those edicts or laws which we have at any time occasion to examine.

The first book treats exclusively of the Catholic religion and ecclesiastical matters, and contains thirteen titles.

The second book, in its commencement, treats of laws in general; after which follow many titles prescribing the duties of the presidents of audiences, chancellors, judges, and inferior officers of courts. The most instructive title in this book, is that which speaks of the king's council ("*el concejo del Rey*").

The third begins with laying down rules and regulations that ought to be observed in the various tribunals; it afterwards treats of the affairs of justice in cities and provinces \*(Los Corregidores), contains a variety of [\*47 dispositions, with respect to the Alcades, or officers charged with the authority of permitting exports, &c.—the president and council of Bilbao—the council charged with that branch of rural economy connected with the management of cattle,<sup>3</sup> and concludes with regulations for the examination and reception of physicians, surgeons, apothecaries, farriers, &c.

In the first title of the fourth book, are found necessary rules and regulations for the proper maintenance of the royal jurisdiction. From thence, to the twenty-second title, is occupied with the law of the different species of judgments; some decisions of the ancient law on the subject; the mode of carrying on suits, and the time given for their termination; rules with regard to pleas, answers, the taking of testimony, the practice to be pursued in the courts of the first and second instance; proceeding against persons in contempt, &c. From the twenty-third to the thirty-third title is found the law defining the duties of sheriff, jailer, and the fees allowed them by law.

The fifth book is principally occupied with three subjects, and their incidents, viz: First, marriage; second, inheritances or successions; and, third and last, of contracts, concluding with the titles relative to banks and their officers, goldsmiths, &c., and the regulations established with respect to bakers, &c. In this book, say the Spanish writers, the most worthy of attention is the fourth title, which speaks of commissioners appointed to make wills; a singular authority, and not of any antiquity in their jurisprudence. The sixth, which treats of an heir who receives a legacy of the third or fifth

1.—These laws of "Toro" are all included in the Recopilacion, but they are introduced into the latter work as new laws. Thus, in the Spanish law-writers, we frequently find references made to them in this way, law 20 of Toro, which is law of the Recopilacion, &c.

2.—The "Ordenamiento Real," seems to have been a work or collection of the same kind with the ordinance of Alcavala, viz., collections of the royal ordinances or Pragmaticas. The latter collection comprised those up to the year 1348—the former, from that time up to the year 1496. The laws of Toro seem to have originated in the cortes or national assemblies, or, at least, to have been first promulgated there.

3.—This is a curious title. The assembly is composed of the richest and most extensive owners of cattle, sheep, &c. A member of the council presides at their deliberations, and they meet once every year. This meeting is called "*el honorado concejo de las mestas*," an expression which does not admit of a literal translation. The Recopilacion contains a variety of provisions establishing the authority of this council, defining its limits. It may be gathered from the existence of this tribunal, and from the anxiety displayed by the Spanish government, from time to time, by its laws on this subject, what vast importance was attached to the inestimable flocks of merinos, of which they were for ages the sole owners.

48\*] of the property of \*the testator. The seventh, which provides for the succession of nobles, it being the first in any of the collections of the laws of Spain, where we find a distinct title appropriated to this subject. The fifteenth title prescribes the formalities which ought to be observed with regard to taxes, respecting which there had been, anciently, various disputes.

The provisions, or titles, of the sixth book, are more conformable than those of any other in the Recopilacion to the ancient codes of Spain, *los fueros antiguos*, and those which are contained in the second Partidas. They treat of knights and of gentlemen, of towns, of vassals, of cattle, and fortresses—of the cortes—of ambassadors, inspections, tributes, ports—of those exempted from taxes and not subject to the prohibition which prevents certain articles from being exported. And the book concludes with the titles respecting the hunter, gamekeeper, and fowler, of the king. One of these titles is respecting the young of horses of a noble race.

The seventh begins with the matters that conduce to the good government of corporations; of the rents and property of councils; of the privileges of cities; of taxes; of public limits and commons. Then follow various titles which have no connection either with each other, or with the antecedent ones; as, the tenth speaks of ships; the eleventh, which speaks of artisans; the twelfth, which contains regulations with respect to dress. From the thirteenth to the seventeenth, is taken up with rules respecting the cloth manufactories, and concludes with those of chandlers and manufacturers of tallow, and the tanners and braziers of the kingdom.

The eighth book maintains a more perfect connection between its title and the matters contained therein. It begins with the preparatory steps for the ascertaining of offenses, and then proceeds to the twenty-third title, with the penalties affixed to each crime, according to its grade; among which, say the Spanish authors, is worthy of note, the eighth, which imposes the pain of death (*"ultimo supplicio"*), with other penalties, against any person who sends a challenge or accepts one.

In this provision, they say, is seen the difference 49\*] once between the \*ancient and present state of the monarchy. The authority of the laws was not then sufficient to punish the individuals attached to, or connected with, families of vast opulence and power, who might commit violations of good order; duels were, therefore, permitted; regulations fixed for carrying them publicly into effect, and the strongest vengeance of the law, as well as the more dreadful punishment of public contempt, awaited those who, either injured or injuring, failed to resort to this mode to obtain satisfaction, or give redress.

The nobles, at last, as the light of knowledge began to dawn, perceived the superior advantages of recurring to the laws instead of resorting to these public and solemn combats. A change, correspondent to the alteration in the general opinion, took place, and duels are now placed on the same footing in Spain, as in every other well-regulated country in Europe, condemned by the laws of God and man, forbidden by the maxims of religion; yet still practiced by the obedience of all men to a false code of honor, which is unequal in its principles, and almost always cruel in its operations.<sup>1</sup>

The ninth, and last book, is occupied with details in all its branches of the royal treasury; the office of treasurer and auditor of the public exchequer; of those who compose the treasury council. Then follow the judicial regulations for the recovery of taxes, of the royal rents, &c. In continuation, are \*found, the tariff of [\*50 duties levied by the king on each article sold within the kingdom, the confiscation of contraband, &c., &c.

A more extensive analysis has been given of this work than of any other, because, as it is last in time, it is first in authority.

The author, from whom this account is principally taken, observes, that in the work entitled, "*Autos Accordados*," there are wanting many titles, which are to be found in the Recopilacion.

Since the publication of the Recopilacion, there have been issued by the kings of Spain, a vast number of proclamations, decrees, instructions for governors of Spanish America, "*Royal cédulas*," which have not as yet been compiled, although there was an order of the king in council to that effect. The want of a general collection of these laws, is very frequently and seriously deplored by the Spanish lawyers.

From this short statement of the rise and progress of the Spanish law, it will be seen, that the ancient codes of Spain have been, like that of almost every other country in Europe, nearly supplanted by modern changes and improvements; yet an acquaintance with them is necessary to him who wishes to understand the laws of his country, and aspires to rise to the higher honors of his profession. This knowledge, indeed, has become indispensable, since the order of council, passed the 4th of December, 1713, in reference to many laws anterior to the "*Fuero Juzgo*," and which are found in that work, the *Partidas*, the *Ordenamientos*, the first law of Toro, the new Recopilacion, &c. It provides, that in the conducting and deciding of causes, the courts of justice shall be governed by the Recopilacion, the ordinances and decrees, the laws of the *Partidas*, and the other codes ("*Los otros fueros*"), notwithstanding it is said they have become obsolete; and in case nothing can be found on the subject, in any of

1.—The institution of judicial combats, or trial by battle, was universally established in Europe by the barbarous nations who established themselves on the ruins of the Roman Empire; (Montesquieu. *Esprit des Loix*, l. 28, c. 14, 18; Gibbon, *Decline and Fall*, &c., Vol. vi., c. 38, note. 84; Robertson, *Hist. of Charles V.*, Vol. I., sec. I., note, 322), and was even transported by their posterity into the kingdoms founded by them in the East, during the crusades, as appears by that venerable monument of feudal jurisprudence, the *Assise of Jerusalem*. (Gibbon, *Decline and Fall*, &c., Vol. xi., c. 58). "It has been

slowly abolished by the laws and manners of Europe," and had a legal existence even in England, (though not practically used), so recently as the year 1818, when it was formally suppressed by act of Parliament, in consequence of the attempt to resort to it in the appeal of murder prosecuted in the case of Ashford v. Thornton, which will be found reported in 1 Barnwell & Alderson's Reports, 405, and in which the ingenuity of the learned judges was perplexed to contrive the means of evading this species of trial, which was demanded by the accused.



these codes or laws, then that recurrence shall be had to the sovereign authority to decide on them. This decree was confirmed by Philip V., June 12th, 1714; directing the ancient laws which had not been repealed to be observed, although they might have been generally considered as void by non-user.

Between all these codes, and the laws of the 51\*] Indies, there \*exists a great connection. In the American provinces of Spain, the study of the civil law is a part of their education at the universities; and by the laws for the government of these provinces, it is expressly provided, that where the *Recopilacion de las Indias* is wanting in provisions for any case that may arise, recourse shall be had to the laws of Castile or Spain.

The "*Recopilacion de las Indias*, the collection of laws of the Spanish provinces, is very similar to the "*Recopilacion*," of which so much has been said, both in its order and materials.

In the first book are inserted all the definitions concerning points of ecclesiastical law. In the second, after speaking of laws in general, it prescribes the order of government for the council of the Indies, and the other superior and inferior tribunals thereon. The third begins with the subject of the royal domain, and provides for its officers; then treats of viceroys, presidents, and governors, and of military affairs; and concludes with the title concerning ceremonies, post-offices, and Indian couriers. The fourth book commences with the laws relative to discoveries by sea and land; treats afterward of cities, their population, and of their

rights and contributions; of gold and silver mines, and incidental matters; and concludes with regulations for the pearl fishery, and the manufactory of cloth. The fifth book treats, principally, of the boundaries and divisions of the different governments; after which follow many miscellaneous matters, v. g. that of the Holy Brotherhood; of the assembly for the police of cattle; of physicians and apothecaries; of the order of judicial proceedings, and concludes with a title respecting the domicile of individuals. The sixth book is occupied nearly throughout with the laws respecting Indians, the commandants placed over them, &c. The seventh is taken up with criminal jurisprudence. The eighth, with the laws respecting the royal treasury; and the ninth with regulations respecting the armada, or fleets, by means of which the commerce of Spain was formerly carried on with the colonies. But these regulations are now obsolete.

This work, it may be seen from the analysis of it, is of a \*very limited nature, and [\*52 seems almost entirely confined to regulations respecting the functionaries of the government in those countries; leaving the subject of contracts, the rights of persons and things, &c., &c., to be regulated by those laws which are in force in old Spain respecting them. The order in which those laws govern, may be seen by reference to this short history, applying to them this concise, but universal maxim, that those which are last in date are first in authority.

The ordinance of Bilboa is a commercial code of great value.

### [NOTE III.]

#### ON THE SUBJECT OF PRIZE LAW.

In order to complete the information contained in the former notes to these reports, on the subject of prize law, the editor has thought proper to subjoin to the present volume the text of the chapters of the *Consolato del Mare*, on that subject, as translated by Dr. Robinson, and of the principal ordinances regulating the practice of the tribunals on the European continent, in matters of prize, which are found scattered in different books, not always accessible to the general reader. The prize code of Spain is, in general, copied from that of France; but wherever any considerable differences occur, the editor has noted them in the margin. The prize codes of the new states, which have recently arisen in Spanish America, and which are now engaged in war with the parent country, are also modeled upon those of France and Spain, as will be seen by a reference to the prize ordinance of Buenos Ayres, annexed to the 4th volume of these reports. These pieces

will show, that, except the severe rule condemning the goods of a friend found on board the ship of an enemy, and the more relaxed principle of free ships free goods, both of which have occasionally been adopted by certain powers, together with some other less important anomalies, the leading principles of prize law, as now administered, have been established and acted upon by the principal maritime states of the world from a very early period.

As a further apology for inserting them in this place, the editor begs leave to refer the learned reader to the following observations of Sir William Grant, in a question arising upon a warranty of neutrality in a policy of insurance, alleged to be falsified by a sentence of a French court of admiralty grounded on the ordinances of France: "These ordinances," says that accomplished judge, "have been misunderstood; sometimes by the French courts of

admiralty themselves, and sometimes by the courts in this country. Those in France considered these ordinances as making the law, and as binding on neutrals, and have, therefore, sometimes declared, in the same breath, that the property was neutral, and yet that it was liable to condemnation; whereas, all that was meant by those ordinances was, to lay down rules of decision conformable to what the lawyers and statesmen of the country understood to be the just principles of maritime law. When Louis XIV. published his famous ordinance of 1681, nobody thought that he was undertaking to legislate for Europe, merely because he collected together, and reduced into the shape of an ordinance, the principles of the marine law as then understood and received in France. I say, as understood in France, for although the law of nations ought to be the same in every country, yet, as the tribunals which administer that law are wholly independent of each other, it is impossible that some differences should not take place in the manner of interpreting and administering it in the different countries which acknowledge its authority. Whatever may have been since attempted, it was not, at the period now referred to, supposed that one state could make or alter the law of nations; but it was judged convenient to declare certain principles of decision, partly for the purpose of giving a uniform rule to their own courts, and partly for the purpose of apprising neutrals what that rule was. And it was truly observed at the bar, in the course of the argument, that it has been matter of complaint against us (how justly is another *54*\*) \*consideration), that we have no code by which neutrals may learn how they may protect themselves against capture and condemnation. Now, this court, in this case, seems to us to have well and properly understood the effect of their own ordinances. They have not taken them as positive laws binding upon neutrals but they refer to them as establishing legitimate presumptions, from which they are warranted to draw the conclusion which it is necessary for them to arrive at, before they are entitled to pronounce a sentence of condemnation." (Marshall on Ins., 426.)

EXTRACT FROM THE CONSOLATO DEL MARE.

CHAP. CCLXXIII.—Of Merchant Vessels captured by an armed ship.

SECTION 1.—If an armed ship, or cruiser, meets with a merchant vessel belonging to an enemy, and carrying a cargo the property of an enemy, common sense will sufficiently point out what is to be done; it is, therefore, unnecessary to lay down any rules for such a case.

2. If the captured vessel is neutral property, and the cargo the property of enemies, the captor may compel the merchant vessel to carry the enemy's cargo to a place of safety, where the prize may be secure from all danger of recapture, paying to the vessel the whole freight, which she would have earned at her delivering port; and this freight shall be ascertained by the ship's papers, or in default of necessary documents, the oath of the master shall be received as to the amount of the freight.

3. Moreover, if the captor is in a place of Wheat. 5.

safety, where he may be secure of his prize, yet is desirous to have the cargo carried to some other port, the neutral vessel is bound to carry it thither; but for this service, there ought to be a compensation agreed upon between them; or, in default of any special agreement, the merchant vessel shall receive for that service the ordinary freight that any other vessel would have earned for such a voyage, or even more; and this is to be understood \*of a ship that has arrived in the place [*55* where the captor may secure his prize; that is to say, in the port of a friend; and going on an ulterior voyage to that port, to which the captor wishes her to carry the cargo which he has taken.

4. If it shall happen that the master of the captured vessel, or any of the crew, shall claim any part of the cargo as their own, they ought not to be believed on their simple word; but the ship's papers or invoice shall be inspected; and in defect of such papers, the master and his mariners shall be put to their oaths; and if, on their oaths, they claim the property as their own, the captor shall restore it to them; regard being paid, at the same time, to the credit of those who swear and make the claim.

5. If the master of the captured vessel shall refuse to carry the cargo, being enemy's property, to some such place of safety, at the command of the captor, the captor may sink the vessel if he thinks fit, without control from any power or authority whatever, taking care to preserve the lives of those who are in her. This must be understood, however, of a case where the whole cargo, or at least the greater part, is enemy's property.

6. If the ship should belong to the enemy, the cargo being either in the whole, or in part, neutral property; some reasonable agreement should be entered into, on account of the ship now become lawful prize, between the captor and the merchants owning the cargo.

7. If the merchants refuse to enter into such an agreement, the captor may send the vessel home to the country whose commission he bears; and in that case the merchants shall pay the freight, which they were to have paid at the delivering port; and if any damage is occasioned by this proceeding, the captor is not bound to make compensation, because the merchants had refused to treat respecting the ship, after it had become lawful prize; and for this further reason, also, that the ship is frequently of more value than the cargo she carries.

8. If, on the other hand, the merchants are willing to come to a reasonable agreement, and the captor, from arrogance, or other wrong motives, refuses to agree, and forcibly sends the \*cargo away, the merchants are not [*56* bound to pay the whole, nor any part of the freight; and, besides, the captor shall make compensation for any damage he may occasion to them.

9. If the capture should be made in a place where the merchants have it not in their power to make good their agreement, but are, nevertheless, men of repute, and worthy to be trusted, the captor shall not send away the vessel without being liable to the damage; but if the merchants are not men of known credit, and cannot make good their stipulated payment, he may then act as it is above directed.



CHAP. CCLXXXVII.—*Of cases of recapture.*

SECTION 1.—If a ship is taken by the enemy, and afterwards another ship of a friend comes up, and effects a recapture, the vessel, and all that is in her, shall be restored to the former proprietors, on payment of a reasonable salvage for the expense, and trouble, and danger, that have been incurred; but this is to be understood of recaptures effected within the seigniory or territorial seas of the country, to which the captured vessel belongs, or before the enemy had secured the vessel to himself in a place of safety.

2. If the recapture has been effected within the enemy's territories, or in a place where the enemy was in entire possession of his prize, that is, in a place of security, the proprietors shall not recover, nor shall the recaptors claim any salvage; for they are entitled to the whole benefit of the recapture, without opposition from any rights of seigniory, or the claims of any person whatever.

3. If an enemy, having made a capture of a vessel, quits his prize on appearance of another vessel, either from fear, or from any doubt that he may entertain of her, and the vessel, on whose account the captured ship was abandoned, takes possession of the vessel that has been relinquished, and brings her into port, she shall be restored to the proprietor, or his heirs, without opposition, on payment of a **57\*** reasonable salvage, to be *\*fixed*, by agreement between the parties, or if the parties cannot agree, by the arbitration of creditable persons.

4. If it should happen that anyone abandons his vessel through fear of his enemy, and any friendly vessel falls in with the ship that has been deserted, and brings her into a place of security, that is to say, in a case where the finding vessel has not retaken the ship from the enemy, and where the enemy had not carried her into a place of security, and had not taken her from the owner, the finders shall have no claim to the vessel, nor to the cargo on board, but, by the use and custom of the sea, they may demand a reasonable salvage, to be settled either by agreement, or by reference to the arbitration of creditable persons; for it is not fit that anyone should endeavor to take undue advantage of the misfortunes of another, since he cannot foresee what may happen to himself; and because, every one should be ready to submit his disputes, especially in cases like the present, to the arbitration of two unexceptionable persons.

5. It is besides to be understood, in all that has been said, that everything shall be done without fraud; for no man can tell what may be his own case; and it sometimes happens that the deceit and injury which a person attempts to practice on others, light upon himself; therefore, if any persons, knowing that a ship is going on a voyage, where she must be exposed to danger or alarm from the enemy, fit out a vessel with a view, and for the purpose of doing injury to that ship or any other, in making salvage at their expense; or with a design of getting possession of the ship and cargo; if it can be proved against them, that they went out with any such intention, such persons shall not be entitled to any salvage on the ship or cargo,

although the owner may have abandoned her; nor even, although she may have been taken by the enemy.

6. If those who fitted out the vessel cannot establish, in proof, that they did not arm with any of the before-mentioned intentions; or if it should be proved against them, that they armed for the purpose of doing injury to anyone, or generally to all, whom they might meet, in the form and manner of enemies; in such a case, whether they bring in a vessel, with or without *\*a cargo*—whether it shall be retaken **[\*58]** from the enemy, or merely found by them, they shall take no benefit from it, but the whole shall be restored to the former proprietors; and moreover, such persons, so arming, shall be delivered over to justice, to be treated as robbers and pirates, if the fact can be established in proof.

7. If they are not convicted of such an intention, having either retaken or found a vessel in any of the situations above mentioned, they shall be entitled to their full right and benefit, according to the preceding regulations. But if the matter shall remain in doubt, or if it shall rest with them to disprove the charge, neither they, nor any that were with them, nor any that are interested in the event, shall be received to give evidence in their favor; nor shall any person of a covetous disposition, nor anyone who may be suspected of being biassed by money, be a witness for them.

8. If an enemy shall have made a capture of a vessel or cargo, and shall afterwards abandon it, voluntarily, and not from any fear or apprehension of any vessel coming upon him; and if any persons shall find the vessel or cargo that has been voluntarily abandoned, and bring it to a place of security, the property shall not be acquired to them, if any owner can be found; but they shall receive a reasonable salvage, to be fixed, at the discretion of reputable persons of the place, to which the ship or goods shall be carried.

9. If, after the expiration of a reasonable time, no owner comes forward, the finders shall receive for their salvage one-half of the proceeds, and the other half shall be applied in the manner that has been expressed and declared in a preceding chapter.<sup>1</sup>

**\*10.** If the enemy, being in possession **[\*59]** of any ship or cargo, shall not have deserted it voluntarily, but shall have been obliged to abandon it by storm or tempest, or on account of any ship or vessel by whom he may have been alarmed, the same rule shall be observed as if the enemy had quitted the same voluntarily, and of his own accord.

11. If the enemy, after a capture, comes to any place where he takes a ransom for his prize, if the proprietors wish to have their vessel or cargo again, he or they, who have ran-

1.—In chapter 249, the same proportion of a moiety is given to the finder of goods found floating in port, &c., after the expiration of a year and a day if no owner appears to claim. The other moiety was to be divided into two parts, of which the Lord of the Jurisdiction was to retain one; and to apply the other to pious purposes, for the soul of the proprietor. "All hora la giustitia debba dare a quello che trovata l'haverà, la metà pur suo beveraggio, et della metà che rimanerà, debba fare la giustitia due parti; et può pigliarne lui una parte, et l'altra che rimane, debba dare per amor di Dio, dove a lui piace, per l'anima di quello, di chi sarà stata.

somed her, are bound to deliver her up to the original owners, on payment of the debt and charges, and some further allowance besides, if they choose to accept it.

12. If an enemy, on capture of a ship or cargo, shall make a gift of it; such a donation or gift shall not be valid on any account; except that if a gift is made of the ship or cargo, to those to whom it belonged, such donation shall be valid. But if the captor bargains with the master in these words: "We are willing to give you your ship for nothing, but must have a ransom for the cargo," such a donation shall not be good; because, in the case of which we are now speaking, the enemy had not carried it to a place of security, so as to say, that he might not lose it; notwithstanding that he might so far have obtained power over his prize, as to be able to burn or sink it; though, in such case, it would be totally lost both to him and to the owner: it is to be understood, therefore, that if the cargo is ransomed, the master to whom his ship has been so given, is bound to contribute to the ransom paid for the cargo according to the value of the ship; and the same rule shall be observed. *e contra* also, and applied equally to the ransom of the ship or cargo.

13. If the captor shall have taken the prize to a place of security; that is, if it shall have been carried out of the seas of the enemy, where a recapture might be effected; if when the captor shall have it in safe possession, and in his own power, he shall make a donation, or sale of the ship or cargo, such a donation or sale shall be valid, without exception, from any quarter; unless he, to whom the donation was made, should have accepted it with an intention of doing a kindness to the owner, and for his benefit; in that case, he may restore it if he pleases; but otherwise, he is not compellable by any person, nor on any account.

14. If, however, he to whom the property belonged, can show that there has been any fraud in the business, the donation shall not, on any account, avail; but he, to whom it was made, ought to be seized by the lord of the country, and punished in goods, and in person, according to the circumstances of the case; and the ship or cargo shall be restored to the former owner.

15. If the ship or cargo shall have been sold by the enemy to anyone, the sale shall be valid, provided that he, who has purchased, can show that the sale was made to him by the enemy in a place of security; that is, where the enemy held the goods in question, *in suo dominio*; and in case anyone, who pretends to have acquired the ship or cargo by a just title, cannot prove the asserted sale, it shall not be valid; and if the former owner appears, and can make proof of his property, it shall be restored to him. The evidence of these disputed claims shall be discussed before two reputable persons of the country where the dispute arises, and without fraud; and if any fraud is discovered, the party against whom the fraud is proved, shall be bound to pay to the other party, costs, damages, and interests; and besides, the party consenting to the fraud shall be delivered over to the justice of the country.

16. If the master, or person acting for him, Wheat. 5.

recovers the ship or cargo by any means, he is bound to make restitution to the proprietors, according to their several proportions, on payment of the expenses *pro rata*.

17. If the master shall redeem any part of the cargo, or make any agreement with the consent of the major part of his copartners, by which he shall regain the ship or cargo, he may compel them to contribute, by course of justice, because they are as much under an obligation to him as if they had agreed to take part in building or purchasing a new ship.

18. But if the master makes any agreement, without the consent of his partners, or the major part of them, they are not bound [\*61 to anything, unless they like it; nor is the master answerable to them for the rights and interests which they had in the ship at the time of capture; saving for any previous accounts which might be still remaining unsettled, respecting their shares in the ship or cargo at the time it was taken by the enemy.

19. If the original proprietors are disposed to resume their shares, and the master makes any opposition, the justice of the country may compel him to acquiesce; for there can be no ground of reasonable resistance on his part, if they are willing to pay their proportion of the expense; and it would be manifestly unjust that anyone should dispossess the rest of their property.

20. But if the master, or anyone for him, redeems his ship or cargo, after the enemy has gained a just title in it, and those who were part owners refuse to pay, as before specified, the master, or his agent, ought to repeat his demand upon them several times, and call upon them to pay their share; and if they still refuse, it shall be put up to auction, with permission of the government, and be disposed of to the best bidder.

21. If the ship or cargo shall be sold for more, after such refusal, than the ransom paid, the surplus shall be paid to the owners, according to their shares, if the master chooses it; otherwise, he is not obliged. And the master shall have the privilege of retaining the goods in question at the price that others are willing to give for them.

22. If the sale shall not produce so much as the ransom; if the master made the ransom without the consent of his partners, they are not bound for the deficiency, unless they choose it; and therefore it is reasonable that the master, or his agent, should have the privilege of retaining, at the price that any other person would give, as the deficiency would fall upon him; saving, however, that if any of the partners are inclined to resume their shares, they are bound to make good the deficiency to him *pro rata*. All the reasonings, and cases, and conditions above mentioned, shall be taken under the supposition that the enemy had carried the prize into a place of security; \*and that the ransom or sale had been [\*62 made fairly, and without fraud.

POSTSCRIPT.—It may not be improper to add as an observation pointing out the chasm between the regulations of this ancient code, and the prize ordinances of particular countries, and the provisions made in public treaties, in later times, on the subject of prize, that



neither the laws of Oleron, nor the ordinances of Wisbuy, nor the quidon, nor the ordinances of the Hanse Towns, contain any regulations respecting the general law of prize; scarcely mentioning the subject, except incidentally, amongst the accidents to which merchant vessels are liable. There are, in the black book of the Admiralty, a few, and but a few, articles respecting it. In the ordinances of Barcelona, of 1340, there are also a few articles, but relating rather to the division of interest between the captors, than to the general subject.

#### EXTRACTS FROM THE CODE DES PRISES.

*Articles relatifs aux Prises, Extraits de L'Ordonnance de Charles VI. sur le fait de l'Amirauté. Du 7 décembre 1400.*

ARTICLE III.—Si aucun de quelque estat qu'il soit, mettoit sus aucun Nauire à ses propres despens pour porter guerre à nos ennemis, ce sera par le congé et consentement de nostre dit amiral ou son lieutenant, lequel a ou aura au droict de son dit office la cognoissance, iuridiction, correction et punition de tous les faicts de la dite mer et des dépendances, criminellement et ciuilement, &c.

ART. IV.—De toutes les prinsces qui d'oresnavant se feront sur la mer, par quelques gens que ce soyent, tenant nostre partie, ou souz ombre et couleur de nos guerres, leurs prisonniers en seront amenez ou apportez à terre deuers nostre amiral, ou son lieutenant, lequel tantost ou incontinent les examinera auant que nulle chose se descende, pour sçauoir le pays dont ils sont, et à qui appartiennent les biens s'aueuns biens y auoit, pour garder iustice, et faire restituer ceux qui sans cause auroient esté domagez, si le cas estoit trouué tel.

63\*] ART. VI.—Que d'oresnavant, s'aucune telle prinse se fait, le dit amiral ou son lieutenant s'informera deuement et le plus véritablement que faire se pourra, aux preneurs et à chacun à part de la manière de la prinse, du pays ou coste où elle aura esté faite; verra et fera veoir les marchandises et les nefes par les gens cognoissans à ce. Et par bonne et meure délibération regardera par la conscience ou contention, les dépositions d'iceux preneurs ainsi faite en secret, ou par la veuë des dites prinses, s'il y a vraye apparence qu'elles fuissent de nos ennemis, auquel cas icelles seront déliurées aux preneurs, en prenant leurs noms pour en auoir recouure sur eux, s'aucune poursuite en estoit faite, avec inuentaire des biens. Et s'il y a mieux et plus évidente présomption par aucuns des moyens des susdits, qu'il y eust quelque faute, et que les dites prinses fussent des contrées de nostre royaume, ou des pays de nos alliez, icelles prinses en ce cas seront par nostre dit amiral mises en seure garde, aux despens de la chose, ou des dits preneurs, si le cas le requiert, jusques à temps compétent, dedans lequel sera fait diligence d'en sçauoir la vérité. Et si les dits preneurs estoient gens solubles, et qu'avec ce ils baillassent bonne et seure caution des dites prinses, icelles deuement apprécies et inuentoriées, se pourront bailler à iceux preneurs, s'il n'y a trop grande suspicion.

ART. VII.—Et si aucuns des dites preneurs en leur voyage en especial auoient commis faute

telle qu'ils fussent atteints d'auoir enfrondé aucuns Nauires, ou noycz les corps des prisonniers ou iceux prisonniers descendus à terre en aucune loingtaine coste, pour céler le larrecin et meffaict, voulons que sans quelque délai, faueur ou déport, nostre dit amiral en face faire punition et iustice selon le cas.

ART. VIII.—Les dits preneurs cmpeschans aucuns marchands, Nauire ou marchandise sans cause raisonnable, ou qu'ils ne soyent nos aduersaires, nostre dit amiral fera deuement restituer le dommage, et ne permettra plus l'usage qu'ont à ce contre raison tenue, iceux preneurs, en quoy ils ont fait et donné de grands dommages à aucuns de nos alliez par feinte, ou fausse couleur qu'ils mettoient de non cognoistre s'ils estoient \*nos aduersaires, ou non, [\*64 qui est chose bien damnable, contre raison et iustice, que homme sous telle couleur deust porter dommage, ou destourbier.

ART. IX.—Pour ce qu'il est voix et publique renommée, que quand aucune prinse est maintenant faite sur nos ennemis, les preneurs sont si accoutumez de faire et vser de leurs volonteiz et à leur profit, qu'ils ne gardent en rien l'usage que l'on dit anciennement en ce estre ordonné, mais sans traité de justice, souvent inobédiens, pillent et rompent coffres, et prennent ce qu'ils peuvent. En quoy nostre dit amiral et les gens d'autre estat qui ont mis sus les Nauires à grands despens, sont excessiueusement fraudez, et si aduiuent par faute de iustice souuent de grandes questions, noyses entre les preneurs, qui sans crainte, et par cy-deuant chacun de sa volonté sans en estre punis et en ont ainsi vsé.

ART. X.—Et quand aucune prinse estoit trouuée appartenir à nos subiects et estoit par justice restituée, on ne pouuoit trouuer les biens, ne sçauoir qui les auoit euz, nous auons ordonné que d'oresnavant l'usage ancien sera en ceste partie estroitement gardé sans enfreindre; c'est à sçauoir, que s'il y a aucun qui rompe coffre, balle ou pippe, ou autre marchandise que nostre dit amiral ne soit présent en sa personne pour luy, il forera sa part du butin et si sera par iceluy amiral puny selon le meffaict.

ART. XI.—Si nostre dit amiral, ou aucuns de ses lieutenans, n'estoient en personne aux entreprises qui se feront sur la dite mer pour tenir ordre à iustice entre ceux de la dite entreprise, les maistres, chefs, capitaines, ou patrons, auant leur partement, feront serment, ainsi que dessus est dit, qu'à leur pouuoir ils deffendront nos subiects sans leur porter dommage. Et toutes les prinses qu'ils feront, les amèneront à terre, et en donneront cognoissance certaine au dit amiral et lui deliureront ceux qui pour le voyage auront commis quelque meffaict contre nos dites ordonnances, ou autrement.

ART. XII.—De toutes les prinses qui se feront par la dite mer, les vendus butins et départemens en seront faits deuant nostre dit amiral, ou son lieutenant, qui fera retenir par deuers \*luy, [\*65 d'iceux biens, ject et compte, pour y auoir recours, pour ceux qui en auront besoin, et pouuoir cognoistre le fait et estat d'icelles prinses.

ART. XVIII.—A ce que le dit amiral dit auoir droict sur les prisonniers prins sur la mer, et par la dite mer, lesquels droicts leur aduiendront souuent, qu'en demeurera la part moindre, ceux qui les auront prins; d'oresnavant nostre dit amiral ne se pourra ayder de chose qui en ait esté vsé, mais déclarons que sur les

dits prisonniers il ne pourra demander que son Dixiesme, avec le droict de son sauf-conduit, ny auoir la garde d'iceux, sinon en tant que monteroit le faict et portion de son Dixiesme, s'il n'estoit prisonnier de si grand prix et les preneurs de si petites essence, qu'il ne fust pas bon les laisser en leurs mains. Excepté que si aucun, sans congé ou consentement du dit amiral ou personne de par luy, mettoit quelques prisonniers à finance, il (par priuilege de son office) pourra prendre les dits prisonniers en sa main, en payant la dite finance; et sur le prix rabatu son droit de Dixieme.

*Articles Extraits, de l'Edit, concernant la Jurisdiction de l'Amirauté de France.*

*Du mois de mars 1584.*

ARTICLE XXIV.—Si une Nef estrangère veut entrer en un port ou havre de nostre dit Royaume, faire ne le peut, sans l'auctorité et congé de nostre dit Amiral ou de ses Commis, si par fortune ou tourmente de mer n'y estoit entrée par force; et qu'aucun Pilote ne l'ameine, et la puisse guider ne conduire au dit havre sans demander congé à nostre dit Amiral. Et d'avantage incontinent ils seront tenus venir vers nostre dit Amiral, ou son dit Lieutenant au dit lieu, pour faire entendre le lieu dont ils viennent. Et aussi à ce que nostre dit Amiral ou son dit Lieutenant les puisse interroger de ce qu'ils auroient veu en leur voyage, pour nous en avertir si besoiñ estoit.

ART. XXXIII.—De toutes les prinses qui se feront en mer, soit par nos sujets, ou autres tenans nostre party, et tant sous ombre et couleur de la guerre qu'autrement. Les prisonniers **66\*** ou pour le moins deux ou trois des plus apparens d'iceux seront amenez à terre, devers nostre dit Amiral ou son Vice-Amiral, ou Lieutenant, pour, au plustost que faire se pourra, estre par lui examinez et ouys, avant qu'aucune chose des dites Prises soit descendue; afin de savoir le pays delà où ils seront, à qui appartiennent les navires et biens d'iceux, pour, si la prinse se trouve avoir esté bien faite, telle la déclarer, sinon, et où elle se trouveroit mal faite la restituer à qui elle appartiendra; en enjoignant par ces dites présentes au dit Amiral, Vice-Amiral, ou Lieutenant ainsi le faire. Et sur ce administrer bonne et briefue justice et expédition.

ART. XXXV.—Si aucuns se trouvent avoir commis faute en leur voyage, soit d'avoir mis à fonds aucuns Navires, ou robbé des biens d'iceux, ou noyé les corps des Marchands, Maistres, Conducteurs, et autres Personnes des dits navires, ou iceux descendus à terre en aucune loingtaine coste, pour celer le larcin et malfait, ou bien quand il adviendrait comme il a fait quelquefois, qu'aucuns d'eux se trouvant les plus forts, viendront à rançonner à argent les navires de nos sujets, ou d'aucuns nos Amis et Alliez: Voulons que sans quelque délai, faveur ou déport, le dit Amiral en face ou face faire justice et punition, telle que ce soit exemples à tous autres, deues informations des cas précédemment faites, et selon qu'il sera cy-après ordonné.

ART. XXXVII.—Et pour ce que souventes fois quand une Prise estoit faite sur nos Ennemis, les Preneurs estoient si coutumiers de user de leur volonte pour leur profit, qu'ils ne gardoyent l'usage toujours et de toute ancienneté Wheat. 5.

sur ce ordonné et observé, mais sans crainte de Justice, comme innobédiens et pilleurs, eux estans encore sur mer rompent les coffres, balles, boujettes, malles, tonneaux et autres vaisseaux, pour prendre et piller ce qu'ils peuvent des biens de la prise, en quoy ceux qui ont équipé et mis sur les navires à gros despens sont grandement foullez, dont advient souvent de grandes noises, débats et contentions. Nous prohibons et deffendons à tous Chefs, Maistres, Contre-Maistres, Patrons, Quarteniers, Soldats, et Compagnons, de ne faire aucune ouverture des coffres, balles, &c., ny autres vaisseaux de quelques Prises qu'ils facent, ny aucunes choses des dites Prises receler, transporter, vendre, ny \*eschanger, ou autrement allier, ains **\*67** ayent à représenter le tout des dites Prises, ensemble les personnes conduisant le navire au dit Amiral, ou Vice-Amiral, le plustost que faire se pourra, pour en estre fait et disposé selon qu'il appartiendra, et comme contiennent nos présentes ordonnances, et ce sur peine de confiscation de corps et des biens.

ART. XXXVIII.—Quand une Prinse faite et amenée à terre, est trouvée appartenir à nos sujets, Amis et Alliez, et il est ordonné qu'elle sera restituée, l'on ne peut trouver les biens, ny savoir qui les a euz, de sorte que les pauvres Marchands, à qui elle est adjugée ne savent à qui avoir recours. Nous avons ordonné, que d'oresnavant si aucun rompt coffres, balles, pippes, et autres marchandises, que nostre dit Amiral n'y soit présent, ou personne pour lui et par son commandement, il perdra sa part, du butin, et sera puni par nostre dit Amiral ou son Lieutenant, corporellement selon le meffait, en sorte que tous les autres y prendront exemple.

ART. XXXIX.—Pour ce aussi que plusieurs Bourgeois, Propriétaires et Avicteuillieurs des Navires, nos sujets, nous y ont cy-devant fait remonstrer, que jaoit ce qu'ils facent faire les dits navires, et icelles équiper, et fournissent d'artillerie et autres munitions de guerre et de vivres, pour grever et offencer nos Ennemis et Adversaires, le tout à grands frais et despens, neantmoins ne leur est baillé que la Huictiesme pour leurs portions de butins qui sont gaignez sur nos dits Ennemis et Adversaires, qui n'est chose suffisante, en esgard aux grands frais, mises et despences qui leur convient faire, à faire faire les dits navires, et icelles équiper, munir et avicteuiller, qui est cause que les dits Bourgeois, Propriétaires et Avicteuillieurs, ne peuvent mettre sus, et nous servir de grands et puissans navires, ainsi qu'ils pourroyent faire; si des dits butins raisonnable et compétente portion leur estoit distribuée. Nous à ce que d'oresnavant ils aient plus grande occasion et vouloir de faire faire et entretenir bons, grands, forts, et puissans vaisseaux, dont puissions estre servis et secourus en nos guerres contre nos dits Ennemis et Adversaires, et iceux amplement équiper, munir, et garnir de toute chose requise pour la guerre, Avons ordonné et ordon- **\*68** nons qu'iceux Bourgeois et autres ausquels appartiendront aucuns navires, après le dixiesme de nostre dit Amiral pris et déduit sur la totalité de la Prise et butin, que feront les dits Navires, auront et prendront la quarte partie du surplus d'icelles Prises et butin, soit de marchandises, prisonniers, rançons, et quelques soient les dites Prises et butin, sans aucune chose en réserver ny excepter; et de trois quarts restans, les Avic-



tuailleurs en auront quart et demi, et les Marins et autres Compagnons de guerre autre quart et demi, pour le repartir entre eux en la manière accoutumée.

ART. XLIII.—Pour obvier à tout désordre et confusion, et à ce qu'à chacun son droit soit gardé, voulons et ordonnons, que les maîtres, contre-maîtres, Gouverneurs, et autres ayans charge des navires, amènent les personnes, navires, vaisseaux, marchandises, et autres biens qu'ils prendront à leur voyage, au mesme port et havre dont ils seront partis pour faire le dit voyage, ou au lieu de leur reste, sur peine de perdre tout le droit qu'ils auront en la dite Prise et butin, et d'amende arbitraire; le tout à appliquer au dit Amiral, à la charge et juridiction duquel sera le dit port dont ils seront partis, et outre de punition corporelle sinon que par force d'ennemis, ou par tempeste ils feussent contraints eux sauver en autre port; esquels cas seront tenus estans arrivés esdits autres ports et havres, avertir les dits officiers de la dite Amiraute, pour estre presens à l'inventaire des dites marchandises, avant qu'en décharger aucune sur les dites peines, et en rapporter certificat des dits officiers esdits havres dont ils seront partis, pour estre délivré ausdits Marchans, Propriétaires et Victuailleurs; ce qui aura en semblable lieu, pour les navires qui font voyage hors ce Royaume en marchandise ou autrement.

ART. XLV.—Et pour ce que plusieurs gens de guerre des dits navires voudroyent dire plusieurs biens tenir nature de pillage, pour par ce moyen les appliquer à leur profit, au préjudice de ceux qui équipent et arment les dits navires, nous avons dit et déclaré, disons et déclarons suivant nos anciennes Ordonnances, que nulle chose pourra estre dit pillage, qui excède la valeur de dix escus.

69\*] ART. XLVIII.—Avons défendu et défendons sur peine de prison et confiscation de biens, à tous marchands de quelque estat, qualité ou condition qu'ils soient, d'acheter, eschanger, permuter ou prendre par don, ou autre couleur ou condition que ce soit, ne de celer ou occulter par eux ou autres, directement ou indirectement, les marchandises et biens depredez, et amenez de la mer, avant que le dit Amiral ou son dit Lieutenant, ait déclaré les prises estre justes et de bon et licite gain.

ART. LXI.—Si aucun navire de nos sujets pris par nos ennemis, a esté entre leurs mains jusques à vingt-quatre heures, et après il soit recous et repris par aucuns de nos navires de guerre, ou autres de nos sujets, la prise sera déclarée bonne; mais si la dite reprise est faite auparavant les vingt-quatre heures, il sera restitué avec tout ce qui étoit dedans, et aura toutefois le navire de guerre, qui l'aura recoussé et reprise, le tiers.

ART. LXII.—Et pour autant que en faisant prise en mer par nos navires et autres de nos sujets, plusieurs se présentent souvent pour y avoir part, sous ombre qu'ils veulent alléguer avoir veu prendre la dite prise, et oy l'artillerie durant le combat, encore qu'ils n'ayent esté l'occasion que l'ennemi se soit rendu par crainte d'eux; et afin d'éviter et obvier aux différends qui se peuvent mouvoir sur celles injustes demandes, il ne sera loisible à aucun navire, à qui qu'il soit appartenant, de demander aucune part et portion aux prises qui se feront, si ce

n'est qu'ils ayent combattu ou fait tel effort, que pour son devoir l'ennemi ait amené ses voiles, ou bien qu'il en ait esté en quelque partie cause; dont les prisonniers seront creuz par serment; si ce n'est qu'il y ait eust promesse entre les uns et les autres, de départir les prises faites en présence ou absence.

ART. LXIV.—Là où aucuns navires à la semonce qui leur sera faite par les navires de guerre de nous et de nos sujets, amèneront libéralement sans aucune résistance leurs voiles et montreront leurs chartesparties et recognoissance aux dits navires de guerre, il ne leur sera fait aucun tort. Mais si le capitaine du navire de guerre ou ceux de son équipage lui robbent aucune chose, ils seront tenus ensemble- [\*70 ment, et l'un seul et pour le tout, à la restitution entière, et avec ce condamnez realement et de fait et exécutez à la mort et supplice de la roue, nonobstant l'appel, pourvu que au dit jugement y assistent six Avocats ou Notables personnes de Conseil, qui orront de bouche les prisonniers, et seront tenus signer le dictum.

ART. LXV.—Pour ce qu'il est à considérer que ayant par nous ou autres de nos sujets, armé un, deux, ou plusieurs navires en guerre pour chercher l'aventure de profiter sur l'ennemi, l'on ne peut moins faire que découvrant navire à vue, ou plus prez, que de courir après pour sçavoir s'il est ami ou ennemi, au moyen de ce que la plus grande part des navires des amis et alliez sont de même construction que ceux des dits ennemis, aussi que bien souvent dedans les dits navires d'amis et alliez, les marchandises qui y sont appartiennent aux dits ennemis, ou bien il y a marchandises prohibez: Nous afin d'esclaircir nos gens et sujets, de ce qu'ils auront affaire eu ce que dessus, pour n'y faire faute et erreur dont ils puissent estre repris, avons permis et permettons, voulons et nous plaist, que tous navires de guerre de nous et de nos dits sujets, decouvrans à vue ou plus près, autres navires, soyent d'amis, alliez, ou d'autres, pourront courir après et les semondre d'amener les voiles, et estans refusans de ce faire après cette semonce leur tenir artillerie jusques à les contraindre par force, en quoy faisant venant au combat, par la témérité ou oppiniastreté de ceux qui seront dans les dits navires, et là dessus estans prius, nous voulons et entendons la dite prise estre dite et déclarée bonne.

ART. LXIX.—Et pour ce que par cy-devant sous couleur des pratiques et intelligences, que ont aucuns de nos alliés et confédérés avec nos ennemis, lorsqu'il y avoit aucune prise faite sur mer par nos sujets, plusieurs procès se suscitoient, par nos dits alliez, voulant dire que les biens, prins en guerre, leur appartiennoient, sous ombre de quelque part et portion qu'ils avoient avec nos dits ennemis, dont se sont ensuivies grosses condamnations à l'encontre de nos dits sujets; au moyen de quoi, iceux nos sujets ont depuis craint esquiper navires \*en [\*71 guerre, pour nous faire fermer et endommager nos ennemis: Nous pour remédier à telles fraudes, et afin que nos dits sujets reprennent leur courage, et ayent meilleur désir et occasion d'esquiper navires en guerre par mer, avons voulu et ordonné, voulons et ordonnons, que si les navires de nos dits sujets sont, en temps de guerre, prises par mer d'aucuns navires appartenans à autres nos sujets ou à nos alliez, con-

fédérez ou amis, esquels y aient biens, marchandises ou gens de nos ennemis, ou bien aussi navires de nos dits ennemis, esquels y aient personnes, marchandises, ou autres biens de nos dits sujets, confédérez et alliez (in ord. 1543, ou esquels nos dits sujets ou alliez fussent personniers en quelques portions), que le tout soit déclaré de bonne prise—et dès à présent comme pour lors, avons ainsi déclaré et déclarons par ces présentes, comme si le tout appartenait à nos dits ennemis. Mais pourront nos dits alliez et confédérez, faire leur trafic par mer, dedans navires qui soient de leur obéissance et subjection, et par leurs gens et sujets, sans y accueillir nos ennemis et adversaires; les quels biens et marchandises ainsi chargés, ils pourront mener et conduire où bon leur semblera, pourvu que ce ne soient munitions de guerre, dont ils voulassent fortifier nos dits ennemis. Auquel cas, nous avons permis et permettons à nos dits sujets, les prendre, et amener en nos ports et havres, et les dites munitions retenir, selon l'estimation raisonnable, qui en sera faite par notre dit Amiral, ou son dit Lieutenant.

ART. LXX.—Et pour ce qu'il pourroit advenir, qu'aucuns de nos dits alliez et confédérez, voudroient porter plus grande faveur à nos dits ennemis et adversaires, que à nous, et à nos dits sujets, et à ceste cause, voudroient dire et soutenir contre vérité, que les navires prins en mer par nos dits sujets leur appartiendroyent, ensemble la marchandise, pour en frauder nos dits sujets: voulons et ordonnons, qu'incontinent après la prise et abordement de navire, nos dits sujets fassent diligence de recouvrer la charte partie, et autres lettres concernant la charge du navire; et incontinent à leur arrivée à terre, les mettre par devers le Lieutenant de notre dit Amiral, afin de cognoistre à qui le navire et marchandises appartiennent; et où ne **72**\*) \*seroit trouvée charte partie dedans les dits navires, ou que le maître et compagnons l'eussent jettée en la mer, pour en celer la vérité, voulons que les dits navires ainsi prins, avec les dits biens et marchandises estans dedans, soient déclarez de bonne prise.

*Sur la Navigation—Ordonnance du Roi de Suède, 19 Fév. 1715.*

“1. Le Roi voulant bien permettre, non seulement à ses propres sujets, mais aussi à ceux des puissances étrangères, d'aller en course sur tous ceux qui contreviendront à ce règlement; un chacun qui souhaitera d'avoir une commission d'armateur, l'obtiendra de Sa Majesté ou de ses Amiraux: mais ceux qui ne seront pas munis d'une telle commission, n'auront point la permission d'aller en course.

“2. Lorsqu'un armateur fera un signal, ou donnera la chasse à un vaisseau, le maître sera obligé de lui obéir et de le respecter; de venir à son bord avec ses documents, ou de les envoyer par quelqu'autre. En cas que l'armateur trouve que le vaisseau ou sa charge, ou tous les deux ensemble, soient confiscables, il gardera les documents, après les avoir fait sceller par le propriétaire, et fera aussi sceller les écoutes du vaisseau avec son cachet et celui du maître.

“3. Si l'armateur trouve par les documents que le vaisseau et sa charge ne soient pas de bonne prise, il pourra encore envoyer quelqu'un à bord du vaisseau, pour examiner si les docu-

ments ne sont point défectueux; et en cas qu'ils soient trouvés conformes à la vérité, il laissera aller le vaisseau sans lui causer aucun dommage.

“4. Si le vaisseau, à qui on aura fait le signal, tâche de se soustraire, et s'il est ensuite pris par force, le maître sera obligé de donner satisfaction à l'armateur.

“5. Un vaisseau qui fera la moindre résistance à un armateur, perdra par là sa liberté, et sera de bonne prise, quoiqu'il ne l'eût pas été sans cela.

“6. L'Armateur ayant fait une prise, devra l'annoncer au Juge du lieu où il l'aura conduite, et lui produira le protocole \*et les docu- **73** ments scellés; Il sera permis, à la réquisition de l'armateur, de faire débarquer le maître et son équipage; mais le vaisseau et sa charge resteront à la garde du dit armateur, qui sera obligé de restituer le tout, en cas que l'un et l'autre soient déclarés libres.

“7. Tous les vaisseaux qui seront amenez à Karelskroon, ou dans les ports à côté de Sund, seront jugez par des personnes établies pour cet effet, et ensuite par des Conseillers de l'Amirauté de Karelskroon; Ceux qui seront conduits à Gottenbourg ou aux environs, seront jugez par l'Amirauté de Gottenbourg; et ceux qui seront amenez à Stralsund ou dans quelques ports d'Allemagne, seront jugez par l'Amirauté de Stralsund. Ces jugemens devront se faire sans aucun retardement, et il ne sera pas seulement permis aux maîtres des vaisseaux, d'envoyer chercher ailleurs de nouvelles preuves pour leur justification. Mais en cas que l'affaire soit si embrouillée, qu'on ait besoin de plus grands éclaircissemens, on déchargera les effets jusqu'à ce tems là.

“8. Tous les vaisseaux appartenant aux ennemis ou à leurs Sujets, seront confiscables, sans avoir égard aux lieux d'où ils viennent et où ils vont.

“9. De même que tous les vaisseaux neutres qui négocioient dans les places de la Mer Baltique, enlevées au Roi, y compris les Isles et Havres sur les Côtes de Finlande, Ingermelande, Oestlande, Livonie, et Courlande.

“10. Comme aussi les vaisseaux construits ou achetez dans des places ennemies, et qui n'ont pas encore été dans des endroits libres.

“11. Les documens indispensables dont les maîtres de vaisseaux doivent être munis, sont le contract de la construction du vaisseau, le contract d'achat ou de transport; et l'Acte de Jaugeage du vaisseau, par où l'on puisse voir si sa capacité ou grandeur, y mentionnée, se rapporte aux contracts de construction et d'achat, comme aussi à la lettre de Mer ou attestation de l'Amirauté, par laquelle on puisse voir le lieu à qui le vaisseau appartient, le nom du capitaine, si les Fréteurs ne sont pas ennemis, et où le vaisseau est destiné: le tout devant être attesté \*par serment, tant des capitaines **74** que des Fréteurs. Toute la charge devra aussi être spécifiée dans le même passeport, avec le nom du propriétaire, et le seing du magistrat du lieu; et les attestations que les officiers de la Douane pourroient donner à cet égard, ne seront point valables, quand même les magistrats seroient absens.

“12. Tous les vaisseaux qui auront des documens doubles ou contradictoires, en sorte que selon quelques uns ils soient confiscables, et



selon quelques autres livres, seront néanmoins déclarés de bonne prise.

"13. Tous les effets appartenans à des sujets ennemis, ou envoyés pour leur compte, seront confiscables, dans quelque vaisseau que ce soit qu'ils soient trouvez.

"14. Comme aussi les effets des sujets neutres, qui se trouveront dans des vaisseaux ennemis.

"15. De même que tous les effets qui vont ou viennent des Havres mentionnez dans l'article IX.

"16. Tous les effets, de quelque valeur qu'ils soient, seront pareillement confiscables, lorsqu'on ne trouvera pas à bord les preuves nécessaires; savoir, un certificat attesté des Fréteurs par serment, et signé par le Magistrat du lieu, spécifiant en general la charge, à qui elle appartient, et où elle est destinée: comme aussi les connoissemens, contenant en particulier et par division la dite charge, et pour le compte et risque de qui elle est. Le capitaine sera aussi tenu d'être muni de pareils certificats et documens, pour la portion qu'il pourroit avoir dans la charge, avec la Liste et les marques des dits effets, qui doivent se rapporter avec les Connoissemens. Tous les Connoissemens qui ne seront pas entièrement remplis, sont tellement défendus qu'ils rendront le vaisseau confiscable comme aussi divers Connoissemens d'une même sorte des marchandises, ou doubles Connoissemens. Et quoiqu'il soit spécifié dans l'article IX., quels documens on doit produire pour la franchise du vaisseau et de sa charge; on pourra néanmoins en exiger encore d'autres, comme la chartepartie, Comptes de Facture, Lettres de Correspondence, Listes des Douanes, et autres pareils; après quoi on jugera si le vaisseau est franc ou non.

**75\*** "17. Les effets qui auront des documens doubles ou contradictoires, seront confiscables comme les vaisseaux. Article XII.

"18. De même que toutes les marchandises de contrebande, qui peuvent être employées pour la Guerre.

"19. Tous les vaisseaux qui viennent ou vont à une place des ennemis, avec leurs charges, seront tenus pour confiscables.

"20. Les vaisseaux qui s'éloigneront de leur route, seront aussi confiscables, lorsqu'ils ne pourront pas justifier qu'ils y ont été contraints par tempête ou mauvais tems.

"21. Comme il doit y avoir sur chaque vaisseau un rôle de tout l'équipage, signé par le Magistrat du lieu à qui il appartient, avec le nom du lieu de la naissance de chaque Matelot,

et à qui il appartient: Sa Majesté veut qu'il n'y ait sur chaque vaisseau, qu'un quart de Matelots nez dans les Païs ennemis; sous peine d'être confisqué de même que les vaisseaux qui n'auront pas de Rôles ou Listes.

"22. En cas qu'une partie du vaisseau ne soit pas libre, et que l'autre le soit, toutes les parties du dit vaisseau seront confiscables.

"23. Tout ce qui sera déclaré de bonne prise, appartiendra entièrement à l'Armateur et à ceux qui auront fait l'Armement, sans qu'on en retienne la moindre chose pour le Roi, ou pour le public."

*Ordinance of his Majesty the King of Denmark, Norway, the Vandals, and Goths, &c., &c. Dated 23d Sept., 1659.*<sup>1</sup>

We, Frederick the Third, by the grace of God, King of Denmark, Norway, &c., &c., do hereby make known to all persons; Whereas, \*in our most gracious declarations, respecting those who trade by sea, bearing date the 30th August last, it is set forth—concerning the certificates for ships (the sea-briefs), as well as the certificates for the goods and cargo, on board ships which are destined to Sweden, or to other territories and towns belonging to the crown of Sweden, or now in possession of the Swedes, as long as this war shall continue, viz., in what form they shall be composed and made out so as to be deemed sufficient by the Court of Admiralty, and to avail and benefit those persons, that shall produce them in court. Now, to the end that every person may know it, and in a right manner and form furnish ships and goods with certificates; therefore we have most graciously ordered and consented, and do also hereby order and consent, that all and every certificate made, taken out, or granted, for free ships and goods in neutral places, and by neutral persons, ship-masters and owners, as long as this war continues, must, in their letter and true meaning, manner and form, be of the tenor as here follows:

\*1. The certificate for the ships (which [\*77 must be made upon oath, and with fingers erect, by every ship-owner, or ship-master, before the magistrates of his own town or place), must, in its letter and true meaning, be of the tenor as hereunder; and the said certificate must likewise be signed and sealed by the usual sworn secretary or notary; and besides them, as further ordered on this subject, in our aforesaid most gracious declaration.

We, N. N. and N. N., conjunctively, ship-master, and owner, of the ship N. N., of the

1.—In 1793, the Danish government issued the following proclamation respecting the trade of Danish subjects, in the war which was then just broke out:

"We, by the grace of God, Christian VII., &c.

"It is only by strictly observing the rules and provisions stipulated for by our treaties with foreign powers, that the merchants of our kingdoms can enjoy the security which our neutrality has procured for the Danish flag during the present calamities of the war. We therefore order,

"Art. 3. As the principles of neutrality do not permit any neutral vessel to enter a port blockaded by any of the belligerent powers, or to have articles on board, considered as contraband, and destined for states at war, or their subjects, or, finally, such as already belong to them; the magistrates must inform the parties concerned of these principles, and be careful that the required oath contains also the engagement to receive nothing on board which may be comprised in the under-mentioned denominations.

"Art. 4. By contraband is understood, fire-arms and other species of arms, horses, harness, and in general every article necessary for the construction and repair of vessels, with the exception, however, of unwrought iron, beams, boards and planks of deal and fir.

"Art. 6. In the treaty of commerce and alliance of 1670, with England, it is stipulated that amongst the ship's papers there should be, in time of war, a certificate to prove that the cargo belongs to a neutral power. In order, therefore, to prevent all cause of dissatisfaction on either side, we have ordered the magistrates in our ports to deliver the certificates required on this subject, and also our consuls in foreign ports; and the former as well as the latter are enjoined to affix their signature to them.

"Art. 14. The certificates respecting the neutrality of the vessel, as well as the cargo, must be granted under the forms prescribed by the Council of Commerce."

burthen of N. lasts, now commanded by captain N. N., do hereby certify, that the aforesaid ship belongs to no other person, but solely to us, in true right of property, and that no enemy or other person besides ourselves, aforesaid, has any share or interest therein; also, that neither with our conjunctive knowledge and will, or with the knowledge and will of either of us, shall any goods belonging to enemies be laden therein. So help us God, and His holy Word!

2. And that the certificate, which is required to be taken upon oath, and with fingers erect, for every ship's cargo, and goods, and merchandise on board, by every merchant, or freighter, before the magistrates of his own town or place, must likewise be signed in the manner aforesaid, and must in its letter and true meaning be of the following tenor:

I, N. N., inhabitant and burgher in N. N., do hereby and by virtue of these presents certify, that all such goods as shall be laden in the ship N. N., whereof N. N. is master, destined to N. N., and which shall be specified in this certificate, with their denominations and marks, do belong to no other person whatever, in this world, besides myself solely and only, and were purchased with my own property or means. Also, that they do solely go for my own account and risk; and this not in appearance only, or for color sake, so that by means of some clandestine agreement with enemies, I am collusively to cover the said goods by this declaration, as if they were for my own account and risk, until they are brought in safety, and that then they shall belong to, and be sold for a-**78\***count of, enemies; but \*that they do *bona fide* belong to myself, solely, without fraud. So help me God, and His holy Word.

And in this certificate there must be inserted a true specification of all the goods, belonging to each certificant, which he has thus caused to be laden, and marked with his proper mark. Inasmuch as such certificates that are of a different tenor, or affirmed to in a manner different from the above-mentioned, shall be considered of no value, before our Court of Admiralty, whosoever the claimant may be, or wherever he may be found with such upon the seas; but they shall be, and remain of no value, even as those certificates are held and considered, which, in a judicial manner, or otherwise, are proved to be false; inasmuch as by and with the advice of our beloved counselors of state, we have by these presents so enacted it, and have before issued orders concerning the same, in our most gracious declaration.

3. And whereas in our aforesaid most gracious declaration, as well as in all the passports granted by us, it is prohibited to carry, or bring any sorts of contraband goods to and from Sweden, and the countries and places belonging thereto, or at present possessed by them. Now, that every person may know what sort of goods it is which are considered and deemed as contraband, we have on that subject made and given this specification and declaration to wit:

1. The following goods will be regarded as contraband, viz.: All sorts of ammunition, arms, gunpowder, matches, and saltpetre; also, saddles, horse-harness, and horses; further, oak ships' timber, and all sorts of ship's materials and apparel, such as sail-cloth, tackling, cordage,

and whatever else is considered necessary and useful for carrying on war, besieging, blockading, or other military operations, by land and by sea.

2. The following shall likewise be considered as contraband and prohibited goods, to wit: All sorts of provisions for food and beverage, as well as all sorts of coarse and fine salt, without any distinction whatever, none excepted; save, solely, all sorts of wines, brandy, and spices (or groceryware), and also such quantity of herrings and salt, as are destined to Narva, or \*Reval, from which places traffic is [**\*79** carried on with the Russian towns and countries; to the end that the trade of Russia may be carried on unmolested; which articles we have graciously, out of a special consideration, consented to have excepted, and to allow that they may be freely conveyed to Narva aforesaid, and the before-named Livonian cities.

3. The following goods shall also be reckoned as contraband, viz.: Calamine, cotton, and whatever else serves for the furtherance of all sorts of manufactures, made, woven, or otherwise put together in Sweden, and the countries and towns under its dominion. Also, such articles as are cast, smith's work, or wire drawn, whether they be of copper, brass, iron, lead, or other materials, or what is made either of metal, linen, or wool, wheresoever they are met with, on board of free, or unfree ships, belonging to Swedish subjects. Under this description are to be understood, all sorts of ordnance and cannon, mortars of brass or iron, small or great, all sorts of arms, armour, arms for the use of cavalry or infantry, anchors and anchor-stocks, nails, spikes, and bolts; also all sorts of ready-made house furniture and cooper's articles; together with copper and all other coins, being the property of Swedish subjects, and exported from the dominions of Sweden, although they should be found on board of ships belonging to free, or neutral places, and persons, as aforesaid; nevertheless that, on that account, free ships and goods belonging to neutral persons, shall not be subject to confiscation, if with such legal and proper certificates, as above described, they can judicially be proved to be such.

4. But such goods as, in the before-mentioned manner, are satisfactorily proved to belong to free places and neutral persons, and by them are exported from Sweden in ships of their own, whether it be iron in bars, osmund (moonwort), refined copper (original Gaar-copper), brass wire, and copper in plates; further, all sorts of grain, and greasy articles (or fatmongery); also, hides and skins, and all other Swedish goods, being raw materials, or not made up or manufactured in Sweden, or other countries and cities belonging to Sweden; also, flax, \*hemp, [**\*80** wax, fir building timber, deals, laths, Gottland lime and lime-stones, all sorts of flags and other stones, together with masts, spars, tar, pitch, pot and wood ashes, clap-boards, pipe-staves, peltry, and other Russia leather, and Russian goods, are not herewith understood or prohibited to be exported (*i. e.*, out of Sweden), but are hereby permitted and allowed, so that for the sake of maintaining commerce they may be freely exported by neutral towns and persons, in their ships, by their factors, in the manner aforesaid; and that, on the other hand, they may also freely import into Sweden all



sorts of silk articles, cloths, and such like fine shop ware, and current goods, which are not, properly and directly necessary and useful for any purpose of war; but all such free goods as are found or met with, or overtaken in ships that are not free, shall and must after all (without any exception) be subject to confiscation as good prize. According to which our admiralty council board, and servants thereof, and all and every our officers, cruisers, and commanders of ships, having commissions, as well as all others, whether they be our friends, neighbors, or enemies, who are carrying on any commerce and traffic by sea, and are minded to continue the same, during the present war, have to conform themselves, and to beware of losses. Given in our palace at Copenhagen, the 23d of September, in the year 1659, under our seal.

[L. S.]

FRIEDERICH.

FROM THE FRENCH ORDINANCE OF 1681.

## LIVRE III.—TITRE IX.

SEC. 2. *Des Prises.*

Art. 3. Défendons à tous nos sujets, de prendre commissions d'aucuns rois, princes ou états étrangers, pour armer des vaisseaux en guerre, et courir la mer sous leur bannière, si ce n'est par notre permission, à peine d'être traités comme pirates.

**81\*** 4. Seront de bonne prise tous vaisseaux appartenants à nos ennemis, ou commandés par des pirates, forbans ou autres gens courant la mer sans commission d'aucun prince ni état souverain.

5. Tout vaisseau combattant sous autre pavillon que celui de l'état dont il a commission, ou ayant commission de deux différens princes ou états, sera aussi de bonne prise; et s'il est armé en guerre, les capitaines et officiers seront punis comme pirates.

6. Seront encore de bonne prise les vaisseaux avec leur chargement, dans lesquels il ne sera trouvé chartes-parties, connoissemens ni factures. Faisons défenses à tous capitaines, officiers et équipages des vaisseaux preneurs, de les soustraire, à peine de punition corporelle.

7. Tous navires qui se trouveront chargés d'effets appartenants à nos ennemis, et les marchandises de nos sujets ou alliés qui se trouveront dans un navire ennemi, seront pareillement de bonne prise.

8. Si aucun navire de nos sujets est repris sur nos ennemis, après qu'il aura demeuré entre leurs mains pendant 24 heures, la prise en sera bonne; et si elle est faite avant les 24 heures, il sera restitué au propriétaire, avec tout ce qui étoit dedans, à la réserve du tiers qui sera donné au navire qui aura fait la recousse.

9. Si le navire, sans être recous, est abandonné par les ennemis, ou si, par tempête ou autre cas fortuit, il revient en la possession de nos sujets, avant qu'il ait été conduit dans aucun port ennemi, il sera rendu au propriétaire qui le réclamera, dans l'an et jour, quoiqu'il ait été plus de 24 heures entre les mains des ennemis.

10. Les navires et effets de nos sujets ou alliés, repris sur les pirates, et réclamés dans l'an et jour de la déclaration qui en aura été faite en l'amirauté, seront rendus aux propriétaires en

payant le tiers de la valeur du vaisseau et des marchandises, pour frais de recousse.

11. Les armes, poudres, boulets, et autres munitions de guerre, même les chevaux et équipages qui seront transportés \*pour le **82** service de nos ennemis, seront confisqués, en quelque vaisseau qu'ils soient trouvés, et à quelque personne qu'ils appartiennent, soit de nos sujets ou alliés.

12. Tout vaisseau qui refusera d'amener ses voiles, après la semonce qui lui en aura été faite par nos vaisseaux ou ceux de nos sujets armés en guerre, pourra y être contraint par artillerie ou autrement; et en cas de résistance et de combat il sera de bonne prise.

13. Défendons à tous capitaines de vaisseaux armés en guerre, d'arrêter ceux de nos sujets, amis ou alliés, qui auront amené leurs voiles et représenté leur charte-partie ou police de chargement, et d'y prendre ou souffrir être pris aucune chose, à peine de la vie.

14. Aucuns vaisseaux pris par capitaines ayant commission étrangère, ne pourront demeurer plus de vingt-quatre heures dans nos ports et havres, s'ils n'y sont retenus par la tempête, ou si la prise n'a été faite sur nos ennemis.

15. Si dans les prises amenées dans nos ports par les navires de guerre armés sous commission étrangère, il se trouve des marchandises qui soient à nos sujets ou alliés, celles de nos sujets leur seront rendues, et les autres ne pourront être mises en magasin, ni achetées par aucune personne, sous quelque prétexte que ce puisse être.

16. Aussitôt que les capitaines des vaisseaux armés en guerre, se seront rendus maîtres de quelques navires, ils se saisiront des congés, passe-ports, lettres de mer, chartes-parties, connoissemens, et de tous autres papiers concernant la charge et destination du vaisseau, ensemble des clés des coffres, armoires et chambres, et feront fermer les écoutilles et autres lieux où il y aura des marchandises.

17. Enjoignons aux capitaines qui auront fait quelque prise, de l'amener ou envoyer, avec les prisonniers, au port où ils auront armé, à peine de perte de leur droit, et d'amende arbitraire, si ce n'est qu'ils fussent forcés par la tempête ou par les ennemis, de relâcher en quelque autre port; auquel cas ils seront tenus d'en donner incessamment avis aux intéressés à l'armement.

\*18. Faisons défenses, à peine de la vie, **83** à tous chefs, soldats et matelots, de couler à fond les vaisseaux pris, et de descendre les prisonniers en des îles ou côtes éloignées, pour celer la prise.

19. Et où les preneurs ne pouvant se charger du vaisseau pris, ni de l'équipage, enlèveraient seulement les marchandises, ou relâcheraient le tout par composition, ils seront tenus de se saisir des papiers, et d'amener, au moins, les deux principaux officiers du vaisseau pris, à peine d'être privés de ce qui leur pourrait appartenir en la prise, même de punition corporelle, s'il y échet.

20. Défendons de faire aucune ouverture des coffres, ballots, sacs, pipes, barriques, tonneaux et armoires; de transporter ni vendre aucunes marchandises de la prise, et à toutes personnes d'en acheter ou receler, jusqu'à ce que la prise ait été jugée, ou qu'il soit ordonné par justice,

Wheat. 5.

à peine de restitution du quadruple et de punition corporelle.

21. Aussitôt que la prise aura été amenée en quelques rades ou ports de notre royaume, le capitaine qui l'aura faite, s'il y est en personne, sinon celui qu'il en aura chargé, sera tenu de faire son rapport aux officiers de l'amirauté, de leur représenter et mettre entre les mains les papiers et prisonniers, et de leur déclarer le jour et l'heure que le vaisseau aura été pris, en quel lieu ou à quelle hauteur; si le capitaine a fait refus d'amener les voiles ou de faire voir sa commission ou son congé, s'il a attaqué ou s'il s'est défendu, quel pavillon il portait, et les autres circonstances de la prise et de son voyage.

22. Après la déclaration reçue, les officiers de l'amirauté se transporteront incessamment sur le vaisseau pris, soit qu'il ait mouillé en rade, ou qu'il soit entré dans le port, dresseront procès-verbal de la quantité et qualité des marchandises, et de l'état auquel ils trouveront les chambres, armoires, écoutes, et fond de cale du vaisseau, qu'ils feront ensuite fermer et sceller du sceau de l'amirauté; et ils y établiront des gardes pour veiller à la conservation du scellé et pour empêcher le divertissement des effets.

**84\*** 23. Le procès-verbal des officiers de l'amirauté sera fait en présence du capitaine ou maître du vaisseau pris; et s'il est absent, en la présence de deux principaux officiers ou matelots de son équipage; ensemble du capitaine ou autre officier du vaisseau preneur, et même des réclamateurs s'il s'en présente.

24. Les officiers de l'amirauté entendront sur le fait de la prise, le maître ou commandant du vaisseau pris, et les principaux de son équipage, même quelques officiers et matelots du preneur, s'il est besoin.

25. Si le vaisseau est amené sans prisonniers, chartes-parties, ni connaissements, les officiers, soldats et équipage de celui qui l'aura pris, seront séparément examinés sur les circonstances de la prise, et pourquoi le navire a été amené sans prisonniers; et seront le vaisseau et les marchandises visitées par experts, pour connaître, s'il se peut, sur qui la prise aura été faite.

26. Si, par la déposition de l'équipage et la visite du vaisseau et des marchandises, on ne peut découvrir sur qui la prise aura été faite, le tout sera inventorié, apprécié, et mis sous bonne et sûre garde, pour être restitué à qui il appartiendra, s'il est réclamé dans l'an et jour, sinon partagé comme épave de mer, également entre nous, l'amiral et les armateurs.

27. S'il est nécessaire, avant le jugement de la prise, de tirer les marchandises du vaisseau, pour en empêcher le dépérissement, il en sera fait inventaire en présence de notre procureur et des parties intéressées, qui le signeront, si elles peuvent signer, pour ensuite être mises sous la garde d'une personne solvable, ou dans des magasins fermant à trois clés différentes, dont l'une sera délivrée aux armateurs, l'autre au receveur de l'amiral, et la troisième aux réclamateurs, si aucun se présente, sinon à notre procureur.

28. Les marchandises qui ne pourront être conservées, seront vendues sur la réquisition des parties intéressées, et adjugées au plus offrant, en présence de notre procureur, à l'issue

de l'audience, après trois remises d'enchères, de trois jours en trois jours, les proclamations préalablement faites, et affiches mises en la manière accoutumée.

30. Enjoignons aux officiers de l'amirauté de procéder incessamment à l'exécution des **\*85** arrêts et jugemens qui interviendront sur le fait des prises, et de faire faire incontinent et sans délai, la délivrance des vaisseaux, marchandises et effets dont la main levée sera ordonnée, à peine d'interdiction, de cinq cents livres d'amende, et de tous dépens, dommages et intérêts.

31. Sera prise, avant partage, la somme à laquelle se trouveront monter les frais du déchargement et de la garde du vaisseau et des marchandises, suivant l'état qui en sera arrêté par le lieutenant de l'amirauté, en présence de notre procureur et des intéressés.

*Règlement du 17 février 1694, concernant les passeports accordés aux vaisseaux ennemis par les puissances neutres.*

Art. 1. On n'aura aucun égard aux passeports des princes neutres, auxquels ceux qui les auront obtenus se trouveront avoir contrevenu, et ces vaisseaux seront considérés comme étant sans avertissement.

2. Un même passeport ne pourra servir que pour un seul voyage.

3. Les passeports seront considérés comme nuls, quand il y aura preuve que le navire pour lequel ils sont expédiés n'était alors dans aucun des ports du prince qui l'a accordé.

4. Tout vaisseau qui sera de fabrique ennemie, ou qui aura eu originairement un propriétaire ennemi, ne pourra être censé neutre, s'il n'en a été fait une vente pardevant les officiers publics qui doivent passer cette sorte d'actes, et si cette vente ne se trouve à bord, et n'est soutenue d'un pouvoir authentique, donné par le premier propriétaire lorsqu'il ne vend pas lui-même.

5. Les connaissements trouvés à bord, non signés, seront nuls et regardés comme des actes informés.

*\*Ordonnance du 12 mai 1696, touchant la manière de juger les vaisseaux qui échouent ou qui sont portés aux côtes de France par tempête ou autrement.*

Sa Majesté étant informée qu'il est survenu quelques contestations à l'occasion du jugement des vaisseaux échoués, soit à l'égard de ceux qui, étant de fabrique ennemie, ne sont pas trouvés munis d'aucun contrat, soit par rapport aux marchandises, sans connaissements, sous prétexte que le règlement du 17 février 1694 paraît n'avoir été fait que pour les vaisseaux pris, et que l'article de l'ordonnance de 1684, qui confisque les marchandises sans connaissement, est inséré dans le titre des prises; à quoi Sa Majesté désirant pourvoir, en sorte que les vaisseaux marqués, et les marchandises véritablement ennemies, mais souvent réclamées par des sujets des princes neutres, ne puissent être soustraits, en aucuns cas, à la juste confiscation établie par les lois de la guerre, et par les ordonnances anciennes et nouvelles; Sa Majesté a ordonné et ordonne que les vaisseaux qui échoueront sur les côtes, et qui seront portés par la tempête ou autrement, seront jugés suivant les articles de l'ordonnance de 1681, insérés dans le



titre des prises, et le règlement du 17 février 1694; ce faisant, que tout vaisseau échoué qui sera de fabrique ennemie, ou qui aura eu originellement un propriétaire ennemi, ne pourra être censé neutre, mais sera confisqué en entier au profit de Sa Majesté, s'il n'en a été fait une vente pardevant les officiers publics qui doivent passer ces sortes d'actes, et si cette vente ne se trouve à bord et n'est accompagnée d'un pouvoir authentique, donné par le premier propriétaire lorsqu'il ne vend pas lui-même. Ordonne pareillement Sa Majesté, que les marchandises chargées sur les vaisseaux échoués, dont il ne se trouvera à bord aucun connaissement, seront et demeureront entièrement confisquées à son profit; n'entend néanmoins Sa Majesté comprendre dans la présente ordonnance, les vaisseaux échoués, dont les papiers se seraient perdus à l'occasion de la tempête et par le malheur du naufrage, en cas que le capitaine ou le commandant en fasse d'abord sa déclaration, et que **87\*** l'état \*du vaisseau, et les circonstances de l'échouement, le faire présumer ainsi; auquel cas, Sa Majesté ordonne que les réclamateurs seront seulement tenus de rapporter une nouvelle expédition du contrat d'achat, et le double des connaissements.

*Extrait du Règlement du 21 octobre 1744, concernant les prises faites sur mer, et la navigation des vaisseaux neutres pendant la guerre.*

Art. 1. Fait Sa Majesté défense aux armateurs Français, d'arrêter en mer, et d'amener dans les ports de son royaume, les navires appartenant aux sujets des princes neutres, sortis d'un des ports de leur domination, et chargés pour le compte des sujets des dits princes neutres, de marchandises du crû ou fabrique de leur pays, pour les porter en droiture en quelque état que ce soit, même en ceux avec qui Sa Majesté est en guerre, pourvu néanmoins qu'il n'y ait sur les dits navires aucunes marchandises de contrebande.

2. Leur fait pareillement défenses d'arrêter les navires appartenant aux sujets des princes neutres, sortis de quelque autre état que ce soit, même de ceux avec lesquels Sa Majesté est en guerre, et chargés pour le compte des dits sujets des princes neutres, de marchandises qu'ils auront prises dans le pays ou état d'où ils seront partis, pour s'en retourner en droiture dans un des ports de la domination de leur souverain.

3. Comme aussi leur fait défenses d'arrêter les navires appartenant aux sujets des princes neutres, partis des ports d'un état neutre ou allié de Sa Majesté, pourvu qu'ils ne soient chargés de marchandises du crû ou fabrique de ses ennemis, auquel cas les marchandises seront de bonne prise et les navires relâchés.

4. Défend pareillement Sa Majesté, aux dits armateurs, d'arrêter les navires appartenant aux sujets des dits princes neutres, sortis des ports d'un état allié de Sa Majesté, ou neutre, pour aller dans un port d'un état ennemi de Sa Majesté, pourvu qu'il n'y ait sur les dits navires aucunes marchandises de contrebande, ni du crû ou fabrique de Sa Majesté, dans lequel **88\*** cas les dites marchandises seront de bonne prise, et les navires seront relâchés,

5. Si dans les cas expliqués par les articles 1, 2, 3, et 4 de ce règlement, il se trouvait sur les dits navires neutres, de quelque nation qu'ils

fussent, des marchandises ou effets appartenant aux ennemis de Sa Majesté, les marchandises ou effets seront de bonne prise, quand même elles ne seraient pas de fabrique du pays ennemi, et néanmoins les navires relâchés.

6. Tous connaissements trouvés à bord, non signés, seront nuls et regardés comme actes informés.

*Règlement du 26 juillet 1778, concernant la navigation des bâtiments neutres en temps de guerre.*

Art. 1. Fait défenses, Sa Majesté, à tous armateurs, d'arrêter et de conduire dans les ports du royaume les navires des puissances neutres, quand même ils sortiraient des ports ennemis, ou qu'ils y seraient destinés, à l'exception toutefois de ceux qui porteraient des secours à des places bloquées, investies ou assiégées. A l'égard des navires des états neutres, qui seraient chargés de marchandises de contrebande destinées à l'ennemi, ils pourront être arrêtés, et les dites marchandises seront saisies et confisquées; mais les bâtiments et le surplus de leur cargaison seront relâchés, à moins que les dites marchandises de contrebande ne composent les trois quarts de la valeur du chargement; auquel cas les navires et la cargaison seront confisquées en entier. Se réservant au surplus, Sa Majesté, de révoquer la liberté portée au présent article, si les puissances ennemies n'accordent pas le réciprocque dans le délai de six mois, à compter du jour de la publication du présent règlement.<sup>1</sup>

2. Les maîtres des bâtiments neutres seront tenus de justifier sur mer de leur propriété neutre par les passeports, connaissements, factures et autres pièces de bord, l'une desquelles au moins constatera la propriété neutre, ou en contiendra une \*énonciation précise; et [**89** quant aux chartes-parties et autres pièces qui ne seraient pas signées, veut Sa Majesté qu'elles soient regardées comme nulles et de nul effet.

3. Tous vaisseaux pris, de quelque nation qu'ils soient, neutres ou alliés, desquels il sera constaté qu'il y a en des papiers jetés à la mer, ou autrement supprimés ou distraits, seront déclarés de bonne prise avec leurs cargaisons, sur la seule preuve des papiers jetés à la mer, et sans qu'il soit besoin d'examiner quels étaient ces papiers, par qui ils ont été jetés, et s'il en est resté suffisamment à bord pour justifier que le navire et son chargement appartiennent à des amis ou alliés.

4. Un passeport ou congé ne pourra servir que pour un seul voyage, et sera réputé nul, s'il est prouvé que le bâtiment pour lequel il aurait été expédié n'était, au moment de l'expédition, dans aucun des ports du prince qui l'a accordé.

5. Ou n'aura aucun égard aux passeports des puissances neutres, lorsque ceux qui les auront obtenus se trouveront y avoir contrevenu, ou lorsque les passeports exprimeront un nom de bâtiment différent de l'énonciation qui en sera faite dans les autres pièces de bord, à moins que les preuves du changement de nom avec l'identité du bâtiment, ne fassent partie de ces mêmes pièces, et qu'elles aient été reçues par des offi-

1.—The same freedom of commerce not having been granted by Great Britain, this privilege was revoked by France, on the 14th of January, 1779, in respect to the United Provinces, except the city of Amsterdam. See 1 Code des Prises, 345.

ciers publics du lieu du départ, et enregistrées par devant le principal officier public du lieu.

6. On n'aura pareillement égard aux passe-ports accordés par les puissances neutres, ou alliées, tant aux propriétaires qu'aux maîtres des bâtimens, sujets des états ennemis de Sa Majesté, s'ils n'ont été naturalisés ou s'ils n'ont transféré leur domicile dans les états des dites puissances, trois mois avant le premier septembre de la présente année; et ne pourront les dits propriétaires et maîtres de bâtimens, sujets des états ennemis, qui auront obtenu les dites lettres de neutralité, jouir de leur effet, si depuis qu'elles ont été obtenues, ils sont retournés dans les états ennemis de Sa Majesté pour y continuer leur commerce.

7. Les bâtimens de fabrique ennemie, ou qui auraient eu un propriétaire ennemi, ne pourront **90\*** être réputés neutres ou alliés, s'il n'est trouvé à bord quelques pièces authentiques, passées devant des officiers publics, qui puissent en assurer la date, et qui justifient que la vente ou cession en a été faite à quelqu'un des sujets des puissances alliées ou neutres, avant le commencement des hostilités, et si le dit acte translatif de propriété de l'ennemi, au sujet neutre ou allié, n'a été dûment enregistré pardevant le principal officier du lieu du départ, et signé du propriétaire ou du porteur de ses pouvoirs.

8. A l'égard des bâtimens de fabrique ennemie qui auront été pris par les vaisseaux de Sa Majesté, ceux de ses alliés ou de ses sujets, pendant la guerre, et qui auront ensuite été vendus aux sujets des états alliés ou neutres, ils ne pourront être réputés de bonne prise s'il ne se trouve à bord des actes en bonne forme, passés pardevant les officiers publics à ce préposés, justificatifs tant de la prise que de la vente ou adjudication qui en aurait été faite ensuite aux sujets des dits états alliés ou neutres, soit en France, soit dans les ports des états alliés; faute desquelles pièces justificatives tant de la prise que de la vente, les dits bâtimens seront de bonne prise.

9. Seront de bonne prise tous bâtimens étrangers sur lesquels il y aura un subrécargue marchand, commis ou officier major d'un pays ennemi de Sa Majesté, ou dont l'équipage sera composé au-delà du tiers de matelots sujets des états ennemis de Sa Majesté, ou qui n'auront pas à bord le rôle d'équipage arrêté par les officiers publics des lieux neutres d'où les bâtimens seront partis.

10. N'entend Sa Majesté comprendre dans les dispositions du précédent article, les navires dont les capitaines ou les maîtres justifieront, par les actes trouvés à bord, qu'ils ont été obligés de prendre les officiers majors ou matelots, dans les ports où ils auront relâché, pour remplacer ceux du pays neutre qui seront morts dans le cours du voyage.

11. Veut Sa Majesté, que, dans aucun cas, les pièces qui pourraient être rapportées après la prise des bâtimens, puissent faire aucune foi, ni être d'aucune utilité, tant aux propriétaires des dits bâtimens qu'à ceux des marchands **91\*** dises qui pourraient y avoir été chargées; voulant Sa Majesté qu'en toutes occasions, l'on n'ait égard qu'aux seules pièces trouvées à bord.

12. Tous navires des puissances neutres, sortis des ports du royaume, qui n'auront à bord d'autres denrées et marchandises que celles qui y auront été chargées, et qui se trouveront mu-

nis de congés de l'amiral de France, ne pourront être arrêtés par les armateurs Français, ni ramenés par eux dans les ports du royaume sous quelque prétexte que ce puisse être.

13. En cas de contravention de la part des armateurs Français aux dispositions du présent règlement, il sera fait main levée des bâtimens et des marchandises qui composent leur chargement, autres toutefois que celles sujettes à confiscation, et les dits armateurs seront condamnés en tels dommages et intérêts qu'il appartiendra.

14. Ordonne Sa Majesté que les dispositions du présent règlement auront lieu pour les navires qui auraient échoué sur les côtes dépendant de ses possessions.

15. Veut au surplus Sa Majesté, que les dispositions du titre des prises de l'ordonnance de la marine, du mois d'Août 1681, soient exécutées selon leur forme et teneur, en tout ce à quoi il n'aura pas été dérogé par le présent règlement.

#### DANISH PRIZE INSTRUCTIONS OF 1810.

*We, Frederick the Sixth, by the grace of God, King of Denmark and Norway, the Wends and Goths, Duke of Sleswick, Holstein, Stormarn, Ditmarsk, and Oldenburg, make known:*

That whereas we find it corresponding with circumstances to renew the acts for privateering from our dominions, which for some time had been stopped, and to establish new regulations, according to which prize cases are to be acted and decided upon, we hereby do publish such rules, recalling our former will of 24th of September, 1807, concerning privateering and the lawful decision of prizes.

SEC. 1. No person or persons within our dominions are permitted \*to act as privateer [**\*92** without being furnished with a lawful commission for this purpose.

Such commissions are henceforth to be issued out from the Royal Board of Admiralty, and are to be furnished with the seal of the said court. Such commissions to be granted to none but such persons as either by birth or naturalization have acquired the privileges of Danish citizens, or to other ships or vessels but such as carry guns, or the crew of which at least are furnished with weapons.

2. Every ship or vessel that proceeds to sea on privateering, is to be commanded by a person who is skillful in navigation, and who, before he is entrusted with his commission, has signed his name upon oath to these regulations, and promised to obey them, as well as any other orders communicated to him, through our Royal Board of Admiralty.

3. The commissions for privateers are to be to the following purport:

“According to His Majesty's most gracious orders, it is hereby made known to all persons concerned, that —, owner of the ship or vessel —, burden — lasts according to the royal bill, dated the 28th of March, 1810, has obtained permission to fit out the said ship or vessel commanded by — in order to cruise against our enemies (being furnished with guns or other weapons), for the purpose of capturing, or if necessary, destroying all ships or vessels belonging to the crown of Great Britain or its



subjects, or of stopping and carrying in, in order to be lawfully examined, such ships as are suspected to belong to the said power, or to be connected with it, in a manner incompatible with the laws of neutrality. The owner has deposited the security ordered, and the commander has declared upon his sacred oath to obey the royal orders issued out for privateering, as well as such others as may be given from the Royal Board of Admiralty for this purpose.

The Royal Board of Admiralty, Copenhagen.  
Signed and sealed.

4. Petitions to obtain commissions for privateering are to be \*sent in to the magistrate of that place whence the ship or vessel destined for privateering is to be fitted out.

He who obtains such a commission ought, as security for such damage as might be occasioned by an illicit use made of the commission, to find bail to the magistrate for a certain sum from 1,000 to 15,000 rix dollars. The magistrate in fixing this sum is to take reference to the number of the crew of the ship, so that security, at all events, be given to the amount of 1,000 rix dollars, but as to the rest, that the sum of 100 rix dollars is computed for each man on board.

Further are the owners as well as the commander (the former with the vessel, the latter with his person and property), responsible for all such damage that may be done to the ship captured.

5. Those privateers to whom lawful commissions have been granted, are allowed to carry the royal Danish pendant and ensign, with our royal cipher in the middle of it, referring ourselves as to the rest, to the regulations ordered in the bill of the 11th of January, 1748.

6. The privateer is bound, as far as it lies in his power, to take and carry in for condemnation all such ships and vessels as belong to and are proved to be the property of the subjects of the crown of Great Britain.

He is also permitted to bring in for examination every other ship or vessel, the neutrality of which, according to the 10th section of these regulations, is not lawfully proved, or against which grounded suspicions may be formed upon any of the reasons mentioned in the 12th section.

Further, he is authorized to carry in all such ships as may have passed the Sound or the Belt, without paying the duty ordered, and which consequently have no certificate; the penalty (being the double of the duty ordered) to be forfeited to him.

7. No privateer is allowed (under punishment of losing his commission, or any other punishment according to circumstances) to stop any ship or make any use of his commission within the territories of a friendly or neutral power, which generally are supposed to reach one league from shore.

94\*] \*With regard to privateering at Oresound, it is to be observed, that the privateers must avoid approaching the Swedish batteries or shore so near that they might be reached by their guns.

8. As we acknowledge as an inevitable rule that free ships constitute free goods, we hereby most positively forbid every cruiser furnished with commission as privateer, to capture any

ship belonging to powers that are neutral or in friendly relation with us (whomsoever the cargo may belong to), provided the papers regarding the ship or the expedition are in proper order, and the ship has no contraband of war on board, bound to any country belonging to His Britannic Majesty, nor be under any of those predicaments mentioned in the sixth section as subject to condemnation.

9. As free ship constitutes free cargo, thus, on the other hand, hostile ship constitutes hostile cargo.

10. The ship's papers, which, according to the eighth section, ought to be in proper order, are the following:

The sea passport issued out by the government of that country whereof the ship's owner is a subject, or by a magistrate authorized by such government. Instead of this document, however, any other legal document, proving that the commander, by that government whose real subject he is, mediate or immediate, is authorized to use that neutral flag he sails under on his present voyage, shall be accepted of and credited.

The bill of sale or purchase of the ship, in case he that had the ship built disposed of her to another, then both documents (as well that of her building as that of the purchase) are requisite, provided both circumstances be not mentioned in one and the same document. In case the ship formerly had been captured as prize, as such condemned, then the act of condemnation serves in lieu as well of the document stating where the ship was built as of the bill of purchase; this is, however, upon a condition that a proper document of the auction held over the ship, or any other proper document proving the lawful disposal of her, is annexed to the act of condemnation.

To ships which, after having been formerly condemned in a foreign state, and to those bought by neutral citizens, proceeding thence \*only with ballast home, the act of condemnation, with the document of this auction, or any other document, of her being transferred to another person, ought to be a full substitute in lieu of the other papers ordered, the ship's journal excepted.

Bill of gauge, which must be issued out by the officer appointed to measure ships at the place where the ship is stated to belong to; it must agree with the passport, or, which is instead of it.

The list or roll of the crew properly certified by the respective officers; a full and clear account of all the persons found on board, and not stated in the roll, is also requisite. This list also must prove, that neither the captain, mate, supercargo, factor, commissioner, nor more than one-third part of the crew, are British subjects.

The receipt for having paid the duty or custom; this document is also to state where the cargo was shipped, and whither it was bound;

The charter-party or bill of lading, or if no charter-party was written, then only the bill of lading, which ought to state whither the ship was bound; and, finally,

The ship's journal of the whole voyage mentioned in the passport, with an exception of such ships which only sail from one port in the Baltic to another.

11. As good and lawful prizes are to be considered:

All such ships as evidently belong to the crown of Great Britain, or to subjects of His Britannic Majesty, in whatever part of the world they may reside.

Such ships as carry on a smuggling trade to or from Great Britain, or the countries which are under the dominions of the said power, by feigned and forged papers of clearance, as well outward as homeward bound, sail to the above-mentioned countries from such places wherein no clearance is allowed, or from these countries to a place where no admittance from thence is allowed.

Such ships as either entirely or partly are loaded with contrabands of war, and which are proved to be bound to harbors in Great Britain, or which have on board officers or privates that **96\*** are engaged, or are to be engaged, in the service of the enemy, as well as such ships that might approach a squadron which blockades a Danish city or harbor, or province, in order to trade with the enemy for provisions or refreshments.

Such ships, the crew of which with force oppose the examination of the privateer. In like manner those ships that, notwithstanding their flag is considered neutral, as well with regard to Great Britain as the powers in war with the same nation, still either in the Atlantic or Baltic, have made use of English convoy.

Such Danish, Norwegian, or, relative to Great Britain, hostile ship, which, after having been captured by the enemy, is recaptured, a third part of the value of the ship and cargo thus recaptured, is due to the captor, whether such ship be taken before or after the expiration of the space of twenty-four hours, the two-thirds to be returned to the owner. If such ships, on the contrary, are recaptured, which as well with regard to us as to the enemy, are neutral, the recaptor is to be paid an equivalent for his danger and trouble according to the decision of the court of justice.

12. As suspected and subject to a further examination may be brought in:

Such ships as are not furnished with the documents mentioned in the tenth section.

Such ships as have double papers or documents, which according to appearance are false.

Such ships, from which papers have been thrown overboard, or by other means destroyed, particularly if this has taken place after the privateer was within sight.

Those ships, the commanders of which have refused to comply with the privateer's request to open such recesses, wherein contraband of war, or documents relating to the expedition of the ship, are suspected to be concealed.

Ships under the above-named predicaments are to be treated according to the preceding sections, provided the suspicion against them be not removed by authentic proofs of their neutrality and lawful destination.

**97\*** **\*13.** As contraband of war (as mentioned in the 11th section), are to be considered: guns, mortars, and all kinds of weapons, pistols, bombs, grenades, balls, firelocks, flintstones, matches, gunpowder, saltpetre, sulphur, breast plates, swords, bandoliers, cartouches, saddles, and bridles; such articles as the Wheat. 5.

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above-mentioned, however, excepted, as are necessary to the defense of the ship and crew.

When the privateer meets a ship that sails under a friendly or neutral flag, he is to hail the commander in order to make him come on board with his ship's documents.

If these are in proper order, he is directly to suffer the ship to proceed on her voyage, without demanding anything of whatever nature.

If, on the contrary, he finds ground to suspect unfair dealing, he is allowed to go on board the vessel to examine her more thoroughly.

14. During this examination, he must not venture to break open any drawers, chests, trunks, barrels, casks, or anything else, wherein the cargo may be put up, nor in any wrongful manner investigate into such part of the cargo that may lay scattered about in the ship; but when he has a suspicion of contraband of war or suspicious papers being concealed anywhere, he is to order the commander to open such recesses which are supposed to contain them, and afterwards again to lock them.

That privateer who acts contrary to these orders, is to pay the damage, forfeit his commission, and besides be punished according to the circumstances.

15. If a privateer brings in a ship, he is forbid, under the same penalty as mentioned in the 14th section, to unload, sell, change, or in any other way to dispose of, or part with, any part of the cargo, but he ought, in concert with the captain, purser, or mate of the ship captured, as far as possible, to seal and lock up the whole of the cargo unopened (as far as the preservation of the cargo does not require the contrary), until his arrival at any of those places that are mentioned afterwards.

17. In case of necessity, he is permitted to take victuals and \*ammunition out of the [**\*98** ship captured, but he is to give the master of her a list of it, signed by himself.

If the ship carried in afterwards be condemned in his favor, what has been thus taken away is to be deducted from his share; but in case the ship be not condemned, he is to refund in money what has been taken out of the ship.

18. All papers, passports, letters and journals, the privateer, after having perused them, shall be obliged to put up and seal, to which the master of the ship adds his. They remain in the possession of the privateer unopened until they may be delivered up to the magistrate of the place where the ship is brought in.

19. The privateer is to proceed to sea from a harbor within our dominions; the prizes he may happen to make during the expedition, are to be carried to such a toll-place in Denmark, Norway, Sleswick, or Holstein, as he may find most convenient, or to the nearest place where he may be protected by military force, but to no foreign places, at the risk of losing his commission and the sum deposited as security, unless he is forced to do so by stress of weather, for want of provisions, or by being pursued by the enemy; and if this be the case, he shall be bound (without meanwhile breaking the bulk) to proceed with the first favorable wind to a custom-place within our dominions.

20. If the cargo, however, consists of goods, which, according to their nature, easily are spoiled, or the ship through average cannot proceed on her voyage, he is permitted to apply to the



magistrate of the place where he enters, in case it be within our dominions, and in foreign countries, to the nearest Danish consul, who are to take such measures as are the most proper for the preservation of the ship and cargo.

21. As soon as the privateer enters into any harbor within our dominions with a prize, he is directly to apply to the judge of the place, who immediately, and at farthest within 24 hours, is to undertake and finish the examination, as well of the privateer and her crew, as of the master of the ship captured, together with the crew and passengers; he is minutely to examine and cross-examine them about the ship's course according to the journal and other circumstances; he is to investigate into the authenticity <sup>99\*</sup> of the ship's documents mentioned in the 10th section, the passports of the passengers, their situation on board, voyage and errand, as well as the place where the ship was seized, the conduct of the privateer before, under and after the capture, and, in short, he is to examine into everything necessary to the illustration of the case.

22. During the proceeding, it is the duty of the judge in general to consider the interest of both parties in the most careful manner, and before the final decision, summon as well the privateer as in particular the master of the ship captured, to declare whether they wish for any farther illustrations, or have anything farther to observe, upon which he is to receive and to reflect upon the claims of both parties.

The utmost attention and zeal in this respect are hereby inculcated on all judges, the more so, as, in order to promote the quick expedition and discharge of justice, so necessary in legal proceedings (and in particular for the ship captured that may expect a release), we have suffered the parties to meet by proxies before the High Court of Admiralty.

23. The judge, attended by two citizens residing at the place, duly sworn, is to take down a true inventory, and it is to be observed, that this is to be taken of the cargo according to the contents of the ship's documents, and no unloading to take place unless the privateer insists upon it, or the judge has grounded suspicions of unfair dealing which might be discovered by the unshipping, or other circumstances might render it necessary for the preservation of the cargo.

24. This being observed, and the case by the respective judges discussed, so far that sentence at the prize court may be pronounced, the proceedings of the court ought to be taken by the secretary, and to be sent by a speedy messenger to the said court, together with the inventory and the rest of the documents. The judge then informs both parties that the case will be decided upon by the prize court as soon as possible, and that no further summons before that court will take place.

25. To judge of prize cases in the first instance, we have appointed:

**100\*** A prize court for the islands of Zealand, Lolland, Falster, Moen, and neighboring islands (the Island of Samsøe excepted). It is held at Copenhagen:

One for the northern parts of Jutland, and the dioceses of Fyon and Samsøe, this is held at Aarhus.

One for the dukedoms of Sleswick and Holstein, held at Flensburg.

One for each of our provinces of our kingdom of Norway, held in the capital of the respective province.

One for the islands of Bornholm and Christiansøe held at Ronne.

Each of these courts to be constituted of a justitiarius (president) and two assessors, among whom an officer of our navy.

A secretary is appointed at each of these courts.

26. If the prize court finds any further illustrations necessary in a case, the court ought to charge the judge who has held the examination, to procure such as may be wanted.

27. At the making up of the sentence, every circumstance ought most minutely to be considered; no other letters or proofs, however, ought to be taken into consideration, but such as were found on board the ship when she was captured, as it is only left to the High Court of Admiralty to decide how far any of the parties may be allowed to produce farther evidence or proofs.

The final issue of the sentence of the prize court, is to be published in the official journal of the province, by the secretary of the court; the sentence itself, upon the demand of the parties, is immediately to be copied and delivered to them for their further use.

28. If any of the parties wish to appeal from the sentence of the prize court, he ought to declare such intention, within twenty-four hours after the annunciation of the sentence, to his opponent, and afterwards within the space of eight weeks procure summons from the High Court of Admiralty, which is held in our royal residence, Copenhagen, and give proper warning to the judge and his opponent, agreeably to the bill of April 30th, 1806, containing the instructions for the High Court of Admiralty.

\*The summons of appeal in Zealand [**101**] are applied for in the High Court of Admiralty. Out of Zealand, the chief magistrates, and at Bornholm, and at Christiansøe, the governors are authorized to issue out such summons in behalf of the High Court of Admiralty.

When the case is decided by the said court, no further appeal is granted.

29. If a privateer bring in a ship for any other causes than those authorized in this our royal bill, he is not only to defray all the expenses of the case, but moreover to repay all the damage suffered by the ship on account of this seizure.

If, on the contrary, the capture is upon probable cause, the privateer is without any responsibility, though the ship, upon the ground of certain circumstances, is released; in this case, the expenses arising from the case and capture are to be defrayed out of the ship.

If any of the parties, without any sufficient ground, appeal from the sentence pronounced, he may expect (if his opponent insists upon it) to be sentenced to pay the loss he thereby may have suffered, beside the expenses of the lawsuit.

30. When any ship captured is condemned in favor of the captor, he is not allowed to dispose of the ship and cargo according to pleasure, but both parts are to be sold generally at the place where the ship is brought in. Out of

the amount of the sale, beside the usual salary, one per centum is to be paid to the hospital of invalid sailors at Copenhagen, which sum it is the duty of the judge to receive and transmit to the direction of the said institution, receiving their acquittance.

31. The privateers are exempt from paying the usual duty; no clearance of duty is consequently requisite at their setting out; at their return they need only to announce their arrival at the custom-house, in order that it may be ascertained they import no goods. Out of the goods, on the contrary, which are carried in and condemned, all duties of every denomination are to be paid, similar to other goods imported.

32. The expenses before the court in prize cases we have fixed in a particular bill for this **102\*** purpose; in the like manner \*we have ordered the sum to be paid for commissions of privateering.

33. Every captor of a ship, either hostile or suspected, is to provide for the victualing the crew, from the time of the capture till the sentence of the prize court is pronounced; the expenses to be defrayed out of the ship, when the case is closed.

In the like manner, and upon the same condition, the victualing of the crew of the ship captured, while the case is pending before the High Court of Admiralty, is to be furnished by the captor, provided the sentence of the prize court be appealed from by the captor. The captor, on the contrary, if he has gained the case before the prize court, and appeal is made by the captured, is not bound to feed the crew, unless the master of the ship gives full security for the expenses paid on this account.

34. The magistrate of the place is to receive and deliver up to the nearest fort, such of the crew of a ship captured and condemned, as are subjects of the British crown, where they are considered as prisoners of war; as far as they prove to be subjects of neutral or friendly powers, they are to be delivered up to their respective consuls.

35. We do hereby forbid our magistrates, or other officers to whom we have entrusted the execution of these our orders, or who are employed in the proceedings or decision of prize cases, to partake in any expedition of privateering. Nor must any auctioneer, who is commissioned to sell any ship or cargo condemned, buy them on his own account.

36. A copy of these regulations and instructions for privateers to be on board of every privateer.

These are our will and orders, according to which everyone is to conform.

Given at our royal residence of Copenhagen, 10th March, 1810.

Under our royal hand and seal. (L. S.)  
 KAAS, BULOW.  
 COLD, MONRAD.  
 KNUDSEN,

are, or shall be, employed in the present cruel and unjust war against the United Colonies, and shall fall into the hands of, or be taken by, the inhabitants thereof, be seized and forfeited to and for the purposes hereinafter mentioned.

2. Resolved, That all transport vessels in the same service, having on board any troops, arms, ammunition, clothing, provisions, or military or naval stores, of what kind soever, and all vessels to whomsoever belonging, that shall be employed in carrying provisions, or other necessaries, to the British army or armies, or navy, that now are, or shall hereafter be, within any of the United Colonies, or any goods, wares, or merchandise, for the use of such fleet or army, shall be liable to seizure, and, with their cargoes, shall be confiscated.

3. That no master or commander of any vessel shall be entitled to cruise for, or make prize of, any vessel or cargo, before he shall have obtained a commission from the Congress, or from such person or persons as shall be for that purpose appointed in some one of the United Colonies.

4. That it be, and is hereby recommended to the several legislatures in the United Colonies, as soon as possible, to erect courts of justice, or give jurisdiction to the courts now in being, for the purpose of determining concerning the captures to be made as aforesaid, and to provide, that all trials, in such case, be had by a jury, under such qualifications as to the respective legislatures shall seem expedient.

5. That all prosecutions shall be commenced in the court of that colony in which the captures shall be made; but if no such court be at that time erected in the said colony, or if the capture be made on open sea, then the prosecution shall be in the court of such colony as the captor shall find most convenient; \*provided, that nothing contained in [\***104** this resolution shall be construed so as to enable the captor to remove his prize from any colony competent to determine concerning the seizure, after he shall have carried the vessel so seized within any harbor of the same.

6. That in all cases an appeal shall be allowed to the Congress, or such person or persons as they shall appoint for the trial of appeals; provided the appeal be demanded within five days after definitive sentence, and such appeal be lodged with the Secretary of Congress within forty days afterwards; and provided the party appealing shall give security to prosecute the said appeal to effect; and in case of the death of the secretary during the recess of Congress, then the said appeal to be lodged in Congress within twenty days after the meeting thereof.

7. That when any vessel or vessels shall be fitted out at the expense of any private person or persons, then the captures made shall be to the use of the owner or owners of the said vessel or vessels; that where the vessels employed in the capture shall be fitted out at the expense of any of the United Colonies, then one-third of the prize taken shall be to the use of the captors, and the remaining two-thirds to the use of the said colony; and where the vessels so employed shall be fitted out at the continental charge, then one-third shall go to the captors, and the remaining two-thirds to the use of the United Colonies; provided, nevertheless, that if the capture be a vessel of war, then the cap-

# **103\*]** \*ORDINANCES OF CONGRESS.

*Nov. 25, 1775.*

1. Resolved, That all such ships of war, frigates, sloops, cutters, and armed vessels, as Wheat. 5.



tors shall be entitled to one-half of the value, and the remainder shall go to the colony or continent, as the case may be, the necessary charges of condemnation of all prizes being deducted before distribution made.

*Dec. 5, 1775.*

Resolved, That in cases of recaptures, the recaptors have, and retain, in lieu of salvage, one-eighth part of the true value of the vessel and cargo, or either of them, if the same hath, or have, been in possession of the enemy twenty-**105\*** four hours; one-fifth \*part, if more than twenty-four and less than forty-eight hours; one-third part, if more than forty-eight and less than ninety-six hours; and one-half, if more than ninety-six hours, unless the vessel shall, after the capture, have been legally condemned as a prize by some court of admiralty, in which case the recaptors to have the whole; in all which cases, the share detained, or prize, to be divided between the owners of the ship making the recapture, the colony or the continent, as the case may be, and the captors, agreeably to a former resolution.

*Jan. 6, 1776.*

The committee to whom it was referred to consider how the share of prizes allotted to the captors, ought to be divided between the officers and men, brought in their report, which, being taken into consideration, was agreed to as follows:

Resolved, That the commander-in-chief have one twentieth part of the said allotted prize money, taken by any ship or ships, armed vessel or vessels, under his orders and command.

That the captain of any single ship or armed vessel have two-twentieth parts for his share, but if more ships or armed vessels be in company when a prize is taken, then the two-twentieth parts to be divided amongst all the captains.

That the captains of marines, lieutenants of the ships or armed vessels, and masters thereof, share together, and have three-twentieth parts divided among them, equally, of all prizes taken when they are in company.

That the lieutenants of marines, surgeons, chaplains, pursers, boatswains, gunners, carpenters, the master's mates, and the secretary of the fleet, share together, and have two-twentieth parts and one-half of a twentieth part, divided among them equally, of all prizes, when they are in company.

That the following petty warrant, and petty officers, viz., (allowing for each ship, six midshipmen; for each brig, four midshipmen; for each sloop, two midshipmen, one captain's clerk, one surgeon's mate, one steward, one sailmaker, **106\*** one \*cooper, one armorer, two boatswain's mates, two gunner's mates, two carpenter's mates, one cook, one coekswain, two sergeants of marines, and one sergeant for each brig and sloop), have three twentieth parts divided among them, equally; and when a prize is taken by any ship or vessel, on board, or in company of which the commander-in-chief is, then the commander-in-chief's cook or coekswain to be added to this allotment, and have their shares with those last mentioned.

That the remaining eight-twentieth parts,

and one-half of the twentieth part, be divided among the rest of the ship or ships companies, as it may happen, share and share alike.

That no officer or man have any share, but such as are actually on board their several vessels when any prize or prizes are taken, excepting only such as may have been ordered on board any other prizes before taken, or sent away by his or their commanding officers.

*March 23, 1776.*

Resolved, That the inhabitants of these colonies be permitted to fit out armed vessels to cruise on the enemies of these United Colonies.

*April 2, 1776.*

The committee appointed to prepare the form of a commission and instructions to commanders of private ships of war, brought in the same, which were read.

The commission being agreed to, is as follows:

The delegates of the united colonies of New Hampshire, &c., to all whom these presents shall come, greeting: Know ye, that we have granted, and by these presents do grant, license and authority to ———, mariner, commander of the ———, called the ———, of the burthen of ——— tons, or thereabouts, belonging to ———, of ———, in the colony of ———, mounting ——— carriage guns, and navigated by ——— men, to fit out and set forth the said ———, in a warlike manner, and by and with the said ——— \*and crew [\***107** thereof, by force to attack, seize, and take the ships, and other vessels, belonging to the inhabitants of Great Britain, or any of them, with their tackle, apparel, furniture, and lading, on the high seas, or between high and low water-marks, and to bring the same to some convenient ports in the said colonies, in order that the courts, which are or shall be there appointed to hear and determine causes civil and maritime, may proceed in due form to condemn the said captures, if they be adjudged lawful prize: the said ——— having given bond, with sufficient sureties, that nothing be done by the said ———, or any of the officers, mariners, or company thereof, contrary to, or inconsistent with, the usages and custom of nations, and the instructions, a copy of which is herewith delivered to him. And we will, and require, all our officers whatsoever, to give succor and assistance to the said ——— in the premises. This commission shall continue in force until the Congress shall issue orders to the contrary.

By order of Congress.

Attest, ———, President.

*April 3, 1776.*

Resolved, That blank commissions, for private ships of war, and letters of marque and reprisal, signed by the President, be sent to the general assemblies, conventions, and councils or committees of safety, of the united colonies, to be by them filled and delivered up to the persons intending to fit out such private ships of war, for making captures of British vessels and cargoes, who shall apply for the same, and execute the bonds which shall be sent with the said commissions, which bonds shall be returned to the Congress.

Resolved, That every person intending to set forth and fit out a private ship or vessel of war,

Wheat. 5.

and applying for a commission, or letter of marque and reprisal for that purpose, shall produce a writing subscribed by him, containing the name and tonnage, or burthen of the ship or vessel, the number of her guns, with their weight of metal, the name and place of residence of the owner or owners, the name of the commander and other officers, the number of the crew, and the quantity of provisions and warlike stores; which writing shall be delivered to the Secretary of Congress, or to the clerk of the House of Representatives, convention, or council, or committee of safety, of the colony in which the ship or vessel shall be, to be transmitted to the said secretary, and shall be registered by him, and that the commander of the ship or vessel, before the commission or letters of marque and reprisal shall be granted, shall, together with sureties, seal and deliver a bond, in the penalty of five thousand dollars, if the vessel be of one hundred tons or under, or ten thousand dollars, if of greater burthen, payable to the President of the Congress, in trust, for the use of the united colonies, with conditions of the words following, to wit: "The condition of this obligation is such, that if the above bounden —, who is commander of the — called —, belonging to —, of —, in the colony of —, mounting — carriage guns, and navigated by — men, and who hath applied for a commission, and letters of marque and reprisal, to arm, equip, and set forth the said —, as a private ship of war, and to make captures of British vessels and cargoes, shall not exceed or transgress the powers and authorities which shall be contained in the said commission, but shall, in all things, observe and conduct himself, and govern his crew, by and according to the same, and certain instructions therewith to be delivered, and such other instructions as may hereafter be given to him; and shall make reparation for all damages sustained by any misconduct or unwarrantable proceedings of himself, or the officers or crew of the said —, then this obligation shall be void, or else remain in force;" which bond shall be lodged with the said Secretary of Congress.

*November 15, 1776.*

Congress took into consideration the report of the committee relative to the navy, whereupon.

**109\*** \*Resolved, That a bounty of \$20 be paid to the commanders, officers, and men, of such continental ships or vessels of war as shall make prize of any British ships or vessels of war, for every cannon mounted on board each prize at the time of such capture, and eight dollars per head for every man then on board, and belonging to such prize.

*Tuesday, May 2, 1780.*

The board of admiralty having reported the form of a commission for private vessels of war, and of the bond to be given by the master and commander of the said private armed vessels, and instructions to the said masters; the same were taken into consideration and agreed to, as follows:

*The form of a Commission.*

The Congress of the United States of America, do hereby certify, that the following is the form of a commission for private vessels of war, and of the bond to be given by the master and commander of the said private armed vessels, and instructions to the said masters; the same were taken into consideration and agreed to, as follows:

[L. s.] ica, to all to whom these presents shall come, send greeting:

Know YE, That we have granted, and by these presents do grant, license and authority to —, mariner, commander of the —, called the —, of the burthen of —, tons, or thereabouts, belonging to —, mounting — carriage guns, and navigated by — men, to fit out and set forth the said — in a warlike manner, and by and with the said —, and the officers and crew thereof, by force of arms, to attack, subdue, seize, and take all ships and other vessels, goods, wares, and merchandises, belonging to the crown of Great Britain, or any of the subjects thereof, except the ships or vessels, together with their cargoes, belonging to any inhabitant or inhabitants of Bermuda, and such other ships or vessels bringing persons with intent to settle within any of the said United States, which ships or vessels shall be suffered to pass unmolested, the masters thereof permitting a peaceable search, and giving satisfactory information of their lading and their destination; or any other ships or vessels, goods, wares, or merchandises, to whomsoever belonging, which are or shall be declared to be subjects of capture by any resolutions of [\*110 Congress or which are so deemed by the law of nations; and the said ships and vessels, goods, wares, and merchandises, so apprehended as aforesaid, and as prize taken, to bring into port, in order that proceedings may be had concerning such capture in due form of law, and as to right and justice appertaineth; and we request all kings, princes, states and potentates, being in friendship or alliance with the said United States, and others to whom it shall appertain, to give the said — all aid, assistance, and succor, in their ports, with his said vessel, company and prizes, we, in the name and on behalf of the good people of the said United States, engaging to do the like to all the subjects of such kings, princes, states and potentates, who shall come into any ports within the said United States. And we will and require all our officers whatsoever, to give to the said — all necessary aid, succor, and assistance in the premises. This commission shall continue in force during the pleasure of the Congress, and no longer.

In testimony whereof, we have caused the seal of the Admiralty of the United States to be affixed hereunto. Witness his Excellency —, Esquire, President of the Congress of the United States of America, at —, this — day of —, in the year of our Lord one thousand seven hundred and —, and in the — year of our Independence.

Passed the Admiralty Office.

Attest —, Secretary of the Board of Admiralty.

*The form of the Bond.*

Know all men by these presents, that we, —, are held and firmly bound to A. B., Esquire, Treasurer of the United States of America, in the penalty of twenty thousand Spanish milled dollars, or other money equivalent thereto, to be paid to the said A. B., treasurer as aforesaid, or to his successors in that office. To which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals,



and dated the — day of —, in the year of **111**]\* our Lord —, and in the — year of the Independence of the United States.

The condition of this obligation is such, that whereas the above bounden —, master and commander of the —, called the —, belonging to —, mounting — carriage guns, and navigated by — men, and who hath applied for and received a commission, bearing date with these presents, licensing and authorizing him to fit out and set forth the said — in a warlike manner; and by and with the said —, and the officers and crew thereof, by force of arms, to attack, subdue, seize, and take all ships and other vessels, goods, wares, and merchandise, belonging to the crown of Great Britain, or any of the subjects thereof (excepting the ships or vessels, together with their cargoes, belonging to any inhabitant or inhabitants of Bermuda, and such other ships or vessels bringing persons with intent to settle within the said United States); and any other ships or vessels, goods, wares and merchandise, to whomsoever belonging, which are or shall be declared to be subjects of capture by any resolutions of Congress, or which are so deemed by the law of nations. If therefore, the said — shall not exceed or transgress the powers and authorities given and granted to him in and by the said commission, or which are or shall be given and granted to him by any resolutions, acts, or instructions of Congress, but shall, in all things, govern and conduct himself as master and commander of the said —, and the officers and crew belonging to the same, by and according to the said commission, resolutions, acts, and instructions, and any treaties subsisting, or which may subsist between the United States of America and any prince, power, or potentate whatever, and shall not violate the law of nations or the rights of neutral powers, or of any of their subjects, and shall make reparation for all damages sustained by any misconduct or unwarrantable proceedings of himself or the officers or crew of the said —, then this obligation to be void, otherwise to remain in full force.

Signed, sealed, and delivered, }  
in the presence of us, }

**112**]\* *Instructions to the captains and commanders of private armed vessels, which shall have commissions or letters of marque and reprisal.*

1. You may, by force of arms, attack, subdue, and take all ships and other vessels belonging to the crown of Great Britain, or any of the subjects thereof, on the high seas, or between high water and low water-marks (except the ships or vessels, together with their cargoes, belonging to any inhabitant or inhabitants of Bermuda, and such other ships and vessels bringing persons with intent to settle and reside within the United States, which you shall suffer to pass unmolested, the commanders thereof permitting a peaceable search and giving satisfactory information of the contents of the lading, and destination of the voyages). And you may also annoy the enemy by all the means in your power, by land as well as by water, taking care not to infringe or violate the laws of nations or the laws of neutrality.

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2. You are to pay a sacred regard to the rights of neutral powers, and the usage and custom of civilized nations, and on no pretence whatever presume to take or seize any ships or vessels belonging to the subjects of princes or powers in alliance with these United States, except they are employed in carrying contraband goods or soldiers to our enemies; and in such case you are to conform to the stipulations contained in the treaties subsisting between such princes or powers and these states; and you are not to capture, seize, or plunder any ships or vessels of our enemies, being under the protection of neutral coasts, nations, or princes, under the pains and penalties expressed in a proclamation issued by Congress the 9th day of May, Anno Domini 1778.

3. You shall bring such ships and vessels as you shall take, with their guns, rigging, tackle, apparel, furniture and lading, to some convenient port or ports, that proceedings may thereupon be had in due form of law concerning such captures.

4. You shall send the master, or pilot, and one or more principal \*person or persons [**\*113** of the company of every ship or vessel by you taken in such ship or vessel, as soon after the capture as may be, to be by the judge or judges of such court as aforesaid examined upon oath, and make answers to such interrogatories as may be propounded touching the interest or property of the ship, or vessels, and her lading; and, at the same time, you shall deliver, or cause to be delivered, to the judge or judges, all, passes, sea-briefs, charter-parties, bills of lading, cockets, letters, and other documents and writings found on board, proving the said papers by the affidavit of yourself, or of some other person present at the capture, to be produced as they were received, without fraud, addition, subduction or embezzlement.

5. You shall keep and preserve every ship or vessel, and cargo, by you taken, until they shall, by sentence of a court properly authorized, be adjudged lawful prize, or acquitted, not selling, spoiling, wasting, or diminishing the same or breaking the bulk thereof, nor suffering any such thing to be done.

6. If you, or any of your officers or crew, shall, in cold blood, kill or maim, or by torture or otherwise, cruelly, inhumanly, and contrary to common usage, and the practice of civilized nations in war, treat any person or persons surprised in the ship or vessel you shall take, the offender shall be severely punished.

7. You shall, by all convenient opportunities, send to the board of admiralty, written accounts of the captures you shall make, with the number and names of the captives, and intelligence of what may occur, or be discovered concerning the designs of the enemy, and the destinations, motions, and operations of their fleets and armies.

8. One-third, at least, of your whole company, shall be landsmen.

9. You shall not ransom or discharge any prisoners or captives, but you are to take the utmost care to bring them into port; and if, from any necessity, you shall be obliged to dismiss any prisoners at sea, you shall, on your return from your cruise, make report thereof on oath to the judge of the admiralty of the state to which you belong, or in which you arrive,

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**114\***]within \*twenty days after your arrival, with your reasons for such dismissal. And you are to deliver, at your expense, or the expense of your owners, the prisoners you shall bring into port, to a commissary of prisoners nearest the place of their landing, or into the nearest county jail.

10. You shall observe all such further instructions as Congress shall hereafter give in the premises, when you shall have notice thereof.

11. If you shall do anything contrary to these instructions, or to others hereafter to be given, or willingly suffer such thing to be done, you shall not only forfeit your commission, and be liable to an action for breach of the condition of your bond, but be responsible to the party grieved for damages sustained by such malversation.

Resolved, That the board of admiralty be empowered, and directed to cause to be printed, so many copies of said forms as they shall judge necessary.

Resolved, That the President transmit to the governors or presidents of the respective states, so many copies of the said forms as the board of admiralty shall advise, and at the same time inform them, that it is the intention of Congress, that all commissions and instructions now in force, be cancelled as soon as possible, and commissions, bonds, and instructions of the new form be substituted in place thereof.

The motion of Mr. Madison was again taken into consideration, and thereupon the following ordinance was passed:

*An Ordinance relative to the capture and condemnation of Prizes.*

The United States in Congress assembled, taking into consideration the implacable war waged against them by the King of Great Britain, and judging it inconsistent with their dignity, as a free and independent nation, any longer to continue indulgencies and exemptions to any of the subjects of their enemy, who is obstinately bent upon their destruction or subjugation, have thought it proper to ordain and order, and it is hereby ordained and ordered, that henceforward general reprisals be granted **115\***] \*against the ships, goods, and subjects of the King of Great Britain; so that, as well the fleets and ships of these United States, as also all other ships and vessels commissioned by letters of marque or general reprisals, or otherwise, by the authority of the United States in Congress assembled, shall, and may lawfully seize all ships, vessels, and goods, belonging to the King or crown of Great Britain, or to his subjects, or others inhabiting within any of the territories or possessions of the aforesaid King of Great Britain, and bring them to judgment in any of the courts of admiralty that now are, or hereafter may be, established in any of these United States, by the authority of the United States in Congress assembled; and the said courts of admiralty are hereby authorized and required, to take cognizance of, and judicially to proceed upon, all, and all manner of captures, seizures, prizes, and reprisals of all ships and goods that are, or shall be taken, and to hear and determine the same, and, according Wheat. 5.

to the course of admiralty, and the laws of nations, to adjudge and condemn all such ships, vessels, and goods, as shall belong to the King of Great Britain, or to his subjects, or to any others inhabiting within any of the countries, territories, or dominions, or possessions, of the aforesaid King of Great Britain.

And that the board of admiralty, or secretary of marine, forthwith prepare, and lay before the United States in Congress assembled, a draught of instructions, for such ships or vessels as shall be commissioned for the purposes above mentioned.

And it is hereby further ordained, that the destruction of papers, or the possession of double papers, by any captured vessel shall be deemed and taken as just cause for the condemnation of such captured vessel; and that, when any prize, having been taken and possessed by the enemy twenty-four hours, shall be retaken from them, the whole of such recaptured prize shall be condemned for the use of the recaptors; but in cases where the prize shall have continued in the possession of the enemy less than twenty-four hours, it shall be restored to the original owner or owners, except one-third part of the \*true value thereof, which shall be allowed as salvage to the recaptors. **[\*116]**

And it is hereby further ordained, that the citizens and inhabitants of these United States be, and they hereby are, strictly enjoined and required to abstain from all intercourse, correspondence, or dealings whatsoever, with the subjects of the said King of Great Britain, while at open war with these United States, as they will answer the same at their peril; and the executives of the several states are hereby called upon to take the most vigilant and effectual measures for detecting and suppressing such intercourse, correspondence, or dealings, and bringing the authors thereof, or those concerned therein, to condign punishment.

And in order the more effectually to remove every colorable pretense for continuing such intercourse, it is hereby ordained, that from and after the first day of November next, no benefit shall be claimed from, nor countenance or regard paid to, any letters of passport or safe conduct, heretofore granted by the Congress of the United States, to any of the citizens or inhabitants thereof, or to any person or persons whatever, for the removal of their property or effects from places within the dominions or possessions of the said King of Great Britain.

Provided always, that this ordinance shall not extend to authorize the capture or condemnation of any vessel belonging to any inhabitant of Bermudas, which, being loaded with salt only, may arrive in any of these United States, on or before the first day of May next.

And it is hereby ordained, that all former acts or resolutions of Congress, contrary to the tenor, true intent, and meaning of this ordinance, be, and they are hereby repealed.

*Saturday, April 7th, 1781.*

On a report of a committee, consisting of Mr. Varnum, Mr. Bee, and Mr. Van Dyke, to



**117\***] whom was referred the draught of \*instructions to the captains of private armed vessels, reported by the board of admiralty:<sup>1</sup>

Be it ordained, and it is hereby ordained, by the United States in Congress assembled, that the following instructions be observed by the captains or commanders of private armed vessels, commissioned by letters of marque or general reprisals, or otherwise, by the authority of the United States in Congress assembled.

First. You may by force of arms, attack, subdue, and seize all ships, vessels, and goods, belonging to the King or crown of Great Britain, or to his subjects, or others inhabiting within any of the territories or possessions of the aforesaid King of Great Britain, on the high seas, or between high water and low water-marks. And you may also annoy the enemy by all means in your power, by land as well as by water, taking care not to infringe or violate the laws of nations, or laws of neutrality.

Second. You are to pay a sacred regard to the rights of neutral powers, and the usage and customs of civilized nations; and on no pretense whatever, presume to take or seize any ships or vessels belonging to the subjects of princes or powers in alliance with these United States; except they are employed in carrying contraband goods or soldiers to our enemies; and in such case you are to conform to the stipulations contained in the treaties subsisting between such princes or powers and these states; and you are not to capture, seize, or plunder any ships or vessels of our enemies, being under the protection of neutral coasts, nations, or princes, under the pains and penalties expressed in a proclamation issued by the Congress of the United States, the ninth day of May, in the year of our Lord one thousand seven hundred and seventy-eight.

Third. You shall permit all neutral vessels **118\***] freely to navigate \*on the high seas, or coasts of America, except such as are employed in carrying contraband goods or soldiers to the enemies of these United States.

Fourth. You shall not seize or capture any effects belonging to the subjects of the belligerent powers on board neutral vessels, excepting contraband goods; and you are carefully to observe, that the term contraband, is confined to those articles which are expressly declared to be such in the treaty of amity and commerce, of the sixth day of February, one thousand seven hundred and seventy-eight, between these United States and his most Christian Majesty, namely, arms, great guns, bombs, with their fuses, and other things belonging to them, cannon-balls, gunpowder, matches, pikes, swords, lances, spears, halberts, mortars, petards, grenadoes, saltpetre, muskets, musket-balls, bucklers, helmets, breastplates, coats of mail, and the like kind of arms proper for arming soldiers, musket-rests, belts, horses, with their furniture, and all other warlike instruments whatever.

Fifth. You shall bring all such ships and

vessels as you shall seize or capture, with their guns, rigging, tackle, apparel, and furniture, and ladings, to judgment, in any of the courts of admiralty that now are, or hereafter may be, established in any of these United States, in any court authorized by his most Christian Majesty, or any other power in alliance with these United States, to take cognizance of captures and seizures made by the private armed vessels of these states, and to judicially hear and determine thereon.

Sixth. You shall send the master or pilot, and one or more principal person of the company, of every ship or vessel by you taken, in such ship or vessel, as soon after the capture as may be, to be by the judge or judges of such court as aforesaid, examined upon oath, and make answer to such interrogatories as may be pronounced, touching the interest or property of the ship or vessel and her lading; and at the same time you shall deliver, or cause to be delivered, to the judge or judges, all passes, sea-briefs, charter-parties, bills of lading, cockets, letters, and other documents and writings found on board, proving \*the said papers by [**\*119** the affidavit of yourself, of some other person present at the capture, to be produced as they were received, without fraud, addition, subtraction, or embezzlement.

Seventh. You shall keep and preserve every ship or vessel, and cargo by you taken, until they shall, by sentence of a court properly authorized, be adjudged lawful prize, or acquitted; not selling, spoiling, wasting or diminishing the same, or breaking the bulk thereof, nor suffering any such thing to be done.

Eighth. If any of your officers or crew shall, in cold blood, kill or maim, or by torture, or otherwise, cruelly, inhumanly, and contrary to common usage, and the practice of civilized nations in war, treat any person or persons surprised in the ship or vessel you shall take, the offender shall be severely punished.

Ninth. You shall, by all convenient opportunities, send to the board of admiralty, or secretary of marine, written accounts of the captures you shall make, with the numbers and names of the captives, and intelligence of what may occur, or be discovered, concerning the designs of the enemy, and the destinations, motions, and operations of their fleets and armies.

Tenth. One-third at least of your whole company shall be landsmen.

Eleventh. You shall not ransom or discharge any prisoners or captives, but you are to take the utmost care to bring them into port; and if, from necessity, you shall be obliged to dismiss any prisoners at sea, you shall, on your return from your cruise, make report thereof, on oath, to the judge of the admiralty of the state to which you belong, or in which you arrive, within twenty days after your arrival, with your reasons for such dismissal; and you are to deliver at your expense, or at the expense of your owners, the prisoners you shall bring into port, to a commissary of prisoners nearest the place of their landing, or into the nearest county jail.

Twelfth. You shall observe all such further instructions as \*shall hereafter be given [**\*120** by the United States in Congress assembled, when you shall have notice thereof.

1.—This ordinance was passed by Congress in consequence of the temporary recognition, by the United States and France, of the principles of the armed neutrality, as laid down in the declaration of Her Majesty, the Empress of Russia, of February 26th, 1780. 2 Dall. 18. See, also, Darby, et al. v. The Brig Estern, 1b. 34.

Thirteenth. If you shall do anything contrary to these instructions, or to others hereafter to be given, or willingly suffer such thing to be done, you shall not only forfeit your commission, and be liable to an action for breach of the condition of your bond, but be responsible to the party grieved, for damages sustained by such malversation.

Ordered, that the Board of Admiralty report, as soon as may be, proper regulations for the conducting and governing the vessels of war

*An Ordinance, ascertaining what captures on water shall be lawful.*

of the United States, and other armed vessels.

In pursuance of the powers delegated by the confederation in cases of capture on water:

Be it ordained, by the United States in Congress assembled, that from and after the first day of February next, all resolutions and ordinances of Congress relating to captures or recaptures on water, and coming within the purview of this ordinance, except as is hereinafter excepted, shall be null and void; but questions of this nature arising before, or which shall be undetermined at that day, shall be determined at any time during the war with Great Britain, according to them, in the same manner as if this ordinance had never been made.

It shall be lawful to capture, and to obtain condemnation of the property hereinafter enumerated, if found below high water-mark; that is to say,

All ships and other vessels, of whatsoever size or denomination, belonging to an enemy of the United States, with their rigging, tackle, apparel, and furniture.

All goods, wares, and merchandises belonging to an enemy, and found on board of a ship or other vessel of such enemy.

All contraband goods, wares, and merchandises, to whatever nation belonging, although found in a neutral bottom, if destined for the use of an enemy; but the goods, wares and **121** merchandises \*belonging to an enemy, contraband goods, and goods destined to a blockaded, invested, or besieged port, being always excepted, found in a vessel belonging to a foreign nation, other than an enemy, shall, in no case, be subject to condemnation.

Provided, nevertheless, that from and after the first day of March, in the year one thousand seven hundred and eighty-two, all goods, wares, and merchandises, of the growth, produce, or manufacture of Great Britain, or of any territory depending thereon, if found within three leagues of the coasts, and destined to any port or place of the United States, in any ship or vessel belonging to the citizens of the said states, or the subjects of any neutral power, shall be liable to capture and condemnation, unless the same shall have been previously captured from the enemy and condemned, or in consequence of capture, may be proceeding to some port or place not in the power of the said enemy, for trial and condemnation.

All ships or other vessels, goods, wares, and merchandises, belonging to any power, or the subjects of any power against which letters of marque or reprisal shall have issued.

All ships or other vessels, with their rigging, tackle, apparel, and furniture, and with their cargoes, to whatsoever nation belonging, destined

to any port or place, invested, besieged, or blockaded, by a sufficient force belonging to, in the service of, or co-operating with the United States, so effectually as that one cannot attempt to enter into such port or place without evident danger.

All ships or other vessels, with their rigging, tackle, apparel, and furniture, and with their cargoes, found in the possession of pirates.

The goods, wares, and merchandises, to be adjudged contraband, are the following, that is to say: Cannons, mortars, fire-arms, pistols, bombs, grenades, bullets, balls, fuses, flints, matches, powder, saltpetre, sulphur, carcasses, pikes, swords, belts, pouches, cartouch-boxes, saddles and bridles, in any quantity beyond what may be necessary for the ship's provision, and may properly appertain to, and be adjudged necessary \*for, every man of the [\***122** ship's crew, or for each passenger. If it shall manifestly appear, that of any entire thing of which division cannot be made without injury to its value, a subject of the enemy, and a citizen or a subject of a foreign power, not being an enemy, are joint holders, the whole shall be condemned and sold for gold or silver, the proper proportion of the net proceeds of which shall be deposited in the treasury of the state in which the sale shall be, to be paid to the order of such citizen, or the subject of such foreign power.

If such division can be accomplished, but neither the citizen, nor the subject of a foreign power, nor his agent, shall require specific restitution of his property, there shall be a sale in the same manner as if the property were indivisible. But if, in such case, a requisition be made to this effect, the due proportion shall be specifically restored.

Where property shall have been originally captured on land from a state, or a citizen of the United States, and shall be recaptured below high water-mark by another citizen thereof, restitution shall be made to the former owner, upon the payment of a reasonable salvage, not exceeding one-fourth part of the value; no regard being had to the time of possession by the enemy.

In all cases of recapture by an armed vessel, fitted out at the expense of the United States, of a vessel, or other effects, belonging to a citizen, the court shall adjudge the proportion which would be due to the United States, to be remitted to such citizen, no regard being had to the time of possession by the enemy.

On the recapture by a citizen, of any negro, mulatto, Indian, or other person, from whom labor or service is lawfully claimed by a state, or a citizen of a state, specific restitution shall be adjudged to the claimant, whether the original capture shall have been made on land or water, and without regard to the time of possession by the enemy, a reasonable salvage being paid by the claimant to the recaptor, not exceeding one-fourth of the value of such labor or service, to be estimated \*according [\***123** to the laws of the state under which the claim shall be made.

But if the service of such negro, mulatto, Indian, or other person captured below high water-mark, shall not be legally claimed within a year and a day from the sentence of the court, he shall be set at liberty.



In all other cases of recapture, restitution shall be made to the owner, upon payment of one-third part of the true value for salvage, if the property shall have been retaken in less than twenty-four hours after the capture. But if it shall not have been retaken until the expiration of twenty-four hours after the capture, restitution shall not be made of any part.

Besides those who are duly authorized to make captures by special commission, captures of the property of an enemy shall be adjudged lawful when made:

1st. By a private vessel not having such commission, satisfactory proof being produced that they were made in pursuing the course of her voyage, and repelling a previous attack from an enemy.

2d. By any body or detachment of regular soldiers.

3d. By inhabitants of the country, if made within cannonshot of the shore.

4th. By an armed vessel sailing under a commission of his most Christian Majesty.

5th. By the crews of British vessels, while captures of this sort are licensed by the British.

Recaptures shall be made by no other persons than those authorized to make captures, except the crews of vessels retaken.

The destruction of papers, or the possession of double papers by any captured vessel, shall be considered as evidence for condemnation, unless good cause be shown to the contrary.

From and after the first day of February, which shall be in the year of our Lord one thousand seven hundred and eighty-two, any letters of passport or safe conduct, granted before the 27th of March last, under the authority **124\*** of Congress, to any \*person whatsoever, for removal of property from a place beyond sea within the dominions or possessions of the British king, shall be void.

Upon the capture of a vessel commissioned as a man of war or privateer, by any of the vessels of war of the United States of America, the whole of the property condemned shall be adjudged to the captors, to be divided in the following manner (saving to all persons who shall lose a limb in any engagement, or shall be otherwise disabled in the service of the United States, every benefit accruing to them under the resolutions of Congress of the 28th day of November, one thousand seven hundred and seventy-five), that is to say:

To the commander-in-chief of the navy of the United States, shall be allotted one twentieth part of all prizes taken by an armed vessel or vessels under his orders and command; when there shall be no such commander-in-chief, the one-twentieth part allotted to him shall be paid into the treasury of the United States.

To the captain of any single armed vessel, two-twentieth parts; but if more ships or vessels be in company when a prize is taken, then the two-twentieth parts shall be divided equally among all the captains.

To the captains of marines, lieutenants, and masters, three-twentieth parts of all prizes taken when they are in company, to be divided equally among them.

To the lieutenants of marines, surgeons, chaplains, pursers, boatswains, gunners, carpenters, master's mates, and the secretary of the fleet, two-twentieth parts, and one-half of one-

twentieth part, to be divided equally among them.

To the following petty warrant officers, viz.: midshipmen (allowing for each ship six, for each brig four, and for each sloop two), captain's clerks, surgeon's mates, stewards, sail-makers, cooper's, armorers (allowing for each vessel one of each only), boatswain's mates, gunner's mates, carpenter's mates (allowing for each vessel two of each), cooks, cockswains (allowing for each vessel one of each), serjeants of marines (allowing two for each ship, and one for each brig and \*sloop), three- [**\*125** twentieth parts, to be divided equally among them; and when a prize is taken by any vessel, on board, or in company of which the commander-in-chief is, then the commander-in-chief's cook, or cockswain, shall be added to the petty warrant officers, and share equally with them.

The remaining eight-twentieth parts, and half of the one-twentieth part, shall be divided among the rest of the vessels' company or companies, as it may happen, share and share alike.

No officer nor man shall have any share but such as are actually on board their several vessels when any prize or prizes shall be taken, excepting only such as may have been ordered on board any other prizes, before taken, or sent away by his or their commanding officers.

Upon the capture of any vessel, if made by a vessel of war belonging to the United States, one-half of the property condemned shall be decreed to the United States, and the other half to the captors, to be divided as aforesaid; if by a private vessel not having a commission, the whole shall be decreed to the captors; if by any body, or detachment of regular or other troops in the service of the United States, the whole shall be adjudged to the captors, to be divided in proportion to the pay in the line of the army; if by inhabitants of the country, being in arms, the whole shall be adjudged to the captors, to be divided equally among them; provided, that if any such inhabitant shall be wounded in making the capture, he shall be entitled to two shares, and if killed, his legal representatives shall be entitled to four shares; if by the crews of British vessels, the whole shall be adjudged to the captors, to be divided at the discretion of the court.

On recapture by an armed vessel belonging to the United States, of a vessel under the protection of a vessel belonging to the enemy, commissioned as a man-of-war or privateer, or where the vessel retaken is equipped in a warlike manner, the proportion to be withdrawn from the original owner shall be divided, as in the case of a capture of an enemy's vessel commissioned as a man-of-war or privateer.

\*On recapture, by an armed vessel [**\*126** belonging to the United States, of a vessel under the protection of a hostile vessel not commissioned as a man-of-war or privateer; and where the vessel retaken is not equipped in a warlike manner, the proportion to be withdrawn from the original owner shall be divided, as in the case of a hostile vessel not commissioned as a man-of-war or privateer.

The rules of decision in the several courts shall be the resolutions and ordinances of the

United States in Congress assembled, public treaties, when declared to be so by an act of Congress, and the law of nations, according to the general usages of Europe. Public treaties shall have the pre-eminence in all trials.

This ordinance shall commence in force on the first day of February, which will be in the year of our Lord one thousand seven hundred and eighty-two.

Done by the United States in Congress assembled, &c., &c.

*Tuesday, January 8th, 1782.*

The ordinance for amending the ordinance, ascertaining what captures on water shall be lawful, was read a third time and passed, as follows:

*An Ordinance for amending the Ordinance, ascertaining what captures on water shall be lawful.*

Whereas, there hath been great variance in the decisions of several maritime courts within the United States, concerning the pretensions of vessels claiming a share of prizes, as being in sight at the time of capture; some having adjudged that the mere circumstance of being in sight was a sufficient foundation of title, while others have required proof of a more active influence; and whereas, this inconvenience hath arisen from the want of an uniform rule of determination in such cases,

Be it therefore ordained, by the United States in Congress assembled, that no share of any **127** prize shall be adjudged to a \*vessel being in sight at the time of capture, unless the said vessel shall have been able at the time when the captured vessel struck, to throw a shot as far as the space between herself and the captured vessel; and that every vessel coming in aid of the captors, which shall have been able at the time when the captured vessel struck, to throw a shot as aforesaid, and shall have been duly authorized to make captures, shall be entitled to share according to the number of her men and the weight of her metal; provided, that nothing herein contained shall be construed to affect any agreement which shall have previously been made between vessels cruising in concert.

And be it further ordained by the authority aforesaid, that whensoever an armed vessel belonging to, and commissioned by the enemy, shall be captured by any armed vessel belonging to the United States, and duly authorized to make captures, the net proceeds of the sales of the captured vessel, and of her rigging, tackle, apparel, and furniture, shall be adjudged to the captors; and where a cargo shall be on board of such captured vessel, one moiety of the net proceeds of such cargo shall be adjudged to the United States, and the other moiety to the captors.

And be it further ordained by the authority aforesaid, that upon the capture of any vessel belonging to the enemy, and laden with masts or spars, by an armed vessel belonging to the United States, and duly authorized to make captures, the net proceeds of the sales of such captured vessel, and her cargo, shall be adjudged to the captors.

This ordinance shall take effect, and be in Wheat. 5.

force, from and after the last day of February next.

Done by the United States in Congress assembled, &c., &c.

*Tuesday, February 26th, 1782*

The following ordinance being read a third time, was agreed to:

*\*An Ordinance for further amending [\*128 the Ordinance, ascertaining what captures on water shall be lawful.*

Whereas, divers ships or vessels belonging to the citizens of several of these United States, may have sailed on voyages to Europe, before the publication of the ordinance, entitled, "An ordinance ascertaining what captures on water shall be lawful," where they, as well as vessels belonging to the subjects of neutral powers, may have laden and taken on board, in promiscuous cargoes, goods, wares, and merchandises, of the growth, product, or manufacture of Great Britain, or of some of the dominions or territories thereon depending, without any knowledge of the said ordinance, and may not be able to arrive in any of the ports of these states, on or before the first day of March next, whereby the said goods may become liable to capture and condemnation:

For remedy whereof, it is hereby ordained by the United States in Congress assembled, that no ship or other vessel, which shall have sailed from any port or place in Europe, not belonging to the King of Great Britain, on or before the tenth day of April next, for any port or place within the United States, not in possession of the enemy, shall be liable to capture or molestation, merely for having on board goods, wares, or other merchandises, of the growth, product, or manufacture of Great Britain, or of any territory depending thereon.

And it is hereby further ordained, that where vessels, their cargoes, or any part thereof, belonging to any citizen of these United States, sailing, or being within the body of a county, or within any river or arm of the sea, or within cannonshot of the shore of any of these states, and laden with the produce of the country, and destined for a port or place within these states, not in possession of the enemy, shall be captured by the enemy, and shall be recaptured below high water-mark by another citizen thereof, restitution shall be made to the former owner, upon the payment of a reasonable salvage, not exceeding one-fourth \*part of the [\*129 value, no regard being had to the time of possession of the enemy.

And be it further ordained, that so much of the aforesaid ordinance as comes within the purview of this, be, and hereby is repealed.

Done by the United States in Congress assembled, &c., &c.

*An Ordinance for the better distribution of prizes in certain cases.*

Be it ordained by the United States in Congress assembled, that so much of the ordinance, entitled, "An ordinance ascertaining what captures on water shall be lawful," as ordains that upon the capture of a vessel commissioned as a man-of-war, or a privateer, by any of the vessels of war of the United States of America, the whole of the property condemned shall be



adjudged to the captors, be, and the same is hereby repealed; and that, in all such cases of capture, the whole of the property condemned shall be adjudged to the use of the captors, if the vessel taken shall be of equal or superior force to the vessel making the capture; if otherwise, one-half only shall be adjudged to the captors, and the other half to the use of the United States, and shall, after condemnation, be so appropriated, unless the United States in Congress assembled, in reward of distinguished valor and exertion, shall otherwise specially direct.

And be it further ordained by the authority aforesaid, that the resolution of the 15th day of November, 1776, giving to the commanders, officers, and men of the ships or vessels of war, a bounty for every cannon, and for every man belonging to British ships or vessels of war captured by them, be, and the same is hereby repealed.

Done by the United States in Congress assembled, &c., &c.

#### BRITISH STATUTES AND PRIZE INSTRUCTIONS.

With regard to the issuing of letters of marque, the Lord High Admiral of Great Britain, or the commissioners appointed for **130\*** \*executing that office, or any three of such commissioners, or any persons by them empowered or appointed, shall, at the request of any duly-qualified owner or owners of any ship or vessel duly registered, according to the directions of the acts passed in the 26th and 34th years of Geo. III.<sup>1</sup> (provided such owner or owners give the bail or security hereafter specified), cause to be issued in the usual manner, one or more commissions, or letters of marque and reprisal, to any person or persons nominated by such owner to be commander, or (in case of death, successively) commanders, of such ship or vessel; for the attacking, surprising, seizing, and taking, by and with such vessel, or with the crew thereof, any place or fortress upon the land, or any ship or vessel, arms, ammunition, stores of war, goods or merchandise, belonging to, or possessed by, any of His Majesty's enemies, in any sea, creek, haven, or river.<sup>2</sup>

All persons applying for such commissions, or letters of marque, must make their application in writing, subscribed with their hands, to the high admiral, or other persons thus empowered, or to the lieutenant or judge of the High Court of Admiralty, or to his surrogate, and such application must be set forth "a particular, true, and exact description of the ship

or vessel for which such commission, or letter of marque and reprisal, is requested, specifying the name and burthen of such ship or vessel, what sort of built she is, and the number and nature of the guns, and what other warlike furniture and ammunition are on board the same, to what place the ship belongs, and the name or names of the principal owner or owners of such ship or vessel, and the number of men intended to be put on board the same<sup>3</sup> \*(all which particulars must be inserted [\***131** in every commission, or letters of marque), for what time they are victualled;" and "also the names of the commanders and officers."<sup>4</sup>

Farther, every commander of a private ship or vessel of war, for which such commission or letters of marque shall be granted, must produce the same to the collector, customer, or searcher, for the time being, of His Majesty's customs, residing at, or belonging to the port, whence such ship shall be first fitted out, or to their lawful deputies. And such collector, customer, &c., shall, without fee or reward, and as early as may be, inspect and examine the said vessel, in order to ascertain her built and burthen, the number of men, together with the number and nature of the guns on board. If, after examination, such vessel appear to be of such built and burthen, and to be manned and armed according to the tenor of the description inserted in the commission or letter of marque; or if she be of greater force or burthen than is therein specified; in such case, the collector, &c., or his or their deputies, shall, immediately, upon the request of the commander of such ship or vessel, give him, gratis, a certificate thereof in writing, under his or their hand or hands; and such certificate shall be deemed a necessary clearance before the vessel or letter of marque, thus commissioned, shall be permitted to sail from that port.<sup>5</sup> The same statute likewise declares, that in case any commander proceed out of port upon a cruise, without such certificate of clearance, or with a force inferior to that specified in the commission or letter of marque, the latter shall be absolutely null and void; the commander thus offending shall be subject to the penalty of £1,000 recoverable with full costs of suit by any person, and shall also be \*imprisoned for such space of time [\***132** as the court shall direct, not exceeding one year for any one offense.<sup>6</sup>

Previously, however, to obtaining letters of marque, bail must be given with surties, before the lieutenant and judge of the High Court of Admiralty, or his surrogate, in the sum of three thousand pounds sterling, if the ship carry more than one hundred and fifty men; and if she carry a less number, in the sum of fifteen

1.—26 Geo. III., ch. 60; 24 G. III., c. 68.

2.—13 G. II., c. 4, sect. 2; 34 G. III., c. 66, sect. 9; 43 G. III., c. 160, sect. 7.

3.—By the 13 Geo. II., c. 3, privateers (and also trading vessels) are allowed to man their ships with foreign seamen, provided they do not exceed three-fourths of the ship's company. This statute also confers all the privileges of British subjects upon such seamen after two years service during war; excepting that no one can be a member of the privy council, or of parliament, hold any office or place of trust, or have any grant of land, tenements, or hereditaments from the crown, either to himself, or any person or persons in trust for him. The duration of this act is unlimited; though several tempo-

rary statutes (28 Geo. II., c. 16; 19 Geo. III., c. 14; 33 Geo. III., c. 26) have subsequently allowed the same privileges during war. A late statute, however, requires three years' service.

4.—33 Geo. III., c. 66; s. 15; 43 Geo. III., c. 160, s. 13. Instructions for letters of marque, &c., against the goods of the French and Batavian Republics. Art. 6. Previously to taking out letters of marque, the owners of all the vessels, for which such letters shall be granted, must nominate and register in the court a proctor, exercent in the Court of Appeal, in case any appeal should be instituted from the decisions of the court below. 41 Geo. III., c. 96, s. 10.

5.—33 Geo. III., c. 66, s. 15; 43 Geo. III., c. 160, s. 13.

hundred pounds sterling.<sup>1</sup> Farther, such sureties must, prior to their being bound, severally make oath before the judge of the said Court of Admiralty of England, or judge of any other court of admiralty in any other of His Majesty's dominions, or his or their surrogates, that they are respectively worth more than the sum for which they are to be bound, over and above all their just debts. And in order to prevent frauds, the marshal of the Admiralty Court is enjoined to make diligent inquiry into the sufficiency of such bail and security; and to make his report accordingly to the judge or his surrogate, before any commission or letter of marque can be granted.<sup>2</sup>

No judge of any vice-admiralty court, established in the West Indian or American colonies, can, either directly or indirectly, have any share or interest whatever, in any privateer or letter of marque.<sup>3</sup> Nor can any judge, advocate, marshal, proctor, or any other officer of any admiralty or vice-admiralty court, either in England, or in the colonies, possess any such interest, on pain of forfeiting his employment, and also the sum of five hundred pounds to the use of His Majesty; being convicted of every such offense in any court of record in Great Britain, or at any general session of the peace in any of the American colonies. And all advocates or proctors, thus offending, are forever disqualified and incapacitated from practicing their profession.

Letters of marque are revocable, either by **133**\*) violating the \*revenue laws, or by the Lord High Admiral. In the former case, if the owner or owners, commander, master, or other persons having the command of the letter of marque, or privateer, be guilty of any offense contrary to any acts now in force, or which may hereafter be enacted, for the protection of the customs or excise, or for the prevention of smuggling, such persons shall forfeit their commission, independently of the other penalties or forfeitures incurred by reason of such offense.<sup>4</sup>

Where, however, the Lord High Admiral, or any three or more of the commissioners for executing that office, may deem it expedient to revoke any letters of marque, by any order or orders in writing, under his or their hand or hands, the secretary of the admiralty is required to transmit, as early as possible after such revocation, a notice in writing to the owner or owners of the vessel named or described in such order, or to his or their agent or agents, surety or sureties, or some or one of them. In case the ship be in the Channel, the order of revocation shall be effectual to supersede and annul the commission or letter of marque, at the expiration of twenty days after such notice has been given, or sooner if the notice be actually given in writing by the secretary of the admiralty to the captain or commander of such vessel. If she be in the North Seas, the commission becomes void at the end of thirty days. Six weeks are allowed before the order takes effect, in case the ship be to the south of

Cape Finisterre, or in the Mediterranean; three months, if she be in North America or the West Indies; and if in the East Indies, six months, after such notice is given. Complaint of such revocation may be made to His Majesty in council by any commander, owner, agent, or surety, within thirty days after notice of revocation has been given by the secretary of the admiralty. His Majesty's determination in council, respecting such complaint, is final; but in case the order of revocation be superseded, the commission or letter of marque shall be deemed to have continued in force; and all prizes taken by virtue thereof shall belong to the owners and \*captors, in the same **[\*134** manner as if no such order of revocation had been made. But no person is liable (before he shall have received personal notice of such order) to be punished for doing any lawful matter or thing, which he might have done under the authority of his commission or letter of marque, in case such order of revocation had not been made.<sup>5</sup>

If any person or persons counterfeit, erase, alter, or falsify any commission for war, or letter of marque, or any warrant for making out the same, or any certificate required by law to be obtained, or shall publish or make use of any such commission, warrant, or certificate, knowing the same to be counterfeited, erased, altered, or falsified, such person or persons incur a forfeiture of five hundred pounds, recoverable with full costs of suit, in any court of record in Great Britain.<sup>6</sup> And if any of these offenses be committed out of this realm, they may be alleged to be committed, and may be laid, inquired of, tried, and determined in any county in England, in the same manner, to all intents and purposes, as if such offenses had been done or committed within the body of such county.<sup>7</sup>

No commander of any ship or vessel, having letters of marque, is allowed, at his peril, to wear any jack, pennant, or other ensign or colors, usually borne by king's ships; but, beside the colors in general hoisted by merchant's ships, he must wear a red jack, with the union jack described in the caution, at the upper corner thereof, near the staff.<sup>8</sup>

The commanders of privateers, or merchant ships, having letters of marque and reprisals, are authorized to set upon by force of arms, subdue, and take, the men-of-war, ships, and vessels, goods, wares, and merchandises, belonging to the enemy, or to any subjects of, or persons inhabiting within his territories;<sup>9</sup> but in such a manner, that no hostilities be committed, nor prize attacked, seized, or taken, within the harbors \*of princes and **[\*135** states in amity with us, or in their rivers or roads within shot of their cannon, unless by permission of such princes or states, or of their commanders or governors-in-chief in such places.

If any ship or vessel be taken as prize, none of the officers, mariners, or other persons on

1.—"Instructions for letters of marque," &c. Art. 15.

2.—43 Geo. III., c. 160, s. 12.

3.—41 Geo. III., c. 96, s. 17.

4.—33 Geo. III., c. 66, s. 19; 43 Geo. III., c. 160, s. 16.

5.—33 Geo. III., c. 66, s. 20; 43 Geo. III., c. 160, s. 17.

Wheat, 5.

6.—Ibid. s. 48; 43 Geo. III., c. 160, s. 48.

7.—Ibid. s. 49; 43 Geo. III., c. 160, s. 49.

8.—"Instructions for letters of marque," &c., Art. 8.

9.—"Instructions," &c., Art. 1.



board her, shall be stripped of their clothes, or in any sort pillaged, beaten, or evil-intreated, on pain of the offender's being liable to such punishment as a court-martial shall think proper to inflict.<sup>1</sup>

No commanders of privateers, or letters of marque, are allowed to ransom or agree to ransom, quit or set at liberty, any ship or vessel, or their 'cargoes, which shall be seized and taken, on pain of forfeiting their commission, unless in cases of extreme necessity, to be allowed by the Court of Admiralty, and incurring such penalties of fine and imprisonment, as the court shall adjudge.<sup>2</sup> Nor are they permitted, on any pretense whatever, to ransom any prisoner; but they must transmit an account of, and deliver over, such prisoners as they may take on board of any prizes, to the commissioners appointed for exchanging prisoners of war, or to the persons appointed in seaport towns to take charge of prisoners; and such prisoners are subject only to the orders, regulations, and directions of the said commissioners.<sup>3</sup> Farther, it is unlawful for any of His Majesty's subjects to ransom, or to enter into any contract for ransoming any ship belonging to British subjects, or any goods on board the same, which shall be captured by the subjects of any state at war with His Majesty, or by any persons committing hostilities against his subjects.<sup>4</sup> And if any contracts be entered into, or any bills, notes, or other securities be given for that purpose, they are absolutely null and void; beside which, the party thus offending incurs a forfeiture of £500, which may be sued **136\***] for by any person.<sup>5</sup> \*If any ship or vessel, or any goods or merchandises, be taken or retaken and restored, by any privateer, through consent or clandestinely, or by collusion or connivance, without being brought to adjudication, such ship or vessel, together with the goods and merchandises, and also the ship's tackle, apparel, furniture, arms, and ammunition, shall, on proof thereof, to be made in any court of admiralty, be declared and adjudged a good prize to His Majesty. One moiety of the prize is to go to His Majesty's use, and the other moiety to the person who may sue for the same; beside which, the bond given by the captain of such privateer is forfeited to His Majesty. Further, if such collusive capture, or recapture and restoration, be made by any captain or commander of any king's ships, the vessel thus taken, or retaken and restored, is not only to be condemned as a prize to His Majesty, but also the offenders are disqualified and incapacitated from serving him for seven years, and incur a forfeiture of £1,000, recover-

able by any person who may sue for the same; and who is entitled to one-half of the penalty, while the other moiety goes to the use of His Majesty.<sup>6</sup>

All prizes must be conducted either into an English port, or into some other port of the British dominions, as may be most convenient, in order that they may be legally adjudged in the High Court of Admiralty in England, or before the judges of any other admiralty court in the British dominions.<sup>7</sup> All the effects found on board, of whatever description must be preserved, without any part of them being taken out, spoiled, wasted, embezzled, or diminished, and without breaking bulk (unless it shall be necessary for the better securing thereof, or for the necessary use and service of any of His Majesty's ships of war), until judgment has been given in the High Court of Admiralty, or in some other lawfully-authorized court of admiralty, that the ship, goods and merchandises are lawful prize.<sup>8</sup> Persons offending in these respects, not only forfeit \*the [**137** whole of their respective shares of the captures to the use of the Royal Hospital at Greenwich, but also incur a fine treble the value of the article or articles so embezzled, one-third part of which goes to the same noble institution, and the remainder to any person that may sue for the same;<sup>9</sup> and if the offender be on board one of His Majesty's ships of war, he is liable to suffer such further punishment as a court-martial or the Court of Admiralty shall impose.<sup>10</sup>

In order to prevent any of these abuses, the commissioners for taking examinations in prize causes are, by their regulations, required first to make an entry of the time of the captured vessel's arrival in port; after which they must give directions to the collector of the customs or naval officer at such port, or any other proper person, to see that the prize be duly and safely moored in sufficient depth of water, or on soft ground, so that the ship may receive no damage. The person attending to this business, receives the sum of one guinea from the captor, who must also pay all lights and port charges incurred on account of the prize.<sup>11</sup> Two of these commissioners, accompanied by the collector of the customs or naval officer of the port, then proceed on board the ship, to examine whether bulk has been broken, in which case they are enjoined to certify the same to the judge of the High Court of Admiralty; next, they seal the hatches and chests of merchandise, which are on no account to be opened or unloaded by any persons whomsoever, unless by special order under seal of the court, excepting only in cases of fire and tempest, and of absolute necessity.<sup>12</sup>

1.—22 Geo. II., c. 33, stat. 2, s. 9, otherwise called the ninth article of war.

2.—"Instructions," Art. 9.

3.—*Ibid.* Art. 10; 33 Geo. III., c. 66, s. 36; 43 Geo. III., c. 160, s. 35.

4.—22 Geo. III., c. 25, s. 1; 33 Geo. III., c. 66, s. 37; 43 Geo. III., c. 160, s. 36.

5.—21 and 22 Geo. III., c. 54 (for Ireland); 22 Geo. III., c. 25, ss. 2, 3; 33 Geo. III., c. 69, ss. 38, 39; 43 Geo. III., c. 160, ss. 37, 38.

6.—13 Geo. II., c. 4, s. 19; 43 Geo. III., c. 160, s. 42.

7.—Instructions, Art. 2.

8.—Instructions, Art. 3; 22 Geo. II., c. 33, stat. 2, s. 8, otherwise called the 8th article of war.

9.—13 Geo. II., c. 4, s. 9; 33 Geo. III., c. 66, s. 46; 43 Geo. III., c. 160, s. 45.

10.—22 Geo. II., c. 33, stat. 2, s. 8.

11.—"Regulations for the Observance of Prize Commissioners," in Sir James Marriott's "Formulare Instrumentorum," p. 380, &c., Art. 1 and 2.

12.—"Regulations," &c., Art. 3. By an order of the Court of Admiralty, dated January 6, 1782, only two commissioners are allowed to be employed for taking the examinations for one ship with one actuary, and so on by rotation. And with regard to interpreters, in cases of neutral vessels, if the master of the captured neutral ship object that the interpreter does not understand the language, in such case the proper persons are directed to be sent up to London, in order that they may be examined by the officer in Doctors' Commons, at the request of the master. Marriott's "Formulare," pp. 15, 16.

**138\*]** \*After the captor has conducted his prize into port, he or one of the chief officers, or some other person present at the capture, must bring or send as early as possible, three or four of the principal of the company (of whom the master and mate or supercargo, must always be two) of every such prize, before the judge of the High Court of Admiralty, or his surrogate, or before the judge of any other lawfully-authorized admiralty court within the British dominions, or such persons as shall be legally commissioned in that behalf, in order that they may be sworn and examined upon such interrogatories<sup>1</sup> as shall tend to the discovery of the truth, concerning the interest or property of such ship or ships, vessel or vessels, and of the goods, merchandises, or other effects found therein. Farther, the captor is obliged, at the time he produces the company to be examined,<sup>2</sup> and before any monition shall be issued, to bring and deliver into the hands of the said judge of the High Court of Admiralty of England, his surrogates, or the judge of such other admiralty court, lawfully authorized within the **139\*]** British dominions, \*or other persons for that purpose commissioned, all such papers, passes, sea briefs, charter-parties, bills of lading, cockets, letters, and other documents and writings, as shall be delivered up or found on board any ship. The captor, chief officer, or some other person who was present at the taking of the prize, and saw such papers and writings delivered up, or found on board at the time of capture, must also make oath that they are brought and delivered in, as they were received and taken, without any fraud, addition, subtraction,<sup>3</sup> or embezzlement, or otherwise to account for the same, upon oath, to the satisfaction of the court.<sup>4</sup>

On receipt of such books, papers, and writings, the commissioners must transmit the same without delay, and under seal (together with copies of the examinations), to the office of the registry of the court of admiralty, wherein such ship may be proceeded against in order to condemnation; but only such books, papers, and writings, shall be made use of and translated, as shall be agreed or insisted upon by the proctors of the several parties, captors or claimants, or (in case no claim be presented by the captor, or his proctor, agent, or register) as shall be

necessary for ascertaining the property of such ship or vessel, and her cargo.<sup>5</sup>

If any ship, vessel, or boat, or any goods therein, which may have been taken as prize, shall appear and be proved, in any court of admiralty, to have belonged to any of His Majesty's subjects, of Great Britain or Ireland, or of any other of His Majesty's dominions; and which ships, vessels, or boats were before taken or surprised by any of His Majesty's enemies, and afterwards again surprised and retaken by any ship of war, \*privateer, or other ship, [**\*140** vessel, or boat, under His Majesty's protection or obedience; in such case the recaptured ships or boats, and goods, and every part thereof, formerly belonging to His Majesty's subjects, shall by a decree of the said Court of Admiralty, be restored to the former owners or proprietors, who shall pay the following rates in lieu of salvage, viz.: If the recapture be effected by any of His Majesty's ships, one-eighth part of the ships, vessels, boats, and goods, respectively, to be restored, shall be paid to the flag-officers, captains, officers, seamen, marines, and soldiers on board such ships of war; and such salvage is to be divided among them in the manner and proportion for that purpose directed. But if such recapture be made by any privateer, or other ship, vessel, or boat, one-sixth part of the true value of the said ships, vessels, boats, and goods, shall, without any deduction, be paid to, and divided among, the owner or owners, officers and seamen, in such manner and proportion as they shall have mutually agreed upon.<sup>6</sup>

Where, however, a recapture has been made by the joint operation of one or more of His Majesty's ships, and one or more privateer or privateers, the judge of the Admiralty Court shall order the owner or owners of such recaptured vessel or goods to pay such a salvage as under the circumstances of the case shall to him appear reasonable, to the agent of the recaptors, and in such proportion as the court shall adjudge.<sup>7</sup> But if the ship or vessel, thus retaken, shall have been fitted out by the enemy for war, she shall not be restored to the former owners or proprietors; but whether recaptured by a ship belonging to His Majesty, or by a privateer, shall be adjudged a lawful prize for the benefit of the captors.<sup>8</sup>

1.—In the examination of witnesses, only two commissioners and one actuary are (as observed in the preceding note) allowed to attend; and the examination of every witness is required to be commenced, continued, and finished on the same day, and not at different times. "Regulations," &c., art. 8. p. 386. of Sir J. Marriott's "Formulare." For the same purpose the commissioners are permitted to use only the standing interrogatories, unless the court direct special interrogatories to be proposed, though they may explain any of them to a witness, where it is necessary. If, however, witnesses answer, that "they cannot say," it is the duty of the commissioners to admonish them, that, as they have sworn to speak the truth, the whole truth, and nothing but the truth, they must answer to the best of their knowledge; or, where they do not know absolutely, that they must in such case answer to the best of their belief, concerning any fact or matter. "Formulare," p. 385.

2.—If the prize-master neglect to produce witnesses before the commissioners, within forty-eight hours after the arrival of the prize, they must admonish him to bring them forward; and if he refuse or delay, or if the witnesses refuse to be ex-

amined, being also admonished of the consequence of their contumacy (viz., imprisonment of their persons for contempt, and confiscation of the ship and cargo), in such case the commissioners are at the expiration of forty-eight hours, to certify the same to the judge of the High Court of Admiralty. "Regulations," &c., art. 1.

3.—If, however, any commanders of His Majesty's ships of war, taking a prize, neglect to preserve, or to transmit the "very originals," entirely and without fraud to the Court of Admiralty, or some other court of commissioners, the offender forfeits his share of the capture, and is liable to such farther punishment as the nature of his offense may deserve, and a court-martial impose. 22 Geo. II., c. 33, stat. 2, s. 7, or the seventh article of war.

4.—"Instructions," Art. 3.

5.—33 Geo. III., c. 66, s. 26; 43 Geo. III., c. 160, s. 26; "Regulations," &c., art. 5, in "Formulare Instrumentorum," p. 384.

6.—13 Geo. II., c. 4, s. 18; 33 Geo. III., c. 66, s. 42; 43 Geo. III., c. 160, s. 41.

7.—33 Geo. III., c. 66, s. 42; 43 Geo. III., c. 160, s. 41.

8.—Ibid.



If a ship be retaken before she has been carried into an enemy's port, it shall be lawful for her, with the recaptors' consent, to prosecute her voyage; nor is it necessary that they should proceed to adjudication till six months, or till the return of the ship to the port whence she **141\*** sailed. Farther, by the \*recaptors' consent, the cargo may be unladen and disposed of before adjudication; and if such vessel does not return directly to the port whence she sailed, or if the recaptors have had no opportunity of proceeding regularly to adjudication within six months, on account of the absence of the vessel, the Court of Admiralty shall, at the instance of the recaptors, decree restitution to the former owners, paying salvage, upon such evidence as shall appear reasonable; the expense of such proceeding not to exceed the sum of fourteen pounds.<sup>1</sup>

The captors of small armed ships and vessels belonging to the enemy, may include in one adjudication any number of such ships having a commission or letter of marque from the enemy; provided they do not exceed six, and are under fifty tons burthen, having been taken within three months before the application to the admiralty for such adjudication.<sup>2</sup>

For the more speedy condemnation of prizes, the judge of the High Court of Admiralty of England, or of any other court of admiralty thereto authorized, or such person as shall by them be commissioned for that purpose, shall within five days after request made, finish the usual preparatory examination of the persons commonly examined in such cases, in order to inquire and prove whether the capture is a lawful prize or not. The proper monition usual in such cases, shall be issued by the proper officer, and be duly executed by the proper persons, within three days after request made for that purpose; and in case no claim of such captured ship, vessel, or goods, be entered and made in the usual form, twenty days' notice **142\*** being \*given after such monition, or if such claim be put in, and the claimant or claimants shall not, within five days after, give bond in the sum of sixty pounds sterling, to pay costs to the captor or captors, in case the ship, vessel, or goods, shall be adjudged lawful prize, the judge of such admiralty court shall

then, on production of the examinations, together with all papers and writings found on board the prize, or upon oath that no such papers or writings were found, proceed to discharge or acquit such capture, or to condemn the same, as shall appear expedient to him, on perusal of the said preparatory examinations, papers, and writings. If, however, such claim be duly entered, and proper security be given, and no other examination appear to be requisite, the judge shall in such case proceed, within ten days, if possible, to give sentence respecting such capture. But where, on entering such claim, and the attestation thereupon, or producing the said papers and writings regarding the captured ship, vessel, or goods, and upon the said preparatory examination, it shall appear doubtful to the judge, whether such capture be lawful prize or not, and he shall deem it necessary, for determining such doubt, to have an examination of witnesses on pleadings given in by the parties, and admitted by the judge, the judge shall, in such case, cause the capture to be forthwith appraised by skillful persons, nominated by the parties, and approved and appointed by the court, and who shall be sworn duly to appraise the same according to the best of their skill and knowledge. And for this purpose the judge shall cause the goods found on board to be unladen and (an inventory, if necessary, being previously taken by the marshal or deputy-marshal of the admiralty) order them to be deposited in proper warehouses, with separate locks, of the collector and comptroller of the customs, or (if there be no comptroller or collector) of the naval officer, and of the agents of both captors and claimants, at the charge of the party requesting the same. After such appraisement, and within fourteen days after claim made, the judge shall take good and sufficient security from the claimants to pay the captors the full value thereof, according to such appraisement, in \*case the **[\*143]** same shall be adjudged a lawful prize.<sup>3</sup> He is also enjoined to take sufficient security from the captors to pay such costs as the court shall think proper, in case the ship, vessel or goods, shall not be condemned as lawful prize; and after such securities have been duly given, he shall make an interlocutory order for re-

1.—33 Geo. III., c. 66, s. 44; 43 Geo. III., c. 160, s. 43.

2.—33 Geo. III., c. 66, s. 11; 43 Geo. III., c. 160, s. 9. Order of the Court of Admiralty, April 11, 1780, in Marriott's "Formulare," p. 4, 5. It is necessary here to remark, that the owners of all privateers are obliged to nominate and register a proctor in the court, whence they obtain their commission or letter of marque; that service on him is binding on the commander, owners, and sureties (41 Geo. III., c. 96, s. 10), and that such owners and sureties are liable to decrees immediately after sentence. *Ib.* s. 12. In case any privateer proceed to adjudication in any other court than that whence the letters of marque have issued, they must pursue the same conduct before the usual monition is granted, and in case of appeal, the service of the process of the Court of Appeal on him will in like manner be effectual.

3.—No claimants are allowed to take cargo on bail, previously to hearing, without the consent of all the parties. 3 Rob. Adm. Rep. 178. But where all the parties interested are liable to sustain loss or damage from the captured cargoes either being perishing, or of a perishable nature, the Court of Admiralty has ordered, that in all cases, by consent of captor and claimant, or upon attestation exhib-

ited on the part of the claimant only, without the captor's consent, the cargo, or the perishing or perishable part thereof, shall be delivered to him, on his specifying the quantity and quality of the cargo, and giving bail to answer the value thereof, if condemned, and also that he will abide the event of the suit. Such bail must be approved by the captor, or otherwise the persons giving the security must swear that they are truly and severally worth the sum for which they give security; but if the parties cannot agree respecting the value of the cargo, a decree of appraisement may issue from the court in order to ascertain the real value. Where, however, no claim is made, the captor may, on exhibiting an affidavit, specifying the quantity and quality of the perishable cargo, have a decree of appraisement and sale of such cargo, and bring the proceeds into court in view of any claim, eventually to abide any future orders. Order of the Court of Admiralty, April 11, 1780, in Sir J. Marriott's "Formulare," pp. 5, 6. Where a commission of appraisement and sale is granted by the judge of the Vice-Admiralty Court, before final sentence, the proceeds of such sale shall not remain in the hands of the captors or their agents, but shall be deposited in the registry of the court till final sentence be pronounced. 41 Geo. 3, c. 96, s. 7.

leasing or delivering the same to such claimant or claimants, or to his or their agents.<sup>1</sup>

In case, however, any claimant or claimants refuse to give the security required, the judge, on sufficient security being given by the captors, that they will pay the full value to the claimants according to the appraisal thereof, if the capture should not be condemned, shall proceed to make an interlocutory order for releasing and delivering the same to such captor or captors, or to their agents.<sup>2</sup> But as great **144\*** injury is often \*sustained by the sale of captured property in remote parts of the British dominions, the colonial vice-admiralty courts are empowered, where farther proof is ordered, and the claimants of the property decline to take it on bail, to direct such property to be sent to England (with the captors' and claimants' consent), there to be sold by consignees nominated by both parties, and the proceeds of sale to be forthwith deposited in the Bank of England, in the name of such consignees, subject to the final adjudication, expenses of freight, insurance, and other charges, attending the sale and transportation of the property. If, however, it shall appear to the court that the captors unreasonably withhold their consent, they shall (in case of restitution) pay the difference in value of the property, at the time of such restitution, and of the produce thereof, in case such property had been sent for sale to England; the said difference to be ascertained in such manner as shall appear satisfactory to the court for that purpose.

Thus far the regulations relate equally to ships of war and to privateers; but in all proceedings had upon captures made by any privateer in the vice-admiralty courts in the West Indies or America, the owners are to be deemed and considered as parties to every part of such proceedings; and such owners as well as the sureties, are jointly and severally liable to all orders and decrees made therein immediately after final sentence, without any farther personal service on the commander, or putting him in contempt by process of contumacy.

In case, however, any captors or claimants shall not rest satisfied with the sentence, or interlocutory decree having the force of a definitive sentence, pronounced in the High Court of Admiralty of England, or in any colonial vice-admiralty court, the parties aggrieved may appeal to the commissioners appointed for determining appeals in prize causes, in like manner as such appeals have usually been interposed;<sup>3</sup> provided the appellants give sufficient security that they will effectually prosecute **145\*** such appeal, answer the condemnation, and pay all costs, if the sentence of the respective courts be affirmed. But the execution of such sentence is not to be suspended by the appeal (excepting in the cases hereafter mentioned), if the parties appellate give sufficient se-

curity, to be approved of by the court where such sentence was given, that they will restore the property in litigation, or the value thereof, to the appellants, in case the sentence or the interlocutory decree appealed from, shall be reversed.<sup>4</sup> And in cases of appeal from a colonial vice-admiralty court, the property in litigation may, at the appellant's request, be sent by the court to England for sale, and the proceeds be deposited in the bank, in the manner already specified;<sup>5</sup> or if the property shall have been converted by sale, the proceeds thence arising shall be consigned to England and deposited in a similar manner. Should any question or difficulty arise respecting any property or proceeds thus sent to England, either before or after any such appeal, at any time after their arrival in England, or respecting the sale or proceeds thereof, the captors or claimants may, on giving notice to the adverse parties, apply by their proctors to the High Court of Admiralty (if before the prosecution of the appeal), or (afterwards) lords commissioners of appeal, for their directions concerning the sale or management of such property or proceeds.<sup>6</sup>

If any person, not being a party in the first instance, appeal from a definitive sentence, or interlocutory decree having the force of such sentence, such person, or his or her agent or agents, must at the same time enter his, her, or their claim or claims, as their appeal will otherwise be null and void.<sup>7</sup>

In all prize causes, whether tried in the English admiralty, or in a colonial vice-admiralty court, all persons interested, whether they be or be not parties in the first instance, may take out an inhibition, and prosecute an appeal within twelve calendar \*months, to be [**\*146** computed from the day of the date of the sentence, or decree appealed from. But if no inhibition be taken out before the twelve months elapse, no appeal will be allowed to be prosecuted, nor will any inhibition be granted, but the said sentence, or interlocutory decree, is to stand confirmed as to such person.<sup>8</sup>

In certain special prize causes, however, to be mentioned in His Majesty's order or orders in council, His Majesty may authorize the persons interested (whether parties or not in the first instance, and in whatever court the decree or sentence appealed from may have been pronounced) to take out inhibitions for prosecuting appeals after the expiration of twelve months; and the lords commissioners of appeals may, if distribution has not taken place, permit an appeal to be prosecuted after that period has elapsed, where, on special cause shown, they shall deem it reasonable to grant such permission;<sup>9</sup> but if it shall appear to the satisfaction of the lords commissions of appeals in prize causes, that distribution has been made of the proceeds of the prizes, at or after the time or times when the right of appealing would have

1.—13 Geo. II., c. 4, s. 3; 33 Geo. III., c. 66, s. 23; 43 Geo. III., c. 160, s. 20. Where a ship and cargo, or either of them, are condemned, with a general reservation of the question to whom, no copy of the interlocutory order is allowed to be delivered to either party, until a final condemnation take place. Order of the Court of Admiralty, dated August 1, 1793, in "Formulare," p. 23, 24.

2.—33 Geo. III., c. 66, s. 24; 43 Geo. III., c. 160, s. 21.

3.—The 33 Geo. III., c. 66, s. 28, specifies fourteen Wheat. 5. U. S., Book 5.

days after pronouncement of the decree, which is the time allowed by the present practice of the Admiralty Court.

4.—33 Geo. III., c. 66, s. 28; 43 Geo. III., c. 160, s. 27.

5.—*Supra*, p. 144.

6.—41 Geo. III., c. 96, s. 9.

7.—33 Geo. III., c. 66, s. 29; 43 Geo. III., c. 160, s. 28.

8.—38 Geo. III., c. 38, s. 2; 43 Geo. III., c. 160, s. 29.



been barred, if no such order had been made, and before notice of such order duly given to the captors, the said captors are not liable to make compensation to the claimants, provided they duly comply with the following regulation,<sup>1</sup> viz.: Where His Majesty shall authorize such appeals, the captors shall, within a reasonable time, at the requisition of the claimants, deliver a true copy of the account of sales, and of all proceedings had under the authority of the sentence or decree, pronounced in the court below, to His Majesty's Procurator-General, who is authorized and required to defend all such appeals, and in such manner as His Majesty's Advocate-General shall direct. But if the captors shall neglect to comply with these regulations, or to obey such further orders as the lords commissioners may deem necessary, they forfeit all claim to any benefit or discharge under the act above detailed, and are **147\*** liable to be proceeded against in the same manner as if the appeal had been duly entered within the period of twelve months, allowed for appeals from the decisions of the courts below.<sup>2</sup>

In cases of appeal, interposed in the manner already specified, the judge of the Court of Admiralty may, at the request and expense either of the captors or claimants (or of the claimant only, where the privilege is reserved in favor of the claimant by any treaty or treaties subsisting between His Majesty and foreign powers), order such capture to be appraised (unless the parties shall otherwise agree upon the value thereof), and direct an inventory to be made. Next, the judge is required to take security for the full value thereof, and he may order the capture to be delivered to the party giving such security, notwithstanding such appeal; but if any difficulty shall arise, or there be any sufficient objection to the giving or taking of security, the judge shall, at the request of either of the parties, order the captured goods and effects to be entered, landed, and sold by auction, under the care of the proper officers of the customs, and under the inspection of persons to be appointed by the claimants and captors. The money, arising by such sale, shall be brought into court, and by the register, or his deputy or deputies, be deposited in the Bank of England; or if the captors and claimants agree, such money may be vested in some public securities at interest, in the names of the register, and of such trustees as the captors and claimants shall appoint, and

the court shall approve. And if such security be given by the claimants, the judge shall give the captured vessel a pass under his seal, to prevent her from being again taken by His Majesty's subjects in her destined voyage.<sup>3</sup>

Where the sentence, or interlocutory decree, having the force of a definitive sentence, shall be finally reversed, after the sale of any ship or goods, the net proceeds of such sale (after payment of all expenses attending the same) shall be deemed to be the full value of such **\*148** ship and goods; nor shall the parties appellate, and their securities, be answerable for the value beyond the amount of such net proceeds, unless such sale appear to have been made fraudulently, or without due care.<sup>4</sup>

With regard to the practice of the Court of Appeals, as many inconveniences formerly arose from delays in serving the processes of that court, it is now provided, that in all cases of captures by His Majesty's ships, a service upon His Majesty's proctor shall be deemed an effectual service upon the commander of the ship making such capture. Farther, on taking out letters of marque, the owners of all the ships or vessels, for which such letters shall be granted, must nominate and register in the court granting such letter of marque, a proctor, exercent in the Court of Appeal in prize causes, with power of revocation and substitution; and service of process on such proctor shall be deemed effectual service upon the commander, owners, and sureties of privateers, in all cases where an appeal has been declared in the court below, within fourteen days after sentence. But neither His Majesty's proctor, nor any nominated proctor, is answerable for any damages arising to their parents respectively, from non-appearance in their behalf in the Court of Appeal, unless such proctor shall have accepted the said nomination by a writing under his hand; and, also, unless the said parties shall have sufficiently instructed him to appear and defend the appeal.<sup>5</sup> Where, however, no appeal has been entered in the manner, and within the time above specified, it shall be deemed sufficient service upon the parties, if the process be served either upon the commander of the king's ship, or upon his registered agent in this kingdom, or upon His Majesty's law-officer in the court below; or in cases of captures by privateers, if such process be served upon the commander of the privateer, or upon any or either of the sureties to the letters of marque.<sup>6</sup>

1.—38 Geo. III., c. 38, s. 3.

2.—38 Geo. III., c. 28, s. 4.

3.—33 Geo. III., c. 66, s. 31; 43 Geo. III., c. 160, s. 30.

4.—33 Geo. III., c. 66, s. 32; 43 Geo. III., c. 160, s. 31.

5.—41 Geo. III., c. 96, s. 10.

6.—Ibid. s. 11.

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\*[NOTE IV.]

The act of the 3d of March, 1819, commented on in the cases of the *United States v. Smith*, in the text, and in the other cases of piracy before the court at the present term, was continued in force, amended, and enlarged, by the following act, passed at the last session of Congress:

*An Act to continue in force "An Act to protect the commerce of the United States, and punish the crime of piracy," and also to make further provision for punishing the crime of piracy.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first, second, third, and fourth sections of an act entitled, "An Act to protect the commerce of the United States, and punish the crime of piracy," passed on the third day of March, one thousand eight hundred and nineteen, be, and the same are hereby continued in force, from the passing of this act, for the term of two years, and from thence to the end of the next session of Congress, and no longer.

SEC. 2. And be it further enacted, that the fifth section of the said act be, and the same is hereby continued in force, as to all crimes made punishable by the same, and heretofore committed, in all respects, as fully as if the duration of the said section had been without limitation.

SEC. 3. And be it further enacted, that if any person shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river, where the sea ebbs and flows, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof such person shall be adjudged to be a pirate; and being thereof convicted before the Circuit Court of the United States, for the district into which he shall be brought, or in which he shall be found, shall suffer death. And if any person engaged in any piratical **150\*** cruise or enterprise, or being \*of the crew or ship's company, of any piratical ship or vessel, shall land from such ship or vessel, and on shore shall commit robbery, such person shall be adjudged a pirate, and on conviction thereof before the Circuit Court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death: Provided, that nothing in this section contained shall be construed to deprive any particular state of its jurisdiction over such offenses, when committed within the body of a county, or authorize the courts of the United States to try any such offenders, after conviction or acquittance, for the same offense in a state court.

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SEC. 4. And be it further enacted, that if any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship or vessel owned in whole or in part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall land from any such ship or vessel, and, on any foreign shore, seize any negro or mulatto, not held to service or labor by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall decoy, or forcibly bring or carry, or shall receive, such a negro or mulatto on board any such ship or vessel, with intent, as aforesaid, such citizen, or person, shall be adjudged a pirate, and on conviction thereof before the Circuit Court of the United States, for the district wherein he may be brought or found, shall suffer death.

SEC. 5. And be it further enacted, that if any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship or vessel owned wholly or in part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall forcibly confine, or detain, or aid and abet in forcibly confining, or detaining, on board such ship or vessel, any negro or mulatto, not held to service by the laws of either of the states or territories of the United States, with intent to make such negro or \*mulatto a slave, or shall, on [**\*151** board any such ship or vessel, offer or attempt to sell, as a slave, any negro or mulatto, not held to service as aforesaid, or shall, on the high seas, or anywhere on tide water, transfer, or deliver over, to any other ship or vessel, any negro or mulatto, not held to service as aforesaid, with intent to make such negro or mulatto a slave, or shall land or deliver on shore, from on board any such ship or vessel, any such negro or mulatto, with intent to make sale of, or having previously sold, such negro or mulatto, as a slave, such citizen or person shall be adjudged a pirate, and on conviction thereof before the Circuit Court of the United States, for the district wherein he shall be brought or found, shall suffer death.

H. CLAY,

Speaker of the House of Representatives.

JOHN GAILLARD,

President of the Senate pro tempore.

Washington, May 15th, 1820. Approved:

JAMES MONROE.

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## [NOTE V.]

*Additional Documents on the Subject of the Neutrality of the United States in the present War between Spain and her Colonies. Vide, ante, Vol. IV. APPENDIX, NOTE II.*

## [TRANSLATION.]

GENERAL DON FRANCISCO DIONISIO VIVES TO  
THE SECRETARY OF STATE.

SIR:—In conformity with the orders of my government, which were communicated to Mr. 152\*] Forsyth on the 16th of December \*last, by his Excellency the Duke of San Fernando and Quiroga, and with the earnest desire of the king, my master, to see a speedy adjustment of the existing difficulties which obstruct the establishment, on a permanent basis, of the good understanding so obviously required by the interests of both powers, I have the honor to address you, and frankly to state to you, that my august sovereign, after a mature and deliberate examination, in full council, of the treaty of 22d February, of the last year, saw, with great regret, that, in its tenor, it was very far from embracing all the measures indispensably requisite to that degree of stability which, from his sense of justice, he was anxious to see established in the settlement of the existing differences between the two nations.

The system of hostility which appears to be pursued in so many parts of the Union against the Spanish dominions, as well as against the property of all their inhabitants, is so public and notorious, that, to enter into detail, would only serve to increase the causes of dissatisfaction; I may be allowed, however, to remark, that they have been justly denounced to the public of the United States, even by some of their own fellow-citizens.

Such a state of things, therefore, in which individuals may be considered as being at war, while their governments are at peace with each other, is diametrically opposed to the mutual and sincere friendship, and to the good understanding which it was the object of the treaty (though the attempt has failed) to establish, and of the immense sacrifices consented to by His Majesty to promote.

These alone were motives of sufficient weight imperiously to dictate the propriety of suspending the ratification of the treaty, even although the American envoy had not at first announced, in the name of his government, and subsequently required, of that of Spain, a declaration which tended directly to annul one of its most clear, precise, and conclusive articles, even after the signature and ratification of the treaty.

The king, my master, influenced by considerations so powerful as to carry with them the 153\*] fullest evidence, has, therefore, \*judged it necessary and indispensable, in the exercise of his duties as a sovereign, to request certain explanations of your government; and he has, in consequence, given me his commands to propose to it the following points; in the discussion and final arrangement of which, it

seems proper that the relative state of the two nations should be taken into full consideration.

That the United States, taking into due consideration the scandalous system of piracy established in, and carried on from, several of their ports, will adopt measures satisfactory and effectual, to repress the barbarous excesses, and unexampled depredations, daily committed upon Spain, her possessions, and properties; so as to satisfy what is due to international rights, and is equally claimed by the honor of the American people.

That, in order to put a total stop to any future armaments, and to prevent all aid whatsoever being afforded from any part of the Union, which may be intended to be directed against, and employed in the invasion of, His Catholic Majesty's possessions in North America, the United States will agree to offer a pledge (*a dar una següiradad*) that their integrity shall be respected.

And, finally, that they will form no relations with the pretended governments of the revolted provinces of Spain situate beyond sea, and will conform to the course of proceeding adopted, in this respect, by other powers in amity with Spain.

*Extract of a Letter from General Vives to the Secretary of State, dated April 24th, 1820.*

It is evident that the scandalous proceedings of a number of American citizens, the decisions of several of the courts of the Union, and the criminal expedition set on foot within it for the invasion of His Majesty's possessions in North America, at the very period when the ratification was still pending, were diametrically opposite to the most sacred principles of amity, and to the nature and essence of the treaty itself. These hostile proceedings were, notwithstanding, tolerated by the \*federal gov- [154] ernment, and thus the evil was daily aggravated; so that the belief generally prevailed throughout Europe, that the ratification of the treaty by Spain, and the acknowledgment of the independence of the rebellious transatlantic colonies by the United States, would be simultaneous acts.

*Extract of a Letter from the Secretary of State to General Vives, dated May 3d, 1820.*

I am now instructed to repeat the assurance which has already been given you, that the representations which appear to have been made to your government of a system of hostility, in various parts of the Union, against the Spanish dominions, and the property of Spanish subjects; of decisions marked with such hostility by any of the courts of the United States, and of the toleration in any case of it by this government, are unfounded. In the existing un-

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fortunate civil war between Spain and the South American provinces, the United States have constantly avowed, and faithfully maintained, an impartial neutrality. No violation of that neutrality by any citizen of the United States has ever received sanction or countenance from this government. Whenever the laws, previously enacted for the preservation of neutrality, have been found, by experience, in any manner defective, they have been strengthened by new provisions and severe penalties. Spanish property, illegally captured, has been constantly restored by the decisions of the tribunals of the United States, nor has the life itself been spared of individuals guilty of piracy, committed upon Spanish property on the high seas.

Should the treaty be ratified by Spain, and the ratification be accepted by and with the advice and consent of the senate, the boundary line recognized by it will be respected by the United States, and due care will be taken to prevent any transgression of it. No new law or engagement will be necessary for that purpose. The existing laws are adequate to the suppression of such disorders, and they will be, as they have been, faithfully carried into effect. The miserable disorderly movement of **155** \*] a number not exceeding seventy lawless individual stragglers, who never assembled within the jurisdiction of the United States, into a territory to which His Catholic Majesty has no acknowledged right, other than the yet unratified treaty, was so far from receiving countenance or support from the government of the United States, that every measure necessary for its suppression was promptly taken under their authority; and from the misrepresentations which have been made of this very insignificant transaction to the Spanish government, there is reason to believe that the pretended expedition itself, as well as the gross exaggerations which have been used to swell its importance, proceed from the same sources, equally unfriendly to the United States and to Spain.

As a necessary consequence of the neutrality between Spain and the South American provinces, the United States can contract no engagement not to form any relations with those provinces. This has explicitly and repeatedly been avowed and made known to your government, both at Madrid and at this place. The demand was resisted, both in conference and written correspondence, between Mr. Erving and Mr. Pizarro.

Mr. Onís had long and constantly been informed, that a persistence in it would put an end to the possible conclusion of any treaty whatever. Your sovereign will perceive, that as such an engagement cannot be contracted by the United States consistently with their obligations of neutrality, it cannot justly be required of them, nor have any of the European nations ever bound themselves to Spain by such an engagement.

*Extract of a Letter from General Vives to the Secretary of State, dated May 5th, 1820.*

[TRANSLATION.]

SIR:—In answer to your note of the 3d instant, and in pursuance of what I expressed to Wheat. 5.

you in both our late conferences, I have to state to you, that I am satisfied upon the first point of the proposals contained in my note of the 14th ultimo, and am \*persuaded, that [**\*156** if the existing laws enacted for the suppression of piracy, should prove inadequate, more effectual measures will be adopted by your government for the attainment of that important object.

I also admit as satisfactory, the answer given to the second point; but I cannot assent to your assertion that the laws of this country have always been competent to the prevention of the excesses complained of; it being quite notorious that the expedition alluded to has not been the only one set on foot for the invasion of His Majesty's dominions; and it is, therefore, not surprising, that the king, my lord, should give credit to the information received in relation to that expedition, or that he should now require of your government a pledge, that the integrity of the Spanish possessions in North America shall be respected.

I mentioned to you in conference, and I now repeat it, that the answer to the third point was not such as I could, agreeably to the nature of my instructions, accept, as being satisfactory; and that, although His Majesty might not have required of any of the European governments the declaration which he has required of yours, yet that ought not to be considered as unreasonable, it being well known to the king, my master, that those governments, so far from being disposed to wish to recognize the insurgent governments of the Spanish colonies, had declined the invitation, intimated to them some time past, by yours, to acknowledge the pretended republic of Buenos Ayres.

*Extract of a Letter from the Secretary of State to General Vives, dated May 8th, 1820.*

The assurances which you had given me in the first personal conference between us, of your own entire satisfaction with the explanations given you upon all the points on which you had been instructed to ask them, would naturally have led to the expectation, that the promise which you was authorized to give would at least not be withheld. From your letter of the 5th \*instant, however, it [**\*157** appears that no discretion has been left to you, to pledge even His Majesty's promise of ratification, in the event of your being yourself satisfied with the explanations upon all the points desired; that the only promise you can give is conditional, and the condition a point upon which your government, when they prescribed it, could not but know it was impossible that the United States should comply; a condition incompatible with their independence, their neutrality, their justice, and their honor.

It was also a condition which His Catholic Majesty had not the shadow of a right to prescribe. The treaty had been signed by Mr. Onís with a full knowledge that no such engagement as that contemplated by it would ever be acceded to by the American government, and after long and unwearied efforts to obtain it. The differences between the United States and Spain had no connection with the war between Spain and South America. The object of the treaty was to settle the boundaries, and adjust and provide for the claims be-



tween your nation and ours; and Spain at no time could have a right to require that any stipulation concerning the contest between her and her colonies should be connected with it. As His Catholic Majesty could not justly require it, during the negotiation of that treaty, still less could it afford a justification for withholding his promised ratification after it was concluded.

The proposal which, at a prior period, had been made by the government of the United States, to some of the principal powers of Europe, for a recognition, in concert, of the independence of Buenos Ayres, was founded, as I have observed to you, upon an opinion then and still entertained, that this recognition must, and would, at no very remote period, be made by Spain herself; that the joint acknowledgment by several of the principal powers of the world at the same time, might probably induce Spain the sooner to accede to that necessity, in which she must ultimately acquiesce, and would thereby hasten an event propitious to her own interests, by terminating a struggle in which

she is wasting her strength and resources, without a possibility of success; an event ardently to be desired by every \*friend [\*158 of humanity, afflicted by the continual horrors of a war, cruel and sanguinary almost beyond example; an event not only desirable to the unhappy people who are suffering the complicated distresses and calamities of this war, but to all the nations having relations of amity and commerce with them. This proposal, founded upon such motives, far from giving to Spain the right to claim of the United States an engagement not to recognize the South American governments, ought to have been considered by Spain as a proof at once of the moderation and discretion of the United States; as evidence of their disposition to discard all selfish or exclusive views in the adoption of a measure which they deemed wise and just in itself, but most likely to prove efficacious, by a common adoption of it, in a spirit entirely pacific, in concert with other nations, rather than by a precipitate resort to it, on the part of the United States alone.

# NOTES

ON THE

## UNITED STATES REPORTS.

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### V WHEATON.

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5 Wheat. 1-76, 5 L. 19, *HOUSTON v. MOORE*.

**Militia.**— Congress has power to designate the time at which State militia called out by the president change their character from State to national militia. In the absence of such designation the national service begins upon reaching place of rendezvous, pp. 16-20.

Cited to this point without specific application of the principle in *Antrim's Case*, 1 Fed. Cas. 1064, and *McCall's Case*, 15 Fed. Cas. 1226.

**Militia.**— So long as acting under the military jurisdiction of the State to which they belong, State and Federal governments have concurrent power over, p. 16.

**Militia.**— Congress may provide for organizing, arming and disciplining them, p. 16.

**Courts.**— Congress cannot confer jurisdiction upon any courts except those existing under Constitution and laws of United States, p. 27.

Cited to this point in dissenting opinion of Barbour, *Kendall v. United States*, 12 Pet. 645, 9 L. 1229, majority holding Circuit Court had authority to compel postmaster-general, by mandamus, to perform a ministerial duty; *Stearns v. United States*, 2 Paine, 308, F. C. 13,341, holding congress cannot compel State courts to entertain jurisdiction; *In re Sheazle*, 1 Wood. & M. 70, F. C. 12,734, holding State court may surrender persons believed guilty of piracy under act of parliament; *United States v. Mackenzie*, 30 Fed. Cas. 1165, 1166, holding jurisdiction of court-martial is exclusive and final as to matters submitted to such courts by congress; *Morgan v. Dudley*,



18 B. Mon. 714, 68 Am. Dec. 739, holding congress cannot authoritatively confer jurisdiction on State courts to naturalize persons; *Rushworth v. Judges of Hudson Pleas*, 58 N.J.L. 98, 99, 100, 32 Atl. 744, 30 L. R. A. 763, 764, and n., holding congress cannot, State objecting, force State courts to act on applications for naturalization; *First Nat. Bank v. Hubbard*, 49 Vt. 3, 24 Am. Rep. 99, holding State courts have jurisdiction of suits brought by national bank, it not having been taken away. Cited in *National Bank v. Eyre*, 52 Iowa, 115, 2 N. W. 996, but not necessary to decision.

Distinguished in *Robertson v. Baldwin*, 165 U. S. 278, 41 L. 716, 17 S. Ct. 327, holding congress may authorize State courts to commit offenders against Federal laws, to naturalize aliens, etc.

Courts-martial established by act of 1814 are not exclusive in jurisdiction, but concurrent with those of the States, and sentence by either court, either of conviction or acquittal, might be pleaded in bar to prosecution in the other, pp. 29-31.

Cited to this point in *Ex parte Houghton*, 7 Fed. 663, 664, 8 Fed. 902, holding writ of habeas corpus from Federal court is proper remedy, where one is restrained by State court for offense punishable only by Federal courts; *Campbell v. United States*, 4 Fed. Cas. 1204, holding power to punish counterfeiting is concurrent; *United States v. Given*, 25 Fed. Cas. 1331, holding congress has power to provide for punishment of a State official violating law as to qualifying colored citizens to vote; *United States v. Wells*, 28 Fed. Cas. 523, holding, in cases of concurrent jurisdiction, one first getting control will exercise jurisdiction until judgment; *Harlan v. The People*, 1 Doug. (Mich.) 213, holding State may provide for punishment of counterfeiting; *Manley v. People*, 7 N. Y. 303, as to whether State has jurisdiction of criminal offense committed on steamboat; *State v. Tutt*, 2 Bailey L. 46, 47, 21 Am. Dec. 510, 512, holding counterfeiting national bank notes indictable under State act; *Jett v. Commonwealth*, 18 Gratt. 939, holding State may punish one attempting to utter forged national bank note.

**Militia.**—A requisition by the president on a State governor for militia is in legal intendment an order, p. 40.

Cited to this point in *Martin v. Mott*, 12 Wheat. 33, 6 L. 541, holding disobedience to such order subjects citizen to court-martial.

**Constitutional law.**—Where power of congress is not made exclusive, States have a concurrent power which they may exercise in the absence of legislation by congress, dissenting opinion, p. 49.

This doctrine has been affirmed and followed in a very large number of citing cases, as follows: *New York v. Miln*, 11 Pet. 150, 9 L. 667, holding State law forcing captain to report number of passengers from foreign port, constitutional; *Holmes v. Jennison*, 14 Pet. 578, 592, 593, 10 L. 598, 605, court dividing as to whether the governor could surrender a fugitive, the Federal government not having

provided for it; *Prigg v. Pennsylvania*, 16 Pet. 618, 10 L. 1090, holding congress having provided for delivery of fugitive slave, State law relating thereto is void; dissenting opinion, same case, 654, 10 L. 1103; dissenting opinion, *Cook v. Moffat*, 5 How. 313, 12 L. 168, majority holding contract made in New York unaffected by debtor's discharge under insolvent laws of his State, though passed previous to contract; *License Cases*, 5 How. 584, 607, 625, 12 L. 292, 303; 311, holding valid a State law forbidding sale of liquor without license; *Passenger Cases*, 7 How. 394, 12 L. 748, holding void a statute of New York taxing aliens arriving there; dissenting opinions, in same case, 498, 12 L. 792; 555, 556, 12 L. 816; *Cooley v. Board of Wardens of Philadelphia*, 12 How. 319, 13 L. 1005, holding State may regulate pilot fees; *Gilman v. Philadelphia*, 3 Wall. 730, 18 L. 101, refusing to enjoin State from building bridge across navigable river, wholly within the State; *Claffin v. Houseman*, 93 U. S. 141, 23 L. 840, holding under bankrupt act, assignee may sue in State courts to recover assets; *McPherson v. Blacker*, 146 U. S. 41, 36 L. 879, 13 S. Ct. 13, holding where State law fixed date for meeting of electors different from that set by congress, the date may be rejected and law stand; *United States v. Rhodes*, 1 Abb. (U. S.) 45, F. C. 16,151, holding "civil rights" bill constitutional; *The Wave*, Blatchf. & H. 251, F. C. 17,297, admiralty has jurisdiction of salvage claims on tide waters within a State; *Day v. Buffinton*, 3 Cliff. 386, F. C. 3,675, United States has no power to levy income tax on judge's salary; *Sherman v. Bingham*, 3 Cliff. 560, F. C. 12,762, holding assignee of one declared bankrupt may maintain action to recover money wrongfully paid defendants in another district, in that District Court; *The Barque Chusan*, 2 Story, 466, F. C. 2,717, statute of State, giving lien to materialmen, is void, so far as applicable to foreign vessels; *United States v. The New Bedford Bridge*, 1 Wood. & M. 426, 430, 432, 439, F. C. 15,867, denying Federal cognizance of the offense of obstructing navigation of river; *Ex parte Geisler*, 4 Woods, 383, 50 Fed. 412, congress having given State courts right to punish passing of counterfeit coin; *Ex parte Houghton*, 7 Fed. 658, 8 Fed. 898, holding State court has no jurisdiction over offense of passing counterfeit national bank bills; *In re Brinkman*, 7 N. B. R. 425, 4 Fed. Cas. 146, holding in certain cases, providing there is no objection, mortgages upon bankrupt's estate may be foreclosed in State courts; *Perry v. Langley*, 19 Fed. Cas. 284, 1 N. B. R. 559 (157), holding bankrupt act supersedes insolvent laws of State; *In re Reynolds*, 20 Fed. Cas. 596, holding State court can issue writ of habeas corpus to inquire into detention of a deserter, by military authorities; *Yeadon v. Bank*, 30 Fed. Cas. 796, holding State has concurrent jurisdiction in bankruptcy suits, act not making it exclusive.

In the State courts, citing cases have also variously affirmed and followed the syllabus doctrine: *Mabry v. Herndon*, 8 Ala. 861, holding State court may inquire into validity of a discharge in bank-



ruptcy; *Dorman v. State*, 34 Ala. 249, 250, declaring prohibitory liquor law constitutional; *Ex parte Hill*, 38 Ala. 450, holding congress having given to surgeons right to pass on unsoundness of soldier, State court cannot inquire into the question; dissenting opinion, *Ex parte Hill*, *In re Armistead*, 38 Ala. 479, majority holding State court cannot revise action of commandant in vacating a discharge; dissenting opinion, *The State, ex rel. Dawson*; *In re Strawbridge*, 39 Ala. 400, majority holding State has right to military service, of those exempted as bonded agriculturists from service of Confederate States; *Rison v. Farr*, 24 Ark. 168, 87 Am. Dec. 56, holding act prescribing oath to purge one of crime as a prerequisite for voting repugnant to Federal Constitution; *Rison v. Powell*, 28 Ark. 435, holding State court has concurrent jurisdiction to set aside fraudulent conveyance, prior to bankruptcy; *People v. Naglee*, 1 Cal. 235, 241, 52 Am. Dec. 315, 320, holding State law prohibiting foreign miners in gold mines, except on paying a license, constitutional; *Webb v. Dunn*, 18 Fla. 724, holding unconstitutional State law providing for imposition of fees on vessel entering port and making fast to wharf; *Rodney v. Ill. C.R. Co.*, 19 Ill. 45, holding State courts having jurisdiction will enforce Federal law as to fugitive slave, coming incidentally in question; *Dunne v. People*, 94 Ill. 127, 129, 130, 133, 34 Am. Rep. 217, 219, 223, holding State has right to provide for organization of militia; *Cobb v. Stallings*, 34 Ga. 77, holding assessors and collectors of Confederate tax not liable to call for militia service by governor; *Freeman v. Robinson*, 7 Ind. 323, holding State laws in conflict with Federal, must yield; *The Steamboat Tweed v. Richards*, 9 Ind. 528, holding statute of State for enforcement of liens on boats, does not extend to liens arising under contracts made and broken in other States; *State v. Garton*, 32 Ind. 7, 2 Am. Rep. 319, holding congress cannot tax bonds given to State by its officers; *Helm v. National Bank*, 43 Ind. 169, 13 Am. Rep. 397, statute providing that in promissory note "given for patent," these words must appear, is unconstitutional; *Denney v. State*, 144 Ind. 509, 42 N. E. 931, 31 L. R. A. 729, apportionment law unconstitutional; dissenting opinion, *Council Bluffs v. Railroad Co.*, 45 Iowa, 358, majority holding State cannot impose any burden upon transportation between points in different States; dissenting opinion, *Price v. Poynter*, 1 Bush (Ky.), 396, majority holding capture of horses for public use of Confederate army excusable; *Ferguson v. Landram*, 1 Bush (Ky.), 580, holding citizens of a State cannot be taxed by local and Federal legislation for same national purpose; *State v. Intoxicating Liquors*, 78 Me. 404, 6 Atl. 5, holding liquors intended to be sold at soldiers' home, not liable to seizure; *Commonwealth v. Tracy*, 5 Met. 547, holding State law for apprehension of fugitives from other States valid; *Commonwealth v. Fuller*, 8 Met. 318, 319, 41 Am. Dec. 513, 514, holding State courts may punish one having counterfeit money; *Harlan v. People*, 1 Doug. (Mich.) 210, holding State can provide for punishment of

counterfeiters; *Robinson v. More*, 3 Mich. 242, 245, 246, holding unconstitutional a State statute, providing a chattel mortgage is void, unless filed in clerk's office of mortgagor's town, so far as it relates to enrolled vessel; *People v. Fonda*, 62 Mich. 407, 29 N. W. 28, holding State courts have no jurisdiction to try clerk of national bank for embezzling its funds; *Sinmons v. Miller*, 40 Miss. 25, holding war power of congress is exclusive; *Crow v. State*, 14 Mo. 306, holding statute taxing merchants is discriminating and void; also dissenting opinion, 326; *Ex parte Crandall*, 1 Nev. 306, holding State law taxing passengers carried out of State by stage valid; *State v. Pike*, 15 N. H. 88, 89, holding State courts have no jurisdiction of perjury before commissioner appointed under bankrupt act; *Robinson v. Potter*, 43 N. H. 190, holding party having agreed to submit cause to arbitrators cannot afterwards ask to have it transferred to Circuit Court; *Bruen v. Ogden*, 11 N. J. L. 379, holding State court may maintain action to replevy goods seized by marshal of United States.

Other citing cases in the State courts affirming the doctrine under consideration are the following: *Jack v. Mary Martin*, 12 Wend. 317, holding after congressional legislation as to fugitive slaves, State legislation is of no effect; *Delafield v. Illinois*, 26 Wend. 210, 211, 214, 216, holding in all controversies between a State and citizen of another State, jurisdiction is possessed by State and Federal courts; *Lemmon v. People*, 20 N. Y. 614, holding statute freeing slave brought into State by voluntary act of master valid; *City of Utica v. Churchill*, 33 N. Y. 241, holding void an act taxing national bank shares, which did not provide that rate should not exceed that on shares of State banks; *People v. Curtis*, 50 N. Y. 328, 10 Am. Rep. 488, holding State statute providing for surrender of fugitives from foreign justice is void; *Robinson v. National Bank*, 81 N. Y. 387, 391, 37 Am. Rep. 510, 513, holding State court has cognizance of action on contract by citizen of this State against national bank located in another State; *People v. Hill*, 126 N. Y. 304, 27 N. E. 790, holding State legislation not excluded, unless power of congress as to militia has been exercised; *People v. Welch*, 141 N. Y. 276, 278, 38 Am. St. Rep. 800, 802, 36 N. E. 331, 332, 24 L. R. A. 121, 122, State may exercise jurisdiction of crimes committed upon navigable waters within State; *Weaver v. Fegely*, 29 Pa. St. 29, 70 Am. Dec. 153, holding State may regulate weights until congress has done so; dissenting opinion, *McCafferty v. Guyer*, 59 Pa. St. 123, majority holding act disenfranchising deserters is unconstitutional; *Craig v. Kline*, 65 Pa. St. 409, 3 Am. Rep. 643, holding State may regulate floating of logs in navigable waters; *Bletz v. National Bank*, 87 Pa. St. 92, 93, 30 Am. Rep. 345, 346, holding State courts have jurisdiction where borrower seeks to recover back twice the amount of illegal interest received by national bank; *Chase v. The American Steamboat Co.*, 9 R. I. 431, 11 Am. Rep. 281, holding State court has jurisdiction of tort on bay; *Ausley v. Timmons*, 3



McCord (S. C.), 333, holding congress has not exclusive control over State militia; State v. Randall, 2 Aikens, 98, holding State act punishing counterfeiting of national bank bills valid; *Ex parte Holmes*, 12 Vt. 646, holding "governor has no authority to surrender fugitive from Canada;" Draper v. Gorman, 8 Leigh (Va.), 633, holding State can prescribe its own rules of evidence; Jett v. Commonwealth, 18 Gratt. 950, 952, 961, holding State court may punish one attempting to utter forged national bank note; Norfolk, etc., Ry Co. v. Commonwealth, 93 Va. 754, 57 Am. St. Rep. 830, 24 S. E. 838, 34 L. R. A. 107, State may prohibit transporting of empty coal cars on Sunday, not being interstate commerce; dissenting opinions, In re Booth, 3 Wis. 75, 125, majority holding national fugitive slave law unconstitutional; In re Kemp, 16 Wis. 365, holding president has no power to suspend the writ of habeas corpus, this being a legislative power; In re Griner, 16 Wis. 439, 440, 441, holding president, under the act of congress, could draft our quota of militia; dissenting opinion, Whiton v. Railway Co., 25 Wis. 435, majority holding invalid a Federal act providing that a citizen of one State, who has begun action in court of another State against a citizen thereof, may remove case to Federal court; State v. Cunningham, 81 Wis. 478, 51 N. W. 728, 15 L. R. A. 566, and n., apportionment act violating constitutional requirements void; Cont. N. Bk. v. Folsom, 78 Ga. 456, 3 S. E. 272, holding nonresident national bank, bringing attachment in a local court, may be sued in that court on its attachment bond. See also note to 70 Am. Dec. 154, on power to regulate weights and measures; collecting authorities; and note to 32 Am. Rep. 355, on power of State to deliver up fugitive from other States, collecting authorities.

Distinguished in *Wooley v. Watkins*, 2 Idaho, 577, 578, 22 Pac. 110, holding relation between congress and territories is that of superior and inferior; State v. McBride, Rice, 413, 418, holding State court has no jurisdiction over one accused of stealing a letter.

**Militia.**—Only militia in actual employment of United States are subject to the rules and articles of war, p. 62.

Rule applied in *Ex parte Henderson*, 11 Fed. Cas. 1076, holding act providing that contractor supplying army may be subject to court-martial, is unconstitutional; *Tyler v. Pomeroy*, 8 Allen, 493, 498, holding written promise to serve as a volunteer, is not sufficient to constitute one a soldier; *Howes v. Middleborough*, 108 Mass. 127, holding guaranty of month's pay on being called into service, refers to service under the United States; In re Spangler, 11 Mich. 321, holding officer (though appointed by governor), while making a draft, acts under national authority, and State cannot inquire into imprisonment by him; *Mills v. Martin*, 19 Johns. 24, holding State militia not subject to martial law, unless in active service; *People v. Campbell*, 40 N. Y. 135, 136, holding officer of militia mustered into service, exempt from civil arrest; *Kneedler v. Lane*, 45 Pa. St. 281,

holding drafted man punishable as deserter; also dissenting opinion of same case, 336; dissenting opinion, *Speer v. School Directors*, 50 Pa. St. 178, majority holding payment of bounties to volunteers is legal, being of a public nature; *Ex parte Bright*, 1 Utah, 155, holding militia in actual service in exclusive control of national government; dissenting opinion, *Gilman v. Morse*, 12 Vt. 558, majority holding act for "regulating and governing State militia," did not disband the militia. Cited, but with no particular application of the rule, in *Ex parte Field*, 5 Blatchf. 79, F. C. 4,761.

**Penal laws.**—No nation is bound to enforce penal laws of another within its own dominions, p. 69.

Rule applied in *Dickson v. Dickson*, 1 Yerg. 115, 24 Am. Dec. 447, 448, refusing to enforce law of Kentucky, making second marriage of offending divorced person bigamous; *Earthman v. Jones*, 2 Yerg. 486, holding judgment in another State, defendant not being served or appearing, no evidence of debt in this State.

Miscellaneous citations.—Cited in *Corbit v. Smith*, 7 Iowa, 65, 71 Am. Dec. 435, but not in point; *Kent v. Mojonier*, 36 La. Ann. 261, apparently not in point; also in *Wolfe v. Joubert*, 45 La. Ann. 1105, 13 So. 808, 21 L. R. A. 744. Cited to no point decided, dissenting opinion, *Luther v. Borden*, 7 How. 60, 77, 12 L. 607, 614, and *Clark v. Sohler*, 1 Wood. & M. 373, F. C. 2,835.

5 Wheat. 76-116, 5 L. 37, UNITED STATES v. WILTBERGER.

Penal laws are construed strictly, but not so strictly as to defeat legislative intention, p. 95.

The following citing cases affirm and follow this rule: *American Fur Co. v. United States*, 2 Pet. 367, 7 L. 454, holding all goods of trader found in company with liquor are subject to forfeiture; *United States v. Morris*, 14 Pct. 475, 10 L. 549, construing statute prohibiting slave trade; *United States v. Hartwell*, 6 Wall. 396, 18 L. 833, holding clerk appointed by officer of United States, whose tenure is not affected by vacation of office of superior, is an "officer," and subject to penalties for misconduct; *United States v. Reese*, 92 U. S. 219, 23 L. 565, construing act to punish election inspector for refusing vote of colored person; note to *In re Coy*, 127 U. S. 739, see 31 Fed. 800, case involving construction of act as to elections; *United States v. Lacher*, 134 U. S. 628, 33 L. 1083, 10 S. Ct. 626, construing statute against embezzlement; *United States v. Chase*, 135 U. S. 261, 34 L. 120, 10 S. Ct. 758, holding a sealed and addressed letter is not a "writing" within statute prohibiting mailing of obscene matter; dissenting opinion of Gray in *United States v. Rodgers*, 150 U. S. 278, 279, 37 L. 1082, 14 S. Ct. 120, 121, construing statute giving Federal courts jurisdiction of crimes on high seas; *Sarlls v. United States*, 152 U. S. 575, 38 L. 558, 14 S. Ct. 722, holding lager beer is not "spirituous liquor" nor "wine," within statute



forbidding sale to Indians; *United States v. Souders*, 2 Abb. (U. S.) 461, F. C. 16,358, construing act punishing anyone preventing electors from voting; *United States v. Sweeney*, 1 Biss. 312, F. C. 16,426, construing revenue laws, forbidding vessel to unlade spirits, without giving collector a manifest of said cargo; *In re Leszynsky*, 16 Blatchf. 19, F. C. 8,279, holding penalty, fine and imprisonment are one punishment; *United States v. Clayton*, 2 Dill. 226, 228, F. C. 14,814, holding governor is not "an officer of election," within criminal statute; *In re Buell*, 3 Dill. 123, F. C. 2,102, construing statute against libel; *United States v. Whittier*, 5 Dill. 39, F. C. 16,688, holding statute in respect to mailing obscene books, etc., does not extend to sealed letter sent in answer to decoy letter; *United States v. Reese*, 5 Dill. 413, F. C. 16,137, holding it is no crime against United States to cut timber on Indian lands; *Wilson v. Singer Manuf. Co.*, 9 Biss. 175, F. C. 17,836, construing act as to marking articles with word "patented;" *United States v. Mattock*, 2 Sawy. 151, F. C. 15,744, construing "cattle" in penal statute to include sheep; *United States v. Williams*, 3 Fed. 491, holding statute against mailing of obscene matter did not extend to sealed letter; *French v. Foley*, 11 Fed. 804, construing statute providing penalty for false patent markings; *Pentlarge v. Kirby*, 19 Fed. 504, construing statute imposing penalty for falsely marking upon articles the word "patented;" *United States v. Comerford*, 25 Fed. 904, holding depositing sealed letter in post-office, not within statute against mailing of obscene matter; *United States v. Huggett*, 40 Fed. 638, applying this rule in construing statute prohibiting obscene language in mails; *United States v. Garretson*, 42 Fed. 25, holding doubt in criminal statute is to be decided in favor of accused; *In re McDonough*, 49 Fed. 362, holding beer is not a spirituous liquor within statute forbidding selling of spirituous liquors to Indians; contra, *United States v. Ellis*, 51 Fed. 810; *United States v. Wilson*, 58 Fed. 771, holding statute against the mailing of obscene matter does not include a sealed letter; *Detroit Citizens' St. Ry. v. Detroit*, 64 Fed. 640, 22 U. S. App. 570, 26 L. R. A. 676, powers of municipal corporation will not be so strictly construed as to defeat legislative intent; *United States v. Harris*, 78 Fed. 291, holding penal statute relating to transportation of live stock does not apply to receivers of a railroad; *United States v. Hewecker*, 79 Fed. 64, where statute could not constitute murder, except by inserting provision that death occur within a year and a day, court refused to impose this limitation; *Ex parte Poulson*, 19 Fed. Cas. 1208, construing strictly a statute giving court power to punish for contempt; *United States v. Hall*, 26 Fed. Cas. 78, holding, if a person be openly engaged in carrying private letters over post-roads of United States, railroad having notice, carrying such, is liable for the penalty; *United States v. Pratt*, 27 Fed. Cas. 613, holding the mailing of obscene postal card within statute.

In the State courts the following citing cases affirm and apply the principle: *Boring v. Williams*, 17 Ala. 518, holding summary proceeding against collector for failing to collect taxes could be against any one or more of his sureties; dissenting opinion, *Crosby v. Hawthorn*, 25 Ala. 225, majority holding affidavit of belief sufficient to justify a warrant; *Walton v. State*, 62 Ala. 199, construing statute prohibiting sale of liquors to minors; *Merriam v. Langdon*, 10 Conn. 469, construing statute for suppression of peddlers; *Rawson v. State*, 19 Conn. 299, construing indictment charging one with keeping liquor store; *United States v. Spaulding*, 3 Dak. Ter. 102, 13 N. W. 540, construing statute as to false pre-emption proof; *Hall v. State*, 3 Ga. 21, holding keeping open of one tippling-house, a violation of the statute; *Holland v. State*, 34 Ga. 457, holding distilling of whiskey from seed of millet, included in terms "other grain;" *Bethune v. State*, 48 Ga. 511, holding entering of place of business of another, where goods are stored, burglary; *Steel v. State*, 26 Ind. 83, holding, in prosecution for seduction, jury could not impose a fine in addition to imprisonment; *Keller v. State*, 11 Md. 536, 69 Am. Dec. 232, construing license laws; *Parkinson v. State*, 14 Md. 195, 74 Am. Dec. 529, construing act prohibiting sale of liquors to minor or colored persons; dissenting opinion of same case, 14 Md. 204; *People v. Braman*, 30 Mich. 467, court dividing on construction of act punishing threats to accuse another of crime to extort money; *State v. Brewer*, 8 Mo. 374, holding disclosures by grand juror not an offense within statute; *Schultz v. Pacific R. R. Co.*, 36 Mo. 27, holding representatives of servant may maintain action against master for death occasioned by negligence, etc., of fellow-servant; *State v. Bryant*, 90 Mo. 537, 2 S. W. 838, construing statute against gambling strictly; *State v. Sibley*, 131 Mo. 525, 33 S. W. 169, holding act of stepfather is within statute punishing guardian or other person in charge for defiling female under his care; *State v. Schuchmann*, 133 Mo. 124, 133, 33 S. W. 38, 41, construing statute punishing burglary strictly; *Moore v. State*, 53 Neb. 847, 74 N. W. 324, holding section of criminal code relating to the embezzlement of public moneys applies only to officers charged by law with the collection, etc., not to an auditor; *State v. Hayes*, 13 Mont. 120, 32 Pac. 416, construing strictly statute against larceny; *Ex parte Deidesheimer*, 14 Nev. 317, holding superintendent not guilty of misdemeanor for refusing to permit stockholders to examine mine; *State v. Butman*, 61 N. H. 515, 60 Am. Rep. 332, holding partner cannot be convicted for embezzling firm property; dissenting opinion, *Camden, etc., R. R. Co. v. Briggs*, 22 N. J. L. 675, majority holding statute inflicting penalties for exceeding charter rates, constitutional; *Buck v. Danzenbacker*, 37 N. J. L. 361, holding under game laws forfeitures can be recovered only by actions of trespass; *Stricker v. Railroad Co.*, 60 N. J. L. 235, 37 Atl. 778, construing statute providing for punishment of person travelling without paying fare; *Cotheal v. Brouwer*,



5 N. Y. 567, holding officer, refusing to permit stockholder to inspect books, subject to penalty; *Wynehamer v. People*, 13 N. Y. 448, holding laws to prevent intemperance, destroy property in liquors already manufactured and are unconstitutional; dissenting opinion, *Lowenberg v. People*, 27 N. Y. 349, majority holding act in relation to capital punishment did not abolish death penalty for murder; *American L. Ins. Co. v. Dobbin*, *Lalor's Supp. to Hill & D.* 260, deciding that "restraining act," prohibiting corporations from discounting bills, notes, etc., does not prohibit their purchasing notes; *Hines v. Railroad Co.*, 95 N. C. 439, 59 Am. Rep. 252, construing act prohibiting freight discrimination; dissenting opinion, *Boyd v. Watt*, 27 Ohio St. 275, majority holding to recover for habitual intoxication, it is not essential that defendant was sole cause; *State v. Meyers*, 56 Ohio St. 350, 47 N. E. 140, refusing to extend criminal statute to persons not within its terms; *State v. Johnson*, 16 S. C. 189, construing act prohibiting carrying of concealed weapon; *Murray v. State*, 21 Tex. App. 633, 57 Am. Rep. 629, 2 S. W. 762, construing statute against malicious mischief; *Harris v. Commonwealth*, 81 Va. 243, 59 Am. Rep. 668, holding skating rink not required to have license for public exhibition; *Lescallett v. Commonwealth*, 89 Va. 884, construing act against betting, as to betting by telegraph; *Hanson v. Eichstaedt*, 69 Wis. 547, 35 N. W. 34, construing act giving parties right to make private notes from public records; dissenting opinion, *State v. Hunkins*, 90 Wis. 270, 63 N. W. 168, majority holding offense of fraudulently conveying incumbered real estate may be committed by one procuring another to make the conveyance; *State v. Shove*, 96 Wis. 9, 65 Am. St. Rep. 20, 70 N. W. 314, 37 L. R. A. 146, certificate of deposit payable at fixed date, a deposit and not a loan. Cited approvingly in *United States v. Rhodes*, 1 Abb. (U. S.) 37, F. C. 16,151, and *United States v. Willetts*, 5 Ben. 227, F. C. 16,699, statutes were not penal.

Distinguished in *Beley v. Naphtaly*, 73 Fed. 125, 44 U. S. App. 232, construing remedial act liberally; *Baring v. Erdman*, 2 Fed. Cas. 788, construing statute in relation to construction of State roads liberally; *Manitowoc County v. Truman*, 91 Wis. 12, 64 N. W. 310, construing act providing for deposit of county funds in bank; *State v. Shove*, 96 Wis. 9, 65 Am. St. Rep. 20, 70 N. W. 314, holding, where certificate of deposit is issued payable in a year, not subject to check, it is a deposit within the statute making it an offense for any officer of a bank to receive money on deposit when he knows the bank is unsafe; *Paragon Paper Co. v. State*, 19 Ind. App. 324, 49 N. E. 603, holding statute requiring that in a criminal prosecution against a corporation a copy of the information or indictment shall be served and returned with the summons, does not require the service of the affidavit upon which the information was based; *Rasmussen v. Baker*, 50 Pac. 831, 38 L. R. A. 784, holding article preventing one not able to read the Constitution from voting, means the Constitution written in English.

**Construction of statute.**—Where there is no ambiguity in the words, there is no room for construction, pp. 95, 96.

Rule applied in *The Cherokee Tobacco Co.*, 11 Wall. 620, 20 L. 229, holding internal revenue acts include liquors made in Indian territories; *Texas v. Chiles*, 21 Wall. 491, 22 L. 651, holding statute providing no witness can be excluded in civil suit because of interest, puts parties on same footing with other witnesses; *Lewis v. United States*, 92 U. S. 621, 23 L. 514, holding under bankrupt act, debts of United States have priority over debts of partners as individuals or as a firm; *Calderon v. Atlas Steamship Co.*, 170 U. S. 280, 42 L. 1036, 18 S. Ct. 591, holding carrier's contract was an attempt to limit his responsibility, and was void under Harter act; *United States v. Ragsdale*, Hemp. 501, F. C. 16,113, holding that offender protected by letter of penal statute cannot be deprived of its benefit; *United States v. Chong Sam*, 47 Fed. 884, 885, construing word "subject" in Chinese exclusion act; *Marine v. Packham*, 52 Fed. 580, 8 U. S. App. 93, construing tariff act as to duty on glass bottles; *Matthews v. People*, 159 Ill. 405, 42 N. E. 865, holding surety on bond of keeper of dram shop need not be a resident but only a freeholder of the county; *Lane v. Ruhl*, 103 Mich. 43, 61 N. W. 348, construing act providing where complainant recovers possession of premises, in case of forcible entry and detainer, he may recover treble damages.

**Treason** is a breach of allegiance, p. 97.

Cited in *Young v. United States*, 97 U. S. 62, 24 L. 998, distinguishing between giving "aid and comfort" and treason.

**Jurisdiction.**—Federal courts can only exercise such criminal jurisdiction as is specifically given by congress, p. 98.

Cited to this point although only inferentially decided, in *In re Metzger*, 17 Fed. Cas. 234, holding all inferior Federal courts received their jurisdiction from congress; *United States v. Abbott*, 24 Fed. Cas. 744, holding Federal courts had power, under statute, to punish for failure to affix revenue stamps; *United States v. MacKenzie*, 30 Fed. Cas. 1162, holding civil courts had not been given jurisdiction over crime of murder committed on United States man-of-war and triable by court-martial; *United States v. MacKenzie*, 26 Fed. Cas. 1120, holding where party charged with murder on high seas is before court of inquiry, District Court will not issue a warrant; *United States v. New Bedford Bridge*, 1 Wood. & M. 448, 483, 484, F. C. 15, 867, holding Circuit Court has no power, without authority of congress, to punish obstructing navigable waters as a crime.

**United States courts**, under act of 1790, have no jurisdiction of manslaughter committed in a river within the jurisdiction of a foreign sovereign, p. 104.



The citations show the following application to this holding: dissenting opinion, *Waring v. Clarke*, 5 How. 481, 12 L. 245, majority holding United States courts have jurisdiction in case of tort on river, where tide ebbs and flows, though it be *infra corpus comitatus*; dissenting opinion, *Tennessee v. Davis*, 100 U. S. 276, 279, 25 L. 655, 656, majority holding Federal court has jurisdiction, where United States officer, acting within scope of his authority, is arrested and brought before State court, to remove case; dissenting opinions, *United States v. Rodgers*, 150 U. S. 267, 269, 282, 37 L. 1078, 1083, 14 S. Ct. 116, 117, 122, majority holding Federal courts have jurisdiction of crime committed on vessel owned by citizen of United States, vessel being on Detroit river within limits of Canada; *United States v. Wilson*, 3 Blatchf. 438, F. C. 16, 731, to give United States courts jurisdiction of crime, it must have been committed on the "high seas;" *Henry Miller's Case*, Brown Adm. 157, F. C. 9,558, holding great lakes are not "high seas" within act punishing burning of vessels; *United States v. Grush*, 5 Mason, 298, F. C. 15,268, holding words "high seas" mean uninclosed waters of the ocean, and State courts have jurisdiction of crimes committed on arms of sea within the body of a county; *Schooner Wave v. Hyer*, 2 Paine, 143, F. C. 17,300, holding, congress having adopted State law as to pilots, District Courts have no jurisdiction; *The Schooner Harriet*, 1 Story, 260, F. C. 6,099, holding "at sea" means without limits of any port; *United States v. New Bedford Bridge Co.*, 1 Wood. & M. 438, 448, 483, 484, F. C. 15,867, holding Circuit Court has no power without authority of congress to punish as a crime obstruction of navigation in navigable water; *Ex parte Byers*, 32 Fed. 406, holding Federal courts have no jurisdiction of assault committed on American vessel in Detroit river; *Commonwealth v. Peters*, 12 Met. 395, holding Federal courts have no jurisdiction of crime committed on merchant vessel within a State; *People v. Tyler*, 7 Mich. 216, 74 Am. Dec. 711, holding crime committed on American vessel within province of Canada, not punishable in our courts; *Hubbard v. Hubbard*, 8 N. Y. 200, holding a nuncupative will may be made by master, vessel being at anchor in arm of sea where tide ebbs and flows.

Distinguished in *The Wave*, Blatchf. & H. 252, F. C. 17,297, holding Federal courts have jurisdiction over salvage claims upon waters where tide ebbs and flows though within a State; it being a civil case.

Miscellaneous citations.—Cited in *Forsyth v. United States*, 9 How. 572, 13 L. 262, and *State v. Crocker*, 5 Wyo. 398, 40 Pac. 684, as an instance of where criminal case was brought upon certificate of division; *The Wave*, Blatchf. & H. 249, F. C. 17,297, as having collected authorities on English admiralty jurisdiction; *United States v. New Bedford Bridge*, 1 W. & M. 438, 458, 463, 466, 472, F. C. 15,867, citing note as to admiralty jurisdiction; *United States v. Roberts*, 27 Fed. Cas. 824, citation is in statement of case; incidentally referred to in *State v. Field*, 14 Me. 247, 31 Am. Dec. 53.

5 Wheat. 116-127, 5 L. 46, *McCLUNG v. ROSS*.

**Tax deed.**—Under laws of Tennessee tax deed to be valid must show every fact necessary to give court jurisdiction upon the record, p. 120.

Rule applied in *Early v. Doe*, 16 How. 618, 619, 14 L. 1083, holding sale void, where notice required by statute was not given; *Dunn v. Gaines*, 1 McLean, 328, F. C. 4,176, holding one claiming under tax deed must show that all the legal requisites of the law have been complied with; *Lyon v. Hunt*, 11 Ala. 312, 46 Am. Dec. 223, setting aside sale, where advertisement of sale under statute failed to describe property; *Fitch v. Pinckard*, 4 Scam. 79, setting aside sale where notice was insufficient under statute; *State Tax Law Cases*, 54 Mich. 447, in note where cases showing intervention of judiciary in tax proceedings are collected; *Morton v. Reeds*, 6 Mo. 73, denying validity of sale in absence of proof of regularity of assessment. Cited, *arguendo*, in *Tolmie v. Thompson*, 3 Cr. C. C. 130, F. C. 14,080, a suit for partition.

Distinguished, *Werz v. Werz*, 11 Mo. App. 35, holding in suit for divorce record need not show every fact necessary to jurisdiction.

**Adverse possession.**—Purchaser of part, having agreement to hold balance for vendor, has adverse possession only of part sold, p. 123.

Cited upon this point in *Ross v. Cobb*, 9 Yerg. 470, holding possession of part of a tract of land under a lease, defined by prescribed boundaries, is not possession of whole tract; *Brown v. Johnson*, 1 Humph. 264, holding where party takes possession under a legal title, possession of part extends to boundaries described in deed.

Distinguished in *Coal Creek Mining Co. v. Heck*, 15 Lea, 515, holding part possession under title is possession of whole tract.

**Adverse possession.**—A tenant in common may oust his cotenant and hold in severalty, but silent possession, unaccompanied by act of ouster or notice of adverse possession, does not amount to adverse holding, p. 124.

The citations collect a number of cases upon this point and show various applications of the principle, as follows: *Kirk v. Smith*, 9 Wheat. 288, 6 L. 92, holding possession to give title must be adverse; *Bradstreet v. Huntington*, 5 Pet. 440, 8 L. 184, holding grantee of one tenant in common for the whole may set up statute against cotenants; *Clymer v. Dawkins*, 3 How. 690, 11 L. 786, holding tenant in common must show adverse possession by some notorious act; dissenting opinion, *Hewitt v. Story*, 64 Fed. 530, 29 U. S. App. 155, 30 L. R. A. 278, and n., case holding water right abandoned by nonuser; *Abercrombie v. Baldwin*, 15 Ala. 370, holding possession of cotenant becomes antagonistic by notorious denial of right of other tenant; *Ashley v. Rector*, 20 Ark. 375, holding cotenants barred where tenant held land openly and did acts hostile to their



rights; *McKneely v. Terry*, 61 Ark. 541, 33 S. W. 956, holding taking of rents by cotenant insufficient to show ouster; *Owen v. Morton*, 24 Cal. 379, holding it is sufficient if cotenant in possession appropriates profits with intent to possess the whole exclusively; *Raymond v. Simonson*, 4 Blackf. (Ind.) 82, holding statute does not run in a continuing trust, until trustee denies right of cestui que trust; *Pattison v. Maloney*, 38 La. Ann. 890, holding one may plead title by prescription, though by inquiry he might have discovered that vendor had no title; *Porter v. Hooper*, 13 Me. 28, 29 Am. Dec. 481, holding tenant in common cannot maintain action for mesne profits without an actual ouster by cotenant; *Richardson v. Richardson*, 72 Me. 408, holding a tenant in common may disseize a cotenant; *Hudson v. Coe*, 79 Me. 94, 1 Am. St. Rep. 294, 8 Atl. 252, holding there must be notorious acts of exclusion by cotenant; *Van Bibber v. Frazier*, 17 Md. 451, holding exclusive possession and appropriation of profits by cotenant is not adverse possession; *Munroe v. Luke*, 1 Met. 471, holding entry of mortgagee under a mortgage made after plaintiff's attachment, and appropriating all profits, not a disseizin; *Dubois v. Campau*, 28 Mich. 316, 318, court dividing as to whether occupation and exclusive taking of profits by tenant in common will bar action in ejectment; *Lowry v. Tillyen*, 31 Minn. 502, 18 N. W. 453, holding possession of mortgagor after foreclosure sale is not adverse to purchaser; *Hoffstetter v. Blattner*, 8 Mo. 282, holding tenant in common may hold adversely to cotenant; *Warfield v. Lindell*, 30 Mo. 283, 77 Am. Dec. 616, holding a notorious assertion of entire ownership is sufficient to oust cotenant; see also 38 Mo. 585, 90 Am. Dec. 452; *Jackson v. Brink*, 5 Cow. 484, holding purchase of cotenant's interest under defective deed from sheriff, constitutes adverse possession; *La Frombois v. Jackson*, 8 Cow. 619, 18 Am. Dec. 486, holding possession may become adverse after its commencement by a subsequent claim of title; *Edwards v. Bishop*, 4 N. Y. 65, holding possession of cotenant to be adverse must be a total denial of other tenants' right; *Culver v. Rhodes*, 87 N. Y. 354, holding that to establish adverse possession of cotenant notice, in fact, or notorious hostile act is necessary; *Northrop v. Marquam*, 16 Or. 190, 18 Pac. 459, holding to make possession of cotenant adverse, cotenant out of possession must have notice of such exclusive claim; *Jefcoat v. Knott*, 12 Rich. Eq. 60, where evidence of ouster of cotenant was insufficient; *Marr v. Gilliam*, 1 Cold. 500, holding adverse possession by cotenant must be made clear by positive proof; *Burnley v. Sharp*, 16 Tex. 237, holding sale by part owner transferring whole right in cattle, is an act of ouster; *Emerick v. Tavener*, 9 Gratt. 238, 58 Am. Dec. 230, deciding that tenant holding over, must disclaim in order to set statute running; *Caperton v. Gregory*, 11 Gratt. 508, holding that coparcener claiming all the property and appropriating the whole of the profits is

a disseizer; *Lagorio v. Dozier*, 91 Va. 508, 22 S. E. 241, where it was held that exclusive possession, receipt of profits, and payment of taxes does not amount to ouster of cotenant; *Covey v. Porter*, 22 W. Va. 124, holding a parcener exclusively using and taking rents, and notoriously ignoring rights of coparceners is in adverse possession; *Challefoux v. Ducharme*, 4 Wis. 565, holding silent possession by tenant in common is not an adverse possession; *Bader v. Dyer*, 106 Iowa, 722, 77 N. W. 471, holding tenant in common in sole possession, using it as his own, but making no public claim of entire ownership, does not hold adversely; see also note in 89 Am. Dec. 428, on action by disseizee for rents and profits.

5 Wheat. 127-132, 5 L. 50, THE VENUS.

**Admiralty.**—Captor's costs and expenses awarded against claimant, although restitution decreed, p. 132.

Cited in *Boston Mfg. Co. v. Fiske*, 2 Mason, 122, F. C. 1,681, holding jury may give plaintiff, in action for infringing patent, counsel fees as damages.

Miscellaneous citations.—Cited to point, that nothing but the clearest proof could relieve transaction from the presumption of illegality, arising from fraudulent papers in *United States v. Packages*, 27 Fed. Cas. 286; *United States v. Barrels of Cement*, 27 Fed. Cas. 297, holding license procured by fraud will not prevent forfeiture of goods.

5 Wheat. 132-144, 5 L. 52, THE LONDON PACKET.

**Prize.**—Goods being found on an enemy's ship, raises a legal presumption that they are enemy's property, p. 137.

Cited in *United States v. Packages*, 27 Fed. Cas. 286, holding willful omission to stamp distilled liquors, forfeits all the liquors; *United States v. Barrels of Cement*, 27 Fed. Cas. 297, holding act done under license procured by fraud, will not prevent forfeiture of goods.

**Prize.**—Restitution decreed, but captor's costs and expenses ordered paid by claimants, because of imperfect documents found on board, p. 143.

Cited in *Boston Mfg. Co. v. Fiske*, 2 Mason, 122, F. C. 1,681, holding jury may give plaintiff, in action for infringing patent, counsel fees as damages.

Miscellaneous.—Cited in *Merriman v. Cannovan*, 9 Baxt. 96, not in point.

5 Wheat. 144-153, 5 L. 55, UNITED STATES v. KLINTOCK.

**Piracy.**—A commission as privateer, issued by one purporting to be "brigadier of the Mexican Republic," which has no authorita-



tive existence, or as "generalissimo of the Floridas," a Spanish province, will not justify captures by such alleged privateer at sea, p. 149.

Distinguished in *Ford v. Surget*, 97 U. S. 617, 24 L. 1025, holding orders relieved Confederate officer from liability for destroying cotton; *Dole v. Insurance Co.*, 2 Cliff. 419, 421, F. C. 3,966, and *Fifield v. Insurance Co.*, 47 Pa. St. 169, 86 Am. Dec. 525, holding capture by a rebel privateer not a taking by a pirate, as also in *The Schooner Chapman*, 4 Sawy. 511, F. C. 2,602.

**Piracy.**—Under act of 1790, United States courts may punish piracy, though committed against a foreign vessel, by foreigners who have thrown off their national character and are cruising piratically, pp. 151, 152.

Cited to this point and applied in *United States v. Pirates*, 5 Wheat. 193, 5 L. 66, under similar facts; *United States v. Holmes*, 5 Wheat. 416, 5 L. 123, holding Federal courts have jurisdiction of crime committed on vessel having no national character; *United States v. Demarchi*, 5 Blatchf. 85, 87, F. C. 14,944, holding indictment for murder, alleging its commission on vessel of citizen of United States sufficient; *United States v. Gibert*, 2 Sumn. 89, F. C. 15,204, holding Federal courts have jurisdiction of crimes aboard American vessels; *United States v. The New Bedford Bridge*, 1 Wood. & M. 485, F. C. 15,867, holding Federal court has no jurisdiction where corporation was indicted for obstructing navigation of a river, under authority of State; *The Ambrose Light*, 25 Fed. 415, 420, 428, holding establishing of blockade by unrecognized rebels is piratical; *People v. Tyler*, 7 Mich. 214, 74 Am. Dec. 709, holding our courts have no jurisdiction of manslaughter, though blow was struck on American vessel, but party died in Canada.

Distinguished in *United States v. Kessler*, Bald. 27-29, F. C. 15,528, holding United States courts have no jurisdiction to try defendant indicted for piracy on board French ship; *United States v. Davis*, 2 Sumn. 485, F. C. 14,932, holding our courts have no jurisdiction of crime on foreign vessel in foreign harbor, shot being fired from our ship.

Miscellaneous.—Cited, generally, in *State v. Jones*, 1 McMull. L. 245, 36 Am. Dec. 262.

5 Wheat. 153-183, 5 L. 57, UNITED STATES v. SMITH.

**Piracy.**—Act of 1819, punishing the "crime of piracy, as defined by the law of nations," is a valid and sufficient exercise of the power to define and punish piracy, pp. 158-161.

**Piracy.**—Forcible depredations or robbery upon the sea, *animo furandi*, is piracy by the "law of nations," and by the act of congress, p. 162.

Cited in *United States v. Pirates*, 5 Wheat. 193, 5 L. 66, holding

our courts can punish piracy committed from on board vessel which has thrown off her national character; *Dole v. New England Ins. Co.*, 2 Cliff. 416, 420, F. C. 3,966, holding taking by rebel privateer not piracy; *United States v. Coppersmith*, 4 Fed. 202, 2 Flipp. 551, defining a felony; *The Ambrose Light*, 25 Fed. 416, 423, holding that maritime warfare of unrecognized rebels is piratical; *United States v. White*, 27 Fed. 201, holding counterfeiting securities of a foreign nation is an offense against the "law of nations;" *United States v. Smith*, 27 Fed. Cas. 1135, declaring United States will treat insurgents plundering our vessels as pirates; *Dole v. Merchants' Mutual Marine Ins. Co.*, 51 Me. 469, as to what is piracy; Opinion of the Justices, 66 N. H. 672, 33 Atl. 1099, defining word in statute in its technical sense.

Miscellaneous citations.—Cited in *Forsyth v. United States*, 9 How. 572, 13 L. 263, of an instance where a criminal case was examined in the Supreme Court upon certificate of division; *The United States v. New Bedford Bridge*, 1 Wood. & M. 446, F. C. 15,867, to support proposition that common law of England was not put in force by the Constitution; *State v. Jones*, 1 McMull. L. 245, 36 Am. Dec. 262, not in point; *United States v. New Bedford Bridge*, 1 Wood. & M. 461, F. C. 15,867, citing note, p. 162, on definition of piracy by law of nations; *United States v. New Bedford Bridge*, 1 Wood. & M. 438, 474, F. C. 15,867, to point that act of congress is necessary to give Circuit Courts criminal jurisdiction.

5 Wheat. 184-206, 5 L. 64, UNITED STATES v. PIRATES.

**United States courts — Jurisdiction.**—Piracy committed from on board a foreign vessel, which has thrown off her national character, is punishable in the courts of this country, p. 192.

Cited in *United States v. Holmes*, 5 Wheat. 418, 5 L. 123, holding Federal courts have jurisdiction of murder committed from on board vessel having no national character; *Davison v. Sealskins*, 2 Paine, 333, F. C. 3,661, holding a pirate is one without any commission from a sovereign State; *United States v. Gibert*, 2 Sumn. 89, F. C. 15,204, holding Federal courts have jurisdiction of crimes on board American vessels.

**Robbery on the seas** is an offense within the criminal jurisdiction of all nations, and plea of *autrefois acquit* would be good in any civilized State, though resting on a prosecution instituted in the courts of any other civilized State, p. 197.

Cited in *Dole v. New England Ins. Co.*, 2 Cliff. 416, F. C. 3,966, without any particular application.

Distinguished in *United States v. Barnhart*, 10 Sawy. 495, 22 Fed. 288, where crime of which defendant was acquitted in State court was not the same as that for which he was indicted in Federal courts.



**Documentary evidence** is not necessary to prove national character of vessel on indictment for piracy, but the jury may determine it from such evidence as satisfies their minds, p. 199.

Rule applied in *United States v. Plumer*, 3 Cliff. 64, 65, 68, F. C. 16,056, under similar facts.

**Piracy.**—In the act of 1790, punishing as piracy, certain offenses committed “out of the jurisdiction of any particular State,” these words mean a State of the Union, p. 200.

Cited in dissenting opinion of Gray, 150 U. S. 267, 276, 37 L. 1078, 1081, 14 S. Ct. 116, 119, majority holding this limitation does not apply to offenses on high seas; *Ex parte Byers*, 32 Fed. 405, holding Federal courts have no jurisdiction of crime committed upon American vessel in Detroit river; *Smith v. United States*, 1 Wash. Ter. 269, 274, holding a territory is not a State. And see 92 Am. Dec. 662, note.

**High seas.**—Vessel lying in an open roadstead of a foreign country, is upon the high seas within the piracy act of 1790, p. 200.

Cited in *United States v. Wilson*, 3 Blatchf. 439, F. C. 16,731, holding “high seas” is used in contradistinction to landlocked tide-waters; *The Schooner Harriet*, 1 Story, 260, F. C. 6,099, holding “at sea” means without the limits of any port; *United States v. New Bedford Bridge*, 1 Wood. & M. 484, 485, F. C. 15,867, discussing admiralty jurisdiction.

**Indictment.**—Each count in an indictment is a substantive charge, and they may be inconsistent one with another; if one be bad, judgment may be on a sufficient count, p. 201.

The citations collect a number of cases affirming and applying this rule, as follows: *United States v. Peterson*, 1 Wood. & M. 318, 320, F. C. 16,037, if indictment contain two counts, for offenses of same class, but of different degrees, judgment will not be arrested, though a verdict of guilty is returned on both; *United States v. Stone*, 8 Fed. 251, 252, holding separation in indictment may be disregarded and general verdict had upon the whole indictment; *Philbrook v. Newman*, 85 Fed. 141, applying the rule in disbarment proceedings; as also in *United States v. Knapp*, 26 Fed. Cas. 793, an indictment for larceny; *Scott v. State*, 37 Ala. 123, where indictment in separate counts charged murder and manslaughter, a general verdict of guilty was held sufficient to authorize death; *Bulloch v. State*, 10 Ga. 60, 54 Am. Dec. 376, where several counts charge different grades of same offense on general verdict of guilty court will award judgment for highest offense; *Dohme v. State*, 68 Ga. 341, holding a general verdict of guilty, without specifying counts, sufficient; *Kennedy v. State*, 6 Ind. 486, where statute provided on indictment for murder in first degree, jury might find verdict of guilty in second degree, verdict of guilty in form and manner charged meant

guilty of murder in the first degree; *State v. Shelledy*, 8 Iowa, 511, where general verdict is rendered, it was held if one count was sufficient, judgment would be supported; *Commonwealth v. Desmarteau*, 16 Gray, 14, holding jury need not return a separate verdict on each count; *People v. McDowell*, 63 Mich. 232, 30 N. W. 69, holding prosecution need not elect count on which conviction would be asked; *State v. Bean*, 21 Mo. 270, holding general verdict upon indictment containing several counts is good; *State v. Lincoln*, 49 N. H. 471, holding, where both counts relate to same transaction, prosecution will not be put to an election; *State v. Snyder*, 50 N. H. 158, holding prosecutor may elect, and conviction will be good; *Kane v. People*, 8 Wend. 214, holding, where there is a general verdict of guilty, judgment may be on the last count; as also in *State v. Toole*, 106 N. C. 741, 11 S. E. 170, an indictment for nuisance, and *Tabler v. State*, 34 Ohio St. 137; *State v. Pace*, 9 Rich. L. 364, holding on general verdict of guilty judgment will not be arrested if there be one good count; *Dalton v. State*, 4 Tex. App. 336, holding, where both charges are substantially for the same offense, prosecution need not elect. Cited with approval in *United States v. Patterson*, 6 McLean, 469, F. C. 16,011, where both counts were held sufficient. Cited without special application in *Lovejoy v. State*, 48 S. W. 522.

Distinguished in *United States v. Kelsey*, 42 Fed. 889, where neither count was sufficient.

Miscellaneous.—Cited to no particular point decided in *Commonwealth v. Macloon*, 101 Mass. 22, 100 Am. Dec. 107, and *People v. Tyler*, 7 Mich. 214, 74 Am. Dec. 709.

5 Wheat. 207-269, 5 L. 70, STEVENSON'S HEIRS v. SULLIVAN.

**Illegitimate child.**—Statute enabling an illegitimate to inherit from mother and to transmit, gives him no power to inherit from a natural brother, p. 260.

Rule applied in *Blair v. Adams*, 59 Fed. 244, 248, 249, holding bastard cannot transmit his estate through deceased mother to her brothers and sisters; *Williams v. Kimball*, 35 Fla. 56, 48 Am. St. Rep. 243, 16 So. 785, 26 L. R. A. 748, statute only makes bastard legitimate so far as his mother is concerned; *Scroggin v. Allan*, 2 Dana (Ky.), 364, 365, holding bastard has no inheritable blood for collateral purposes; *Jackson v. Jackson*, 78 Ky. 391, 39 Am. Rep. 247, holding bastard cannot inherit through his mother from her ancestors; *Croan v. Phelps*, 94 Ky. 215, 218, 21 S. W. 874, 875, 23 L. R. A. 754, 756, and n., mother's collateral kin cannot inherit from bastard; *Helms v. Franciscus*, 2 Bland Ch. 582, 20 Am. Dec. 421, holding bastard, under statute, can inherit from mother; *Porter v. Porter*, 7 How. (Miss.) 112, 40 Am. Dec. 58, holding "children" in statute of descent, does not include bastard; *Edwards v. Gaulding*, 38 Miss. 165, holding children cannot, under statute, inherit estate of ille-



gitimate uncle; *Bent v. St. Vrain*, 30 Mo. 271, holding, under statute, bastard could not transmit to mother or brothers; *Little v. Lake*, 8 Ohio, 290, holding estate of bastard does not pass to the maternal line; *Gibson v. McNeely*, 11 Ohio St. 136, holding illegitimate child could not take in will as the "issue" of her mother, nor could she inherit collaterally; *Moore v. Moore*, 35 Vt. 101, holding, where legislature made person another's heir, former could not inherit from latter's brother. Cited in *Kingsley v. Broward*, 19 Fla. 746, showing conflict on this point, collecting authorities.

Denied in *Butler v. Elyton L. Co.*, 84 Ala. 391, 392, 4 So. 678, holding, under statute, estates of bastard goes to his half brother and not to his mother; *Lewis v. Eutsler*, 4 Ohio St. 355, holding, under statute, brothers of bastard could take his estate; *Briggs v. Greene*, 10 R. I. 499, holding estate of bastard, under statute, passes to sister; *Garland v. Harrison*, 8 Leigh (Va.), 379, 382, holding brothers of bastard can inherit his estate; *Bennett v. Toler*, 15 Gratt. 627, 78 Am. Dec. 644, holding illegitimate child will take under a devise to children. Distinguished in *Sutton v. Sutton*, 87 Ky. 218, 12 Am. St. Rep. 477, 8 S. W. 337, holding children of bastard can take from father's illegitimate brother; *Hepburn v. Dundas*, 13 Gratt. 224, 225, holding children of slave, after emancipation, may take as heirs of deceased sister; *Dickinson's Appeal*, 42 Conn. 510, 19 Am. Rep. 563, holding bastard has inheritable blood for collateral purposes.

**Illegitimate child.**—Under Virginia act of 1785, recognition or proof of paternity to enable illegitimate child to inherit, must have occurred after the passage of that act, p. 260.

Rule applied in *Hartinger v. Ferring*, 24 Fed. 17, similarly construing the Iowa code. Cited in *Ross v. Ross*, 129 Mass. 257, 37 Am. Rep. 332, raising query as to whether legitimacy depending on acknowledgment, should be determined by law at time of the acknowledgment or at time of the birth.

Miscellaneous citations.—Cited in *Pettus v. Dawson*, 82 Tex. 20, 17 S. W. 714, to civil rule in note, page 262, which they refused to follow, holding mother could inherit from bastard; *Dodge v. Hopkins*, 14 Wis. 639, an error.

5 Wheat. 269-276, 5 L. 84, **PERKINS v. RAMSEY.**

**Public lands.**—Entry under Virginia law held void for want of certainty.

No citations.

5 Wheat. 277-290, 5 L. 87, **MANDEVILLE v. WELCH.**

A bill of exchange expressed to be for value received is evidence of a valuable consideration between the parties and as to third persons, p. 282.

Rule applied in *Moses v. Bank*, 149 U. S. 302, 37 L. 745, 13 S. Ct. 901, holding same, even if not purporting to be "for value received;" *Frazer v. Carpenter*, 2 McLean, 236, F. C. 5,069, holding it is evidence between holder and a remote indorser; *Bristol v. Warner*, 19 Conn. 18, holding negotiable note imports consideration, though not negotiated; *Mitchell v. Cotton*, 2 Fla. 151, holding words "for value received" import a consideration; *Horn v. Fuller*, 6 N. H. 513, holding every promissory note imports a consideration; *Doe v. Burnham*, 31 N. H. 430, holding to avoid note, it should appear that note was given for liquors sold without a license; *Jones v. Holliday*, 11 Tex. 415, 62 Am. Dec. 488, stating general rule to be that consideration of an unsealed contract must be averred and proved, bills and notes being exceptions.

Distinguished in *Felt v. Judd*, 3 Utah, 416, 4 Pac. 244, holding in action on nonnegotiable paper, consideration must be alleged; *McNear v. Atwood*, 17 Me. 436, where the order did not partake of the character of a bill or note.

Assignor of chose in action cannot fraudulently interfere to defeat rights of assignee in suit brought to enforce those rights, p. 283.

Rule affirmed and applied in *Hazelton Tripod-Boiler Co. v. Railway Co.*, 72 Fed. 328, holding equity will protect rights of assignees; *Dazey v. Mills*, 5 Gilm. 70, holding declarations of nominal plaintiff after parting with interest, inadmissible to defeat action; *Taylor v. Galland*, 3 G. Greene, 29, holding, where parties undertake to settle a controversy by assigning conflicting claims to third party, courts will favor such assignment; *Blackerby v. Holton*, 5 Dana (Ky.), 522, holding equity will enforce the assignment of a chose in action as being a declaration of a trust; *Hackett v. Martin*, 8 Me. 80, holding no act of assignor after assignment can control it; *Matthews v. Houghton*, 10 Me. 421, holding declarations of assignor, subsequent to assignment, are inadmissible; *Pitts v. Holmes*, 10 Cush. 96, holding assignee of chose in action can sue in assignor's name with his consent; *Scott v. Metcalf*, 13 Smedes & M. 569, holding assignor of note stands in trust relation to assignee, for whom he is to collect the money; *Alexander v. Overton*, 36 Neb. 505, 54 N. W. 826, holding where money paid purported to be plaintiff's, and titles were in her name, she could maintain action for wrongful sale; *Sloan v. Sommers*, 14 N. J. L. 512, 513, 514, holding court will not permit nominal plaintiff to release action, without consent of real plaintiff; *Parsons v. Woodward*, 22 N. J. L. 206, holding any beneficial contract may be assigned, and courts of law will protect rights of assignee suing in name of assignor; *Davenport v. Elizabeth*, 43 N. J. L. 151, holding assignee, being real plaintiff, is liable for costs; *Freund v. Bank*, 76 N. Y. 356, holding when a debtor has notice of assignment of a chose in action he cannot make valid payment to assignor; *Strong v. Strong*, 2 Aikens, 378, holding equitable interest of assignee is protected at law against a



fraudulent discharge by nominal plaintiff. Cited, *arguendo*, in *Price v. Bradford*, 5 Ga. 366, collecting authorities.

Distinguished in *Johnson v. Shields*, 32 Me. 428, holding widow's release of unassigned right of dower, except to party in possession, is of no effect; *Crawford v. Brooke*, 4 Gill, 221, holding acts of assignor at time of assignment competent evidence.

**Equitable mortgage.**—To constitute an equitable mortgage not only a deposit of title papers, but an intent to give security must be shown, p. 284.

Cited in *Wellborn v. Williams*, 9 Ga. 92, 52 Am. Dec. 432, distinguishing vendor's lien from an equitable mortgage; *Rogers v. Hosack*, 18 Wend. 334, holding covenant to pay certain debts out of a designated fund, when obtained, is not an equitable mortgage; *United States v. Cutts*, 1 Sumn. 141, 142, F. C. 14,912, but decisions put upon other grounds. See note on subject of equitable mortgages, 4 Am. St. Rep. 697.

**Equitable assignment.**—An order drawn for part of a fund does not amount to an assignment or give a lien, unless drawee consents, by an acceptance of the draft, or an obligation to accept may be implied from custom, p. 286.

This holding is affirmed and applied by the following citing cases: *McLoon v. Linquist*, 2 Ben. 13, F. C. 8,899, holding same as to advances made on bill of lading; *McGinnis v. Flynn*, 23 Blatchf. 469, 27 Fed. 35, holding check is not an equitable assignment, as also in *Strain v. Gourdin*, 2 Woods, 383, F. C. 13,521, to same effect; *Bosworth v. Nat. Bank*, 64 Fed. 618, 24 U. S. App. 413, holding drawing of drafts without their acceptance does not amount to an equitable assignment; *Fluker v. Henry*, 27 Ala. 402, 403, holding bill of exchange, until accepted, does not operate as an assignment; *Welch v. Mayer*, 4 Colo. App. 444, 36 Pac. 614, holding assignment of part of a debt is not operative, unless debtor consents; *Weinstock v. Bellwood*, 12 Bush (Ky.), 141, holding the assignment of part of a debt does not vest assignee with right of action against debtor; *Russell v. Ferguson*, 7 Mart. (La.) (N. S.) 520, holding a party is not obliged to accept several drafts for one debt; *Poydras v. Delamare*, 13 La. 101, holding agent having funds of principal in his hands, is not individually bound to payee for refusing to pay; *Jackson v. Tiernan*, 15 La. 491, enforcing assignment of part of a debt where obligation-resulting from it may be implied from the custom of trade; dissenting opinion, *Keith v. Mackey*, 5 Rob. (La.) 284, majority holding if drawer, after holder's neglect to present, withdraws funds, he, under code, will be responsible to holder; *Getchell v. Maney*, 69 Me. 444, holding statute did not authorize assignment of part of one's wages; *Gibson v. Finley*, 4 Md. Ch. 78, holding unaccepted draft not an equitable assignment; *Wilson v. Carson*, 12 Md. 74, declaring there was not an equitable assignment; as

also *Gibson v. Cooke*, 20 Pick. 18, 32 Am. Dec. 196; *Palmer v. Merrill*, 6 Cush. 287, 52 Am. Dec. 785, holding assignment of insurance policy pro tanto, policy being retained by assured, is not effectual though notice is given to insurers; *Lyon v. Travelers' Ins. Co.*, 55 Mich. 146, 54 Am. Rep. 357, 20 N. W. 831, holding arrangement by which employer was to pay premiums to insurance company from employee's wages, amounted to an assignment; *Wadlington v. Covert*, 51 Miss. 636, holding order on third person is not absolute discharge of an antecedent debt, unless accepted as such; *Menken v. Gumbel*, 57 Miss. 758, holding acceptance of an order to pay sum out of balance due, takes precedence of a garnishment; *Burnett v. Crandall*, 63 Mo. 413, holding assignee of part of a claim assigned without debtor's consent cannot recover on it; *McGrade v. Savings Institution*, 4 Mo. App. 338, holding that holder of check because of usage, may sue bank for refusing payment; *Rice v. Dudley*, 34 Mo. App. 392, holding garnishment will prevail over prior unaccepted order for part of a fund; *Covert v. Rhodes*, 48 Ohio St. 73, 27 N. E. 96, holding draft for part of fund unaccepted, does not constitute an equitable assignment; *Hopkins v. Beebe*, 26 Pa. St. 88, holding holder of a bill of exchange is not owner of property, which drawer has remitted to drawee; *Jermyn v. Moffitt*, 75 Pa. St. 402, holding an assignment which professes to transfer a debt for wages not yet earned against any person who may thereafter employ the assignor, although there be notice of assignment to the employer, is insufficient, without his acceptance; *Appeals of City of Philadelphia*, 86 Pa. St. 182, holding municipality is not bound to recognize partial assignments; as also in *Geist's Appeal*, 104 Pa. St. 355; *Railway Co. v. Volkert*, 58 Ohio St. 369, 370, 50 N. E. 925, holding assignment of half of a judgment may be enforced in equity; *Carter v. Nichols*, 58 Vt. 555, 5 Atl. 198, holding employer is not bound by partial assignment of employee's future wages. Cited in *Am., etc., Co. v. Gas Co.*, 47 Fed. 47, but not necessary to decision. See valuable note on this topic in 54 Am. Rep. 781; also 2 Am. St. Rep. 473, note.

Distinguished in *Methven v. Light Co.*, 66 Fed. 115, 35 U. S. App. 67, where debtor had recognized the assignment, in the following: *Exchange Bank v. McLoon*, 73 Me. 505, 510, 40 Am. Rep. 389, 394; *James v. Newton*, 142 Mass. 373, 376, 56 Am. Rep. 695, 698, 8 N. E. 125, 126; *Superintendent, etc., of P. S. v. Heath*, 15 N. J. Eq. 28; *Harris Co. v. Campbell*, 68 Tex. 27, 2 Am. St. Rep. 470, 3 S. W. 246, and *National Bank v. Kimberlands*, 16 W. Va. 589, 590, all holding partial assignment of a debt is enforceable in equity; in *Schultz v. Sutter*, 3 Mo. App. 141, holding a corporation can make an assignment of a call already due on stock, since it transfers the entire interest; dissenting opinion, *Shaver v. Telegraph Co.*, 57 N. Y. 472, majority holding a conditional acceptance of an order afterwards revoked, does not amount to an equitable assignment;



*Lowndes v. Ladson*, Rich. Eq. Cas. 319, holding order drawn on part of a fund will, as between the parties, be enforced in equity as an equitable assignment.

**Equitable assignment.**— Where an order is drawn for the whole of a fund, it amounts, after notice, to an equitable assignment, p. 286.

The following citing cases affirm and apply this holding: *Warren v. Emerson*, 1 Curt. 241, 242, F. C. 17,195, holding maker having acquired equitable interest of assignor, may use it in his defense to action on note; *United States v. Cutts*, 1 Sumn. 146, F. C. 14,912, holding transfer of stock, notwithstanding statute requiring it should be on books, passed an equitable interest; *Barcroft v. Denny*, 5 Houst. 14, holding a verbal acceptance of written order for payment of money amounts to an equitable assignment; *Wheatley v. Strobe*, 12 Cal. 98, 73 Am. Dec. 524, holding, under code, an order for money, for full amount, is an assignment; *Cashman v. Harrison*, 90 Cal. 302, 27 Pac. 285, holding bill of exchange does not operate as an equitable assignment, until after acceptance; *McWilliams v. Webb*, 32 Iowa, 579, holding, where order is drawn on the whole of a fund, after notice to drawee, it binds the funds in his hands in favor of payee, as against an attaching creditor of drawer; *First Nat. Bank v. Railway Co.*, 52 Iowa, 381, 35 Am. Rep. 282, 3 N. W. 398, holding bill of exchange, unaccepted, is not an assignment; *Buckner v. Sayre*, 18 B. Mon. 755, holding that acceptance of a bill of exchange is an appropriation of that fund to the holder; *Robbins v. Bacon*, 3 Me. 349, holding order for the whole of a fund, after notice to drawee, binds the fund in his hands; *Tripp v. Brownell*, 12 Cush. 382, holding order by seaman for wages due, on settlement of voyage, is an assignment; *Grammel v. Carmer*, 55 Mich. 204, 54 Am. Rep. 365, 21 N. W. 419, holding a draft does not operate as an assignment; in dissenting opinion of same case, 213, 21 N. W. 424; *Lewis v. Traders' Bank*, 30 Minn. 136, 14 N. W. 587, holding unaccepted draft is not an assignment of fund; *St. John v. Homans*, 8 Mo. 386, holding mere drawing of a check is not an assignment; *Janney v. Bank of Missouri*, 12 Mo. 586, holding bank does not become debtor to holder of government draft, until acceptance; distinguished in dissenting opinion of same case, 587; *Walker v. Mauro*, 18 Mo. 566, holding an order for the whole of debt is an equitable assignment of it; *Bank of Commerce v. Bogy*, 44 Mo. 18, 19, 100 Am. Dec. 250, 251, holding bill drawn upon debtor is evidence of an assignment; *Carter v. Burley*, 9 N. H. 564, it seems an indorsement of a promissory note may be treated as a bill of exchange; *Morton v. Naylor*, 1 Hill, 585, holding order on tenant to pay rent, accepted, is an equitable assignment; *Harris v. Clark*, 3 N. Y. 115, 118, 51 Am. Dec. 356, 358, holding an unaccepted draft not being an assignment is not a valid gift *causa mortis*; *Kahnweiler v. Anderson*, 78 N. C. 143, holding bill of exchange operates as an equitable assignment; *Gardner v. National City Bank*, 39 Ohio St. 605, hold-

ing person's draft amounted to equitable assignment, where drawee before knowledge of it had transmitted funds to drawer; *Lee v. Robinson*, 15 R. I. 370, 5 Atl. 290, holding order for all of a fund is an equitable assignment; *Martin v. Maner*, 10 Rich. L. 276, 70 Am. Dec. 225, holding a direction to transfer amount due him to credit of another, extinguishes the indebtedness without a transfer; *Blin v. Pierce*, 20 Vt. 30, holding order drawn for amount of debt operates as an equitable assignment, notice being given to debtor. Cited in *Railroad Co. v. Johnson*, 29 Kan. 231, but not necessary to decision.

Distinguished in *Randolph v. Canby*, 11 N. B. R. 296, 20 Fed. Cas. 258, holding mere presentation to drawee of a negotiable bill, drawn against a fund in his hands, less than bill, is not an equitable assignment; *In re Smith*, 15 N. B. R. 459, 22 Fed. Cas. 408, where the check was not presented until after bankruptcy of drawer; *Walker v. Seigel*, 12 N. B. R. 394, 29 Fed. Cas. 50, declaring the rule pertains solely to actions at law.

**Contracts.**—A creditor shall not be permitted to split up a single cause of action without the consent of his debtor, p. 288.

Rule applied in *Shankland v. Washington*, 5 Pet. 394, 8 L. 167, holding owner of lottery ticket cannot sell part of it and make promisor liable to every holder of a fragment; *The Hull of a New Ship*, 2 Ware (Dav.), 207, F. C. 6,859, holding creditor cannot divide cause of action by assigning parts; *Cook v. Bidwell*, 8 Fed. 456, holding partial assignments of one's right are not good as against the other contracting party; *Kansas City, etc., R. R. Co. v. Robertson*, 109 Ala. 299, 19 So. 433, holding one cannot, without consent of debtor, assign part of claim so as to enable assignee to maintain an action; *Chapman v. Shattuck*, 3 Gilm. (Ill.) 52, holding original parties to record can compromise suit, notwithstanding a partial assignment of the cause of action; *Crosby v. Loop*, 13 Ill. 629, holding an entire contract cannot be apportioned and enforced in fragments; also *Chicago & N. W. R. R. Co. v. Nichols*, 57 Ill. 467, holding entire cause of action cannot be severed by partial assignments; *Roberts v. Corbin*, 26 Iowa, 324, 326, 96 Am. Dec. 151, 152, holding holder of check cannot sue drawee for refusing to pay; *German Fire Ins. Co. v. Bullene*, 51 Kan. 775, 33 Pac. 469, holding claim against insurance company cannot be split up by assignments; *Otis v. Adams*, 56 N. J. L. 41, 27 Atl. 1093, holding, under statute, assignee of part of a contract cannot sue thereon in his own name, without consent of other party; *Yates v. Tisdale*, 3 Edw. Ch. 75, holding manager of lottery, where two parties have interest in ticket, may file interpleader; *Love v. Fairfield*, 13 Mo. 305, 53 Am. Dec. 149, holding owner of judgment at law cannot, without consent of debtor, assign a part of it; *Erwin v. Lynn*, 16 Ohio St. 547, holding that holder of note indorsed in blank cannot make part payable to



one party and part to another; *Little v. Portland*, 26 Or. 243, 37 Pac. 912, holding that when city splits up a demand, by executing warrants for separate amounts, it is liable on each warrant. Cited in *Grain v. Aldrich*, 38 Cal. 519, 99 Am. Dec. 424, but without particular application of the rule.

Distinguished in *Tiernan v. Jackson*, 5 Pet. 598, 8 L. 242, holding choses in action are unassignable, but if debtor promises to pay assignee, latter may maintain action for money received to his use; *The Elmbank*, 72 Fed. 613, 614, 616, holding an order to pay part of what may be realized from salvage service is enforceable in admiralty as an equitable assignment of part of a fund and is not subject to rule of law against splitting up causes of action; *Whittemore v. Judd, etc., Co.*, 124 N. Y. 577, 21 Am. St. Rep. 714, 27 N. E. 247, holding separate assignments of a judgment constitute no defense, if owners unite in a suit.

Miscellaneous citations.—Cited in *Cronin v. Patrick Co.*, 4 Hughes, 532, 89 Fed. 83, to point that assignee of bonds passing by assignment takes subject to equities; *Whetmore v. Murdock*, 3 Wood. & M. 386, F. C. 17,509, apparently not in point; also in *Hudson v. Weir*, 29 Ala. 299; *Kenner v. Creditors*, 8 Mart. (La.) (N. S.) 41, and *Chittenden v. Hurlburt*, 2 Aikens, 136.

5 Wheat. 291, 292, 5 L. 91, WALLACE v. ANDERSON.

*Quo warranto*, to try the title to an office, can only be maintained at the instance of the government, p. 292.

Rule applied in *Territory v. Lockwood*, 3 Wall. 239, 18 L. 48, holding proceeding of *quo warranto* to test person's right to exercise functions of Supreme Court of territory, must be in name of United States; *In re Yancey*, 28 Fed. 451, holding, where party appears with commission of president, under great seal, appointing him marshal, it is the duty of judge to take his bond and administer oath; *State ex rel. v. Town Council of Cahaba*, 30 Ala. 67, holding *quo warranto* for forfeiture of municipal charter cannot be filed on relation of a citizen; *State ex rel. v. Curtis*, 35 Conn. 378, 95 Am. Dec. 264, holding information in nature of *quo warranto* will not lie in State court to try right to office in bank organized under national act; *State ex rel. v. Bowen*, 8 S. C. 407, holding *quo warranto* to determine title to office of presidential elector cannot be maintained in name of State; *Wright v. Allen*, 2 Tex. 160, holding writ of *quo warranto* can only be issued in name of State; *State v. Railroad Co.*, 24 Tex. 116, holding State can institute suit to forfeit charter of a corporation without special authorization of legislature; *United States ex rel. v. Lockwood*, 1 Pinn. 363, holding proceedings in *quo warranto* must be at instance of the government. Cited in *State v. Kennard*, 25 La. Ann. 243, without any particular application of the rule.

**5 Wheat. 293-312, 5 L. 92, POLK'S LESSEE v. WENDELL.**

Federal courts conform to settled law of the States as to landed property, p. 302.

Rule applied in *United States v. Arredondo*, 6 Pet. 732, 8 L. 562, construing treaty with Spain of 1819, relative to grants of land in territory of Florida; *Brush v. Ware*, 15 Pet. 106, 10 L. 677, following State decisions as to whether courts can go behind patents for lands; *Wynn v. Garland*, 16 Ark. 462, inquiring into pre-emption claim; dissenting opinion, *Hall v. Pearl*, 7 J. J. Marsh. 579, discussing act providing for appropriation of waste lands; *Smith v. Power*, 23 Tex. 33, holding State decisions, settling construction of local laws relating to land, should be binding on every court.

**Public lands.**—Grant is void where State had no title or officer had no authority to issue it, p. 303.

The citations disclose a number of cases relying upon and applying this ruling: *Miller v. Kerr*, 7 Wheat. 5, 5 L. 382, holding prior entry on warrant issued by mistake cannot be supported against a senior patent; *Patterson v. Winn*, 11 Wheat. 384, 6 L. 500, holding, where grant is absolutely void, its validity may be contested at law; *United States v. Arredondo*, 6 Pet. 728, 730, 8 L. 561, 562, construing treaty with Spain of 1819, relative to grants in territory of Florida; *Sampeyreac v. United States*, 7 Pet. 241, 8 L. 672, holding that those coming in under void grant acquire nothing; *Rice v. Railroad Co.*, 1 Black, 375, 17 L. 152, holding grant by territory without title is void; *Sabariego v. Maverick*, 124 U. S. 281, 31 L. 438, 8 S. Ct. 1472, holding conveyance by officer acting authoritatively, will pass only such title as the government has; *United States v. Samperyac*, Hemp. 153, F. C. 16,216a, holding those coming in under void grant acquire nothing; *Chamberlain v. Marshall*, 8 Fed. 409, declaring patent issued without authority of law void; *Parker v. Duff*, 47 Cal. 562, holding patents showing they were issued for scrip for lands outside ceded territory, are void on their face; *Hilliard v. Connelly*, 7 Ga. 180, holding grant void on its face may be attacked collaterally in court of law; *Sykes v. McRory*, 10 Ga. 471, 54 Am. Dec. 404, holding grant issued by mistake cannot be impeached collaterally in an action at law; *Ballance v. McFadden*, 12 Ill. 324, holding patent issued in case not authorized by law, void; *De Armas v. New Orleans*, 5 La. 178, 198, holding permission given by government which has since lost authority is superseded by subsequent grant of succeeding government; *Mantle v. Noyes*, 5 Mont. 291, 5 Pac. 864, holding void a patent for lands previously sold by government; *Talbott v. King*, 6 Mont. 108, 9 Pac. 442, holding town site patent cannot cut off rights of a prior locator of a mining claim; *GrosLouis v. Northcut*, 3 Or. 399, holding claimant under donation law may, before patent issues, obtain such an interest in land that it will be subject to judicial sale; *Calloway v. Hopkins*, 11 Heisk. 377, holding grant made by State



without title is void; *Goode v. McQueens*, 3 Tex. 255, holding grant made is void, unless shown to have been made with approbation of supreme government; *Blankenpickler v. Anderson*, 16 Gratt. 62, holding patent void if grantee were dead at time of issuance. Cited with approval, but rule not particularly applied, in *Holliman v. Peebles*, 1 Tex. 700.

Distinguished in *Payne v. Treadwell*, 16 Cal. 229, holding grant by alcalde will be presumed to have been within his authority; dissenting opinion, *Pino v. Hatch*, 1 N. Mex. 140, majority holding political chief of province of New Mexico could not grant any of the public domain without express authority, but such grant is admissible in evidence against one having no better right; *Payne v. Treadwell*, 16 Cal. 229, and *Hart v. Burnett*, 15 Cal. 553, holding grant by alcalde is presumed to have been made within lawful authority.

**Public lands.**—A grant raises a presumption that every prerequisite to its issuance was complied with, p. 304.

Subsequent cases have very extensively affirmed and applied this holding, as follows: *Patterson v. Jenks*, 2 Pet. 237, 7 L. 409, holding burden of proof is on one attacking validity of a grant; *United States v. Arredondo*, 6 Pet. 731, 8 L. 562, construing treaty with Spain, of 1819, relative to grants of lands in Florida; *Bagnell v. Broderick*, 13 Pet. 448, 10 L. 241, holding patent from United States of public lands, is conclusive in action at law; *Best v. Polk*, 18 Wall. 118, 21 L. 808, holding the location is, in itself, evidence that directions of treaty were observed; *Mobile v. Esclava*, 9 Port. 596, 33 Am. Dec. 332, holding, when grant is made by public officer, it will be presumed he did it by order; *McConnell v. Wilcox*, 1 Scam. 351, holding decision of land register in relation to the right of pre-emption to a tract of lands within his jurisdiction, is conclusive; *Arnold v. Grimes*, 2 G. Greene, 83, holding patent from United States for land cannot be impeached at law for fraud; *Dewey v. Campau*, 4 Mich. 566, holding certified copy of map from general land office, is evidence of location of reserves; *Wray v. Doe*, 10 Smedes & M. 461, holding certificate of register of land office is evidence of date of location; *Kissell v. St. Louis Public Schools*, 16 Mo. 582, holding purchaser, to question legality of act setting aside school lands, must show it entirely without authority; *Frampton v. Wheat*, 27 S. C. 292, 294, 3 S. E. 464, 465, holding grant fair on its face cannot be assailed collaterally; *Houston v. Pillow*, 1 Yerg. 488, holding when land is re-marked according to calls of grant, such re-marking is conclusive; *Howard v. Colquhoun*, 28 Tex. 146, holding action of commissioner in issuing grant is conclusive, State not being a party; *Parkison v. Bracken*, 1 Pinn. 180, 39 Am. Dec. 297, holding that patent regular on its face will be presumed to have been executed according to law; *Ely v. Cram*, 17 Wis. 541, holding it is presumed that officers acting under a special statute rightfully exercised their authority.

Distinguished in *Moffat v. United States*, 112 U. S. 31, 28 L. 625, 5 S. Ct. 14, holding United States may assail patent fraudulently issued by its officers to a fictitious person; *Hardy v. Harbin*, 4 Sawy. 547, F. C. 6,060, holding patent does not affect any equitable relations of holders of subsequent conveyances from grantee to each other or third parties; *Reeder v. Barr*, 4 Ohio, 459, 22 Am. Dec. 763, holding there can be no presumption that rights of heirs have been divested by judgment of court of competent jurisdiction; *Bell v. Duncan*, 11 Ohio, 197, holding, where a patent of the United States recites assignment by persons competent to convey, there is no presumptive notice of latent defects; *Neal v. E. T. College*, 6 Yerg. 197, holding this presumption falls in equity, if grantee had no incipient title by a warrant to the land granted.

Miscellaneous.—Cited in *Strother v. Lucas*, 12 Pet. 437, 9 L. 1147, application doubtful.

5 Wheat. 313-317, *MARSHALL v. BEVERLEY*.

**Parties.**—A judgment at law cannot be enjoined, without making the judgment creditor a party, even though defendant admits himself to be the owner of the judgment, as that may be collusive, p. 316.

Cited and principle applied in *Ribon v. Railroad Co.*, 16 Wall. 451, 21 L. 369, holding bill defective where, in action charging collusion, trustees and consenting stockholders were not made parties; *Phillips v. Mariner*, 5 Biss. 28, F. C. 11,105, holding, where on foreclosure on two notes, no provision was made in bill or decree for third note, a bill of review will lie; *Wilson v. Castro*, 31 Cal. 427, holding all parties materially interested in suit in equity ought to be made parties; *Bryant v. Russell*, 23 Pick. 523, holding a creditor seeking to carry into effect an assignment in trust for benefit of creditors must make all creditors parties.

Distinguished in *Hannegan v. Roth*, 12 Wash. 697, 44 Pac. 256, holding court will not dismiss action on account of nonjoinder of necessary party, but will retain it until all necessary parties are brought in.

5 Wheat. 317-325, *LOUGHBOROUGH v. BLAKE*.

**Taxes.**—Power of congress to levy and collect taxes, duties and excises is coextensive with territory of the United States, p. 319.

Cited in dissenting opinion, *Pollock v. Farmers' L. & T. Co.*, 158 U. S. 693, 39 L. 1145, 15 S. Ct. 942, majority holding income tax a direct tax and invalid.

Distinguished in *Day v. Buffinton*, 3 Cliff. 386, F. C. 3,675, holding salary of judge payable by State not taxable as income by United States; *Smith v. Short*, 40 Ala. 386, holding act of congress requiring stamp on legal process of State court to be unconstitutional; *Union Bank v. Hill*, 3 Cold. 327, holding act of congress taxing original process of State courts void.



Census is to furnish a standard by which direct taxes may be apportioned, p. 321.

Cited in *United States v. Mitchell*, 58 Fed. 998, holding provision of act imposing penalty for refusal of corporate officers to answer questions is ineffective, because there is no provision requiring such answers.

Congress can exercise exclusive jurisdiction in all cases within District of Columbia, p. 324.

Cited in *Dred Scott v. Sandford*, 19 How. 514, 15 L. 746, holding congress may legislate over a territory, but cannot prohibit a citizen of United States from taking his slaves there; in dissenting opinion in same case, 621, 15 L. 790.

Direct taxes may be imposed on District of Columbia by congress, p. 335.

Cited in *Pacific Ins. Co. v. Soule*, 7 Wall. 446, 19 L. 99, deciding that tax on premiums, assessments and income of insurance company is not "a direct tax;" *Gibbons v. District of Columbia*, 116 U. S. 407, 29 L. 681, 6 S. Ct. 429, holding congress may tax different classes of property within the District at different rates; *Parsons v. District of Columbia*, 170 U. S. 56, 42 L. 947, 18 S. Ct. 525, holding congress could create a general system to store water in the District and prescribe amount of assessment and the method of its collection. Cited, dissenting opinion, *Treadway v. Schnauber*, 1 Dak. Ter. 265, 267, 46 N. W. 474, 475, with no particular application.

Miscellaneous.—Cited in *Rhode Island v. Massachusetts*, 12 Pet. 733, 9 L. 1264, and *Second Municipality v. Duncan*, 2 La. Ann. 187, apparently not in point.

#### 5 Wheat. 326-338, 5 L. 100, *MECHANICS' BANK v. BANK OF COLUMBIA*.

Parol evidence is, in case of doubt, admissible to show drawing of check by bank cashier was an official and not a private act, p. 337.

The following citing cases approve and variously apply this principle: *Fleckner v. United States Bank*, 8 Wheat. 358, 5 L. 636, holding banks may bind themselves by acts of officers without the corporate seal; *Bradley v. The Washington, etc., Packet Co.*, 13 Pet. 98, 10 L. 77, holding extrinsic evidence is admissible to give effect to a written instrument by applying it to its proper subject-matter; *Baldwin v. Bank*, 1 Wall. 241, 17 L. 536, admitting parol evidence to show that person to whom note was drawn as cashier, was acting as cashier when he took the note; *Metcalf v. Williams*, 104 U. S. 97, 26 L. 667, holding agent signing paper, without writing principal's name, is not liable personally to one with knowledge; *Xenia v. Stewart*, 114 U. S. 228, 29 L. 103, 5 S. Ct. 847, holding

declarations of cashier at time of transaction may be used against bank; *Bank of Newbury v. Baldwin*, 1 Cliff. 523, F. C. 892, holding where cashier took note running to him as cashier without specifying what bank, evidence admissible to show he was acting for a certain bank; *Dessau v. Bours*, McCall. 23, F. C. 3,825, holding where there is sufficient in instrument to create a doubt as to whom credit was given, parol evidence admissible to remove it; *Baker v. Bank*, 86 Fed. 1009, holding where shares are registered to A., as cashier of defendant bank, defendant may set up that it holds them as a pledgee; *In re Southern M. R. R. Co.*, 10 N. B. R. 89, 22 Fed. Cas. 825, holding obligation signed by corporate officer affixing his official position, may be shown to be obligation of the corporation; *In re Troy Woolen Co.*, 8 N. B. R. 414, 24 Fed. Cas. 246, holding a party dealing with an agent may resort to the principal, unless contract was exclusively on agent's credit; *Everett v. United States*, 6 Port. 182, 30 Am. Dec. 588, holding agents of corporation may act without a seal; *Lazarus v. Shearer*, 2 Ala. 723, holding when it is doubtful whether party signs personally or as an agent, parol evidence is admissible; as also in *Wetumpka R. R. Co. v. Bingham*, 5 Ala. 663, ruling similarly; *Clealand v. Walker*, 11 Ala. 1064, 46 Am. Dec. 240, holding prima facie intendment that party signed as principal may be rebutted by proof; *Savings Bank v. Davis*, 8 Conn. 202, court dividing as to whether an attorney may be appointed by corporation to convey land, without a power under seal; *Bean v. Pioneer Min. Co.*, 66 Cal. 453, 56 Am. Rep. 107, 6 Pac. 87, where payee knew note was given for indebtedness of company, agent not liable though note read, "We promise" and both names appeared in signature; *Hobson v. Hassett*, 76 Cal. 206, 9 Am. St. Rep. 195, 18 Pac. 322, holding one signing with "president" affixed was individually liable, nothing on note indicating who was principal; *S. F. Co. v. Von Schmidt Dredge Co.*, 118 Cal. 373, 50 Pac. 652, where evidence on face of charter indicated it was designed for the copartnership, parol evidence was admissible to bind the company; *Hall v. Rand*, 8 Conn. 575, admitting parol evidence of subject-matter to affect the construction; *Stamford Bank v. Ferris*, 17 Conn. 270, 272, holding transfer of stock to "A., Cashier," to secure liability due bank, vested legal right to shares in bank; *Merchants' Bank v. Central Bank*, 1 Ga. 429, 431, 44 Am. Dec. 668, 670, holding in instrument not under seal parol evidence admissible to remove doubt as to liability; *Ghent v. Adams*, 2 Ga. 218, admitting parol evidence to show whether justices signed note in official or individual capacity; *Ohio & M. R. R. Co. v. Middleton*, 20 Ill. 635, 636, holding extrinsic evidence admissible, when doubtful whether contract was to bind principal and agent; *Swarts v. Cohen*, 11 Ind. App. 23, 38 N. E. 537, admitting parol evidence to clear up ambiguity as to liability on note; *Gourley v. Hankins*, 2 Iowa, 77, holding as between third person, one may show by parol



that person doing act is officer de facto; dissenting opinion, *Mathews v. Mattress Co.*, 87 Iowa, 250, 54 N. W. 227, 19 L. R. A. 679, and n., on note "We promise," signed "Co.; B. P't," parol evidence not admissible to bind company alone; *Taylor v. Williams*, 17 B. Mon. 494, holding officer of corporation acting as agent and within his authority not liable individually; *Hopkins v. Lacouture*, 4 La. 66, holding power executed by agent in his own name binds principal; *Barlow v. Society*, 8 Allen, 461, holding note reading "I, as treasurer, etc., promise" and signed "B., Treas." the note of the society; *Detroit v. Jackson*, 1 Doug. (Mich.) 117, holding principal liable, though agent had signed in his own name.

Other citing cases make the following applications of the syllabus principle: *Farmers & M. Bank v. Bank*, 1 Doug. (Mich.) 469, 471, holding bill, drawn on "A., Cashier of B. Bank," and accepted by "A., Cashier," was drawn on and accepted by bank; *First Nat. Bank v. Loyhed*, 28 Minn. 398, 10 N. W. 422, holding it is competent for agent to sign simply the name of the principal; *Hardy v. Pilcher*, 57 Miss. 22, 34 Am. Rep. 433, admitting parol evidence to show acceptance was not to bind agent personally; *Martin v. Smith*, 65 Miss. 3, 3 So. 34, admitting parol evidence where bill was signed "A., Treas.;" *Southern Hotel Co v. Newman*, 30 Mo. 121, holding acts of corporation may be proved by oral testimony; *Smith v. Alexander*, 31 Mo. 195, where signer affixes official character, parol evidence is admissible to determine liability; *Washington M. F. Ins. Co. v. St. Marys*, 52 Mo. 489, 490, holding if there is an ambiguity in description of person, parol evidence is admissible; *First Nat. Bank v. Gay*, 63 Mo. 42, 21 Am. Rep. 435, holding simple signing of name of principal by agent is sufficient; *Savage v. Rix*, 9 N. H. 270, holding to bind principal, it must in some way appear to be his contract; *Morse v. Green*, 13 N. H. 36, 38 Am. Dec. 473, holding fact that signature was placed there by an agent need not appear on the note; *Dow v. Moore*, 47 N. H. 426, holding if name of principal appear in contract, not under seal, he alone will be bound if that intent can be collected from the instrument; *Bell v. Martin*, 18 N. J. L. 169, admitting parol evidence to identify note mentioned in writing; *Kean v. Davis*, 21 N. J. L. 690, 692, 47 Am. Dec. 187, 189, holding in case of ambiguity parol evidence admissible to show intent of parties signing; *Smith v. Clayton*, 29 N. J. L. 361, holding parol evidence admissible to show meaning of "grain;" *Luna v. Mohr*, 3 N. Mex. 65, 67, 1 Pac. 867, 868, holding one cannot be liable on bill as drawer, his name not appearing thereon as such; *Bank of Utica v. Magher*, 18 Johns. 346, holding parol evidence admissible to explain the ambiguity on face of instrument; *Ely v. Adams*, 19 Johns. 318, admitting parol evidence to explain ambiguous writing; *Fish v. Hubbard*, 21 Wend. 661, admitting parol evidence to show location and ownership of dam and mills in reference to which agreement was made; dissenting opinion,

*Safford v. Wyckoff*, 4 Hill, 449, majority holding bill issued by association, organized without consent of comptroller, will bind it, though signed by the cashier only; *Barnes v. Ontario Bank*, 19 N. Y. 166, holding bank bound by certificate of deposit signed by the cashier; *Rumbough v. Improvement Co.*, 106 N. C. 466, 11 S. E. 529, holding evidence that A. was acting as officer of such corporation and had authority to accept drafts admissible; *Ish v. Crane*, 8 Ohio St. 546, where transaction was not done in name of principal, but by his authority, it is obligatory on his heirs, likewise in *Ish v. Crane*, 13 Ohio St. 610; *Guthrie v. Imbrie*, 12 Or. 193, 53 Am. Rep. 339, 6 Pac. 670, holding when instrument is ambiguous, liability of principal or agent may be proved by parol evidence; *Early v. Wilkinson*, 9 Gratt. 75, 78, admitting parol evidence to remove ambiguity on face of instrument; *Waddill v. Sebree*, 88 Va. 1015, 29 Am. St. Rep. 768, 14 S. E. 850, where one signs as agent, parol evidence is admissible to show who is the undisclosed principal; *Brewster v. Baxter*, 2 Wash. Ter. 141, 3 Pac. 845, holding parol evidence admissible to show circumstances under which incomplete memorandum of sale was signed, and the capacity of signer; *Deven-dorf v. West Va. Oil Co.*, 17 W. Va. 148, 155, 159, holding a person bound by signature on note, which he has virtually made his own by allowing its use in the course of his business; *Ganson v. Madigan*, 15 Wis. 154, 82 Am. Dec. 665, admitting parol evidence to explain patent ambiguity. See the following valuable notes: 12 Am. Dec. 714, where authorities are collected; 42 Am. Dec. 379, and 52 Am. Dec. 776, 95 Am. Dec. 72; also 77 Am. Dec. 762, note on cashier's power to indorse note, where authorities are collected. Cited but without application of the rule in *Port v. Williams*, 6 Ind. 220; as also in *Robinson v. St. Louis*, 28 Mo. 490, and *Le Roy v. Beard*, 8 How. 469, 12 L. 1160.

Distinguished in *Cragin v. Lovell*, 109 U. S. 198, 27 L. 905, 3 S. Ct. 134, holding no action lies against principal on note signed by agent, not disclosing name of principal; *Falk v. Moebs*, 127 U. S. 605, 606, 607, 32 L. 268, 269, 8 S. Ct. 1322, 1323, holding where note was signed, corporation name, A., Sec., and indorsed A., Sec.; parol evidence was inadmissible to show indorser intended to bind himself personally; *Warner v. Brinton*, 29 Fed. Cas. 238, 240, holding extrinsic evidence inadmissible to explain patent ambiguity in will; *Cleaveland v. Stewart*, 3 Ga. 297, holding parties signing as "trustees" individually liable; *Hypes v. Griffin*, 89 Ill. 137, 31 Am. Rep. 73, holding parol evidence is inadmissible to exonerate a trustee appearing as principal to a note; *Bank v. Carpenter*, 26 Ind. 113, where debtor of bank assigned stock to B., without describing him as cashier, B. held it personally; *Underhill v. Gibson*, 2 N. H. 355, 9 Am. Dec. 85, holding if agent uses no language applicable to corporation, and his authority is questionable, he is personally liable; *Kean v. Davis*, 20 N. J. L. 429, holding person cannot by



parol evidence discharge himself from the personal liability established by the instrument; see dissenting opinion, p. 433; *Bickley v. Bank*, 39 S. C. 291, 39 Am. St. Rep. 726, 17 S. E. 978, holding parol inadmissible to show certificate of deposit signed "B., Manager," was made with B. the bank's president; see 43 S. C. 536, 21 S. E. 889; *Shuey v. Adair*, 18 Wash. 194, 202, 63 Am. St. Rep. 883, 889. 51 Pac. 390, 393, 39 L. R. A. 476, agent signing note in his own name cannot introduce parol evidence to exonerate himself from personal liability; *Sparks v. Dispatch T. Co.*, 104 Mo. 543, 24 Am. St. Rep. 355, 15 S. W. 420, holding where president merely signs his individual name, parol evidence is inadmissible to prove agency; *Luna v. Mohr*, 3 N. Mex. 65, 1 Pac. 867, holding party cannot, by parol testimony, be liable upon negotiable instrument where his name is not disclosed.

**Agency.**—Principal is liable for acts of agent done in the exercise of, and within the scope of his power, p. 337.

Rule applied and affirmed in the following citing cases: *The Joseph Grant*, 1 Biss. 196, F. C. 7,538, holding bill of lading signed in blank by master, void; *Walker v. Manhattan Bank*, 25 Fed. 254, holding bank cannot, without express authority from principal, apply money deposited by agent to debt due it from third person; *Blum v. Robertson*, 24 Cal. 140, holding principal not bound by act of agent beyond his powers; *Poulin v. Railroad Co.*, 47 Fed. 860, holding company liable, where passenger was ejected through defect in ticket, resulting from omission of ticket agent; *Sagers v. Nuckolls*, 3 Colo. App. 101, 32 Pac. 189, holding master not liable for act of servant done without the course of employment; *Merchants' Bank v. Central Bank*, 1 Ga. 428, 430, 44 Am. Dec. 666, 669, holding corporation liable where it accepts benefit of act of agent done without authority; *McDougald v. Bellamy*, 18 Ga. 432, holding that corporation is responsible for wrongs of servants; *Foster v. Essex Bank*, 17 Mass. 509, 9 Am. Dec. 179, holding bank not liable where cashier took gold from cask deposited in bank for safe-keeping; *Huntington v. Knox*, 7 Cush. 375, holding principal may maintain action for price of article sold by agent not disclosing his agency; *Sanborn v. Insurance Co.*, 16 Gray, 454, 77 Am. Dec. 421, holding agent of company authorized "to effect insurance," can make an oral contract; *Page v. Lathrop*, 20 Mo. 593, holding extrinsic evidence admissible to show agent's authority; *Franklin v. Insurance Co.*, 52 Mo. 465, holding authority of agent may be proved by custom of the business, and habits of principal; *Norton v. Bank*, 61 N. H. 593, 60 Am. Rep. 336, holding bank not liable on guaranty made by officer, it not having that power; *Bruce v. Reed*, 104 Penn. St. 414, 40 Am. Rep. 587, holding proprietor of newspaper liable for act of employee in publishing libel; *Maxwell v. Planters' Bank*, 10 Humph. 510, holding cashier had

authority to indorse note given to bank; *Northern Bank v. Johnson*, 5 Cold. 94, holding restrictions in charter requiring both signature of president and cashier, do not apply to drawing and indorsing of checks and drafts, and cashier is not individually liable on them; *Walsh v. Pierce*, 12 Vt. 138, holding general agency may be proved by dealings between the parties or by subsequent recognition. See also 77 Am. Dec. 760, note on power of cashier to issue checks.

Distinguished in *Wilson v. Peverly*, 2 N. H. 549, holding master not liable for negligence of servant in exceeding special orders.

Miscellaneous.—Cited in *Sumner v. Marcy*, 3 Wood. & M. 111, F. C. 13,609, apparently not in point; *Power v. Kane*, 5 Wis. 269, to point that usage may become a part of a contract.

5 Wheat. 338-359, 5 L. 104, *THE JOSEFA SEGUNDA*.

**Admiralty**—Plea of distress or necessity to excuse violation of law and avoid forfeiture must be conclusively established by claimant, p. 354.

Rule applied in *United States v. Schooner Catharine*, 2 Paine, 747, F. C. 14,755, holding where voyage is commenced to Africa, with preparations usually employed in slave trade, claimant must remove doubt with unequivocal proof.

**Admiralty**.—Captors may subject property captured to forfeiture for violation of municipal law, even as against the original owners, p. 357.

Rule applied in *Hopner v. Appkeby*, 5 Mason, 75, F. C. 6,699, holding captor has right to sell property.

Miscellaneous citations.—Referred to in *The Josefa Segunda*, 10 Wheat. 319, 6 L. 331. Cited in *Merritt v. Package of Merchandise*, 30 Fed. Rep. 197, and *Coweta, etc., Mfg. Co. v. Rogers*, 19 Ga. 421, 65 Am. Dec. 606; but to no specific point decided.

5 Wheat. 359-374, 5 L. 109, *BLAKE v. DOHERTY*.

**Public land**—Description in grant is sufficient if object conveyed is ascertainable with aid of extrinsic evidence, p. 362.

Rule applied in the following citing cases: *Cox v. Hart*, 145 U. S. 389, 36 L. 747, 12 S. Ct. 967, holding parol evidence admissible to show to which of two tracts of land description in marshal's deed applies; *Brown v. Hunt*, 4 Ala. 135, holding where patent conveyed *eo nomine* a quarter section, though according to official survey it contains less, the latter limits the grant; *Miller v. Cullum*, 4 Ala. 581, holding parol evidence admissible to indicate monument referred to in deed; *Mayor, etc., of Mobile v. Farmer*, 6 Ala. 741, holding power of register to determine conflicting claims, does not extend to a complete grant; *Kennedy v. Townsley*, 16 Ala. 245, hold-



ing a donation claimant can take nothing until quantity of land has been ascertained; dissenting opinion in *Hughes v. Wilkinson*, 35 Ala. 473, majority holding it cannot be proved by parol testimony of justice that acknowledgment of wife was intended to apply to deed and not to relinquishment; *Stanley v. Green*, 12 Cal. 166, holding description of land by name or number is sufficient; *Andrews v. Murphy*, 12 Ga. 433, holding description is sufficient that shows intention of grantor as to what property is conveyed; *Jennings v. National Bank*, 74 Ga. 788, holding parol evidence may be resorted to, to explain ambiguity in a deed; *Mayor, etc., of Chauncey v. Brown*, 99 Ga. 771, 26 S. E. 765, parol evidence admissible to show application of deed to land; *Pursley v. Hayes*, 22 Iowa, 40, 92 Am. Dec. 373, holding grant not void for uncertainty, if the court can imagine testimony which would identify the monument; *Slater v. Breese*, 36 Mich. 81, holding it is always competent to identify natural monuments by extrinsic proof; *Peacher v. Strauss*, 47 Miss. 362, holding extrinsic evidence of county and State, where land is, admissible; *Campbell v. McArthur*, 2 Hawks. 38, 11 Am. Dec. 740, holding mistake in courses of a deed may be corrected by reference to another deed; *Cooper v. White*, 1 Jones (N. C.), 392, holding mistake in courses or distance may be corrected by a more certain description in the deed or by a plat referred to in same; *McChesney v. Wainwright*, 5 Ohio, 453, holding deed describing land as half the tract granted by another deed is *prima facie* a good description; *Raymond v. Coffey*, 5 Or. 134, holding parol evidence is admissible to locate boundaries where ambiguity exists; *Boehreinger v. Creighton*, 10 Or. 44, admitting parol evidence to show location of a stake; *Zeigler v. Hautz*, 8 Watts, 384, holding words of general description may be made definite by extrinsic circumstances; *Douthitt v. Robinson*, 55 Tex. 74, holding extrinsic evidence admissible to render a deed certain.

Distinguished in *Murphy v. Hall*, 68 Wis. 208, 31 N. W. 757, holding description of land by numbers without referring to any book or map is defective for uncertainty; *Wiley v. Smith*, 3 Ga. 558, holding where there is no ambiguity in a will parol evidence is inadmissible.

**Public lands — Private survey** made by direction of interested party inadmissible to prove boundary of grant of public lands, p. 364.

Rule applied in *Rose v. Davis*, 11 Cal. 142, rejecting map of United States surveyor, when authority to act had not been proved; *Surget v. Little*, 5 Smedes & M. 331, holding parol evidence that private survey conforms to official survey is inadmissible.

**Natural objects** called for in grant may be proved by testimony not found in the grant, but consistent with it, p. 363.

**Public lands.**—Plat and certificate of survey annexed to a patent of public land, as also a copy of the entry on which the survey was made, are admissible evidence to identify land patented, p. 364.

5 Wheat. 374-385, 5 L. 113, *HANDLEY v. ANTHONY*.

**Boundary.**—When a river is the boundary between two States and original property is in neither, each owns to the middle of the stream, p. 379.

Rule applied in *The Schooner Fame*, 3 Mason, 150, F. C. 4,634, holding true line between United States and British provinces is the middle of stream; *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 546, 549, 5 Am. St. Rep. 552, 555, 17 N. E. 443, 444, holding it is the main—permanent—river which constitutes the boundary; *Flynn v. Boston*, 153 Mass. 373, 26 N. E. 868, holding line between the cities to be the middle of the channel; *Fletcher v. Thunder Bay, etc.*, *Boom Co.*, 51 Mich. 284, 16 N. W. 649, holding adjoining owner has right to land between middle of channel and shore; *Claremont v. Carlton*, 2 N. H. 372, 9 Am. Dec. 90, holding island lying nearest the bank where premises are situated passes by the deed; *Starr v. Child*, 20 Wend. 153, holding under conveyance “to and along shore,” grantee takes *ad filum æquæ*; *Ingram v. Threadgill*, 3 Dev. 61, holding owners of bank have a several fishery to the middle of the stream; *Spears v. State*, 8 Tex. App. 470, holding jurisdiction of Texas extends to the middle of the river; *Ex parte McNeeley*, 36 W. Va. 86, 32 Am. St. Rep. 832, 14 S. E. 436, 15 L. R. A. 227, applying the rule in determining place where blow was struck.

**Boundaries.**—Where a State, as original proprietor of lands on both sides of river, grants territory on one side, it retains the river, and newly-created State extends to the river only, p. 379.

The following citing cases affirm and apply this principle: *Howard v. Ingersoll*, 13 How. 412, 14 L. 202, holding jurisdiction of Georgia extends to the opposite bank of the river; dissenting opinion, 424, 425, 14 L. 208, as also in *Alabama v. Georgia*, 23 How. 514, 16 L. 560, ruling similarly; *Indiana v. Kentucky*, 136 U. S. 503, 505, 507, 34 L. 330, 331, 332, 10 S. Ct. 1051, 1052, 1053, holding dominion of State after its admission to the Union continues unaffected by action of the forces of nature; *Henderson B. Co. v. Henderson City*, 173 U. S. 612, 613, holding city of Henderson could tax so much of the bridge as was between low-water mark on the Kentucky shore and low-water mark on the Indiana shore, since the boundary of Kentucky extends to low-water mark on Indiana shore; *Corfield v. Coryell*, 4 Wash. C. C. 384, F. C. 3,230, holding claim of New Jersey to parts below low-water mark cannot be maintained; *Aitcheson v. The Endless Chain Dredger*, 40 Fed. 256, holding concurrent jurisdiction of States extends over the whole of a dividing river; *In re Mattson*, 69 Fed. 537, holding one State cannot regulate divid-



ing river unless the other acquiesces; Pea Patch Island, 30 Fed. Cas. 1147, 1148, holding territory of Delaware extends to low-water mark on the Jersey shore; Boardman v. Scott, 102 Ga. 420, 30 S. E. 988, where deed conveyed land bounded by an artificial pond, grant extended to low-water mark at time of deed; Howard v. Ingersoll, 17 Ala. 790, 791, holding grant to shore of river conveys to the water's edge; Emery v. Collings, 1 Harr. (Del.) 329, note, considering the jurisdiction of State over bay and river; Stinson v. Butler, 4 Blackf. (Ind.) 285, holding owner's rights on Indiana side extends only to low-water mark; as also in Cowden v. Kerr, 6 Blackf. (Ind.) 280; Gentile v. State, 29 Ind. 411, holding exception of Ohio river in act regulating fishing, is not local legislation, since it is without the State; Carlisle v. State, 32 Ind. 56, holding county along Ohio is bounded by low-water mark; Brophy v. Richeson, 137 Ind. 121, 36 N. E. 426, holding where description was "to low-water mark" the bed of the lake was excluded; Flemming v. Kenney, 4 J. J. Marsh. 158, holding where vendor owned both sides of a creek and gave his bond for land "to begin on bank," stream below low-water mark is excluded; McFall v. Commonwealth, 2 Met. (Ky.) 396, holding jurisdiction of Kentucky extends to low-water mark on Ohio side; Louisville Bridge Co. v. Louisville, 81 Ky. 196, holding Kentucky has jurisdiction over all the soil to low-water mark; Lincoln v. Wilder, 29 Me. 179, holding term "bounded by shore," excludes the use of river; Wood v. Kelley, 30 Me. 55, holding in conveyance of land bounded by pond, title extends to low-water mark; Binney's Case, 2 Bland Ch. 127, holding the Potomac belongs entirely to Maryland, above tide; State v. Babcock, 30 N. J. L. 33, holding exclusive jurisdiction over Hudson river is in the State of New York; Gough v. Bell, 22 N. J. L. 489, holding owner of lands in New Jersey along shore of tide waters may extend wharf to low-water mark; Halsey v. McCormick, 13 N. Y. 299, holding "to the bank of a creek" includes land to low water; McCulloch v. Aten, 2 Ohio, 310, holding where deed reads from corner on bank, "thence down said creek," boundary is low-water mark; Benner v. Platter, 6 Ohio, 508, holding a call in a survey, for a stream not navigable, the boundary is the middle of the stream; Booth v. Hubbard, 8 Ohio St. 246, holding territorial limits of Ohio extend on the southwest to low-water mark; Commonwealth v. Garner, 3 Gratt. 664, 754, where sovereign State grants territory on other side of river, query, whether grant is bounded by top of bank, or low-water mark; concurring opinion of Johnston, J., 726, 731, 732; dissenting opinion of McComas, J., 684, 694, 701, 712, 717, and of Baker, J., 742; State v. Plants, 25 W. Va. 122, 124, 126, 52 Am. Rep. 212, 214, 215, holding the jurisdiction of West Virginia is coextensive with the water of the Ohio while confined in its banks; Bridge Co. v. Pt. Pleasant, 32 W. Va. 331, 9 S. E. 232, holding a town may extend its limits to include railroad bridge across the Ohio; J. T. Keator Lumber Co. v.

Boom Corp., 72 Wis. 91, 7 Am. St. Rep. 855, 38 N. W. 540, holding States have concurrent jurisdiction of boundary river. See also valuable note, 10 Am. Dec. 389, on navigable river as a boundary, collecting authorities; 27 Am. St. Rep. 61, note as to boundary line along shore, collecting authorities. Cited also in *St. Clair v. Loingston*, 23 Wall. 63, 23 L. 62; see 16 Am. Rep. 525, note, but not necessary to decision; *Hagan v. Campbell*, 8 Port. 24, 33 Am. Dec. 270, but deciding the case on the common law of England; *Sherlock v. Alling*, 44 Ind. 190, but question not decided; *Boston v. Richardson*, 13 Allen, 157, without particular application, likewise in *Rhode Island v. Massachusetts*, 12 Pet. 727, 733, 749, 9 L. 1262, 1264, 1270.

Distinguished in *St. Joseph, etc., R. R. Co. v. Devereux*, 41 Fed. 17, holding where government designates river as a boundary, the center is the line; *Memphis, etc., Packet Co. v. Pikey*, 142 Ind. 308, 309, 40 N. E. 529, holding that by virtue of compact, Indiana has concurrent jurisdiction with Kentucky on the Ohio river; *McManus v. Carmichael*, 3 Iowa, 36, 50, 51, discussing rights of riparian owners.

**Boundary.**—In case of doubt, every country lying upon a river is presumed to have no other limits but the river itself, p. 380.

Cited in *French v. Bankhead*, 11 Gratt. 159, 165, holding when officers of United States elect high-water mark as the boundary, and surveyor adopted it, and deed conveyed to it, the land passes to that boundary.

**Accretion.**—Gradual accretion of land belongs to party owning shore, p. 380.

Rule applied in *Shively v. Bowlby*, 152 U. S. 36, 38 L. 344, 14 S. Ct. 561, holding new States have the same rights to accretion as the original States; *Berry v. Snyder*, 3 Bush, 280, 96 Am. Dec. 228, holding accretion in nonnavigable streams belongs to the adjoining owners.

Distinguished in *Fulton v. Frandolig*, 63 Tex. 332, where there had been an actual survey, and accretion was formed on reef without the survey.

**Boundary.**—Where a State owns to a river it is deemed to own to low-water mark; accordingly an island near the Indiana shore of the Ohio, which at low water is a peninsula, belongs to Indiana, pp. 380-384.

Understanding of people of the vicinage considered in aid of construction of compact, p. 384.

Rule applied in *Strother v. Lucas*, 12 Pet. 437, 9 L. 1147, holding term "laws" in a treaty includes settled customs and usages; *Polard v. Kibbe*, 14 Pet. 413, 10 L. 519, holding terms "new grant, etc.," refers to grants made by local authorities of Spain after the acquisition of Louisiana by the United States, and may be confirmed by



congress; *Middleton v. Pritchard*, 3 Scam. 521, 38 Am. Dec. 116, as an instance of where rules of common law were applied to interpretation of grants.

Miscellaneous citations.—Cited in *Waring v. Clarke*, 5 How. 481, 12 L. 245, and *United States v. New Bedford Bridge*, 1 Wood. & M. 483, F. C. 15,867, as to admiralty jurisdiction of crimes; *Kennedy v. Elliott*, 85 Fed. 835, as an instance of where Supreme Court adjudicated adverse claims of individuals to real estate, where boundary line between States had to be ascertained in order to determine rights of litigants.

5 Wheat. 385-393, 5 L. 115, LA AMISTAD DE RUES.

**Admiralty.**—Probable profits of a voyage are not a fit rule for the ascertainment of damages in cases of marine torts, p. 389.

Rule applied in *Howard v. Stillwell*, 139 U. S. 206, 35 L. 150, 11 S. Ct. 503, holding anticipated profits cannot be recovered for delay in putting up a mill; *Cincinnati Gas Co. v. Western Siemens Co.*, 152 U. S. 206, 38 L. 413, 14 S. Ct. 525, refusing to allow for profits which would have been received if a sale had been made; *Pacific Ins. Co. v. Conrad*, 1 Bald. 144, F. C. 10,647, allowing only value of goods with interest; *The Alice*, 12 Fed. 502, holding measure of damages for nondelivery of cargo is its value at place of shipment and not at place of destination; *McDaniel v. Crabtree*, 21 Ark. 436, refusing to allow for prospective profits; *McAlpin v. Lee*, 12 Conn. 133, 30 Am. Dec. 610, allowing as damages difference between price agreed upon and value of property sold; *The Western Gravel Road Co. v. Cox*, 39 Ind. 264, refusing to allow for tolls in action for failure to complete road in time; dissenting opinion, *Bouldin v. Alexander*, 7 T. B. Mon. 430, majority holding remedy for property seized under an execution against another is in law; *Blanchard v. Ely*, 21 Wend. 350, 34 Am. Dec. 256, holding in action for price of steamboat, defendant may not set off loss of profits; *Cincinnati v. Evans*, 5 Ohio St. 604, refusing to allow damages for profits, but allowing rent; *Livingston v. Exum*, 19 S. C. 228, refusing to allow for profits occasioned by another party being enjoined.

Distinguished in *Illinois Central R. R. Co. v. Davidson*, 76 Fed. 522, 46 U. S. App. 300, admitting evidence of plaintiff's earnings in past years to show amount of damages; *Griffin v. Colver*, 16 N. Y. 492, 69 Am. Dec. 720, holding for breach of contract to deliver engine by certain day ordinary hire can be recovered.

**Prize.**—If prize is captured in neutral waters, courts of neutral can only restore her with expense during pendency of suit, and cannot give vindictive damages, p. 389.

Cited and applied in *The Florida*, 101 U. S. 42, 25 L. 899, dismissing libel by captain of captor against rebel steamer captured in Bahia, our government having disavowed the act of capture; *Hopner*

*v. Appleby*, 5 Mason, 76, F. C. 6,699, holding court had no right to control captors in their sale of prize.

**Prize.**—Where original owner seeks restitution in neutral court upon ground of violation of neutrality laws by captor, onus probandi rests upon him, p. 391.

**Miscellaneous.**—Cited in *United States v. Cement*, 27 Fed. Cas. 297, apparently not in point.

5 Wheat. 394-411, 5 L. 117, *LYLE v. RODGERS*.

**Award.**—It is a good objection to an award against one personally and in a representative character, that the award fails to state separately the amounts due on each account, p. 407.

Rule applied in *Braxton v. Harrison*, 11 Gratt. 55, holding an executor may make a valid promise to pay a debt out of the estate.

**Award.**—If part of award void for uncertainty is so connected with the rest as to affect the justice of the case, the whole is void, p. 409.

Affirmed and applied in *York, etc., R. R. Co. v. Myers*, 18 How. 252, 15 L. 383, holding if arbitrator includes matter not submitted in a single conclusion, the award is bad; *Marks v. Railroad Co.*, 76 Fed. 946, 44 U. S. App. 714, where umpire made a subsequent award without notice, the whole award was declared void; *Woodward v. Atwater*, 3 Iowa, 63, holding unless submission and award show the subject-matter sufficient to constitute a bar, they will be set aside; *Binney's Case*, 2 Bland Ch. 108, holding the making of a substantial amendment dissolves an injunction; *Whitcher v. Whitcher*, 49 N. H. 183, 6 Am. Rep. 494, holding award void in toto; *Hoffman v. Hoffman*, 26 N. J. L. 180, declaring award void where it did not show whether claim was submitted by party in his own right or in a representative character; *Wheatley v. Martin*, 6 Leigh (Va.), 71, holding administrator is bound though there was no new submission after party's death; *Pettibone v. Perkins*, 6 Wis. 589, holding an award must embrace the whole subject-matter submitted. See note, 6 Am. Rep. 499.

Distinguished in *Karthauss v. Ferrer*, 1 Pet. 229, 7 L. 124, where the person being a partner would have to pay, since he had no authority to bind partners; *Martin v. Martin*, 12 Leigh (Va.), 505, holding court may reject excess, and render judgment on so much of the award as is within the submission.

5 Wheat. 412-420, 5 L. 122, *UNITED STATES v. HOLMES*.

Federal courts under act of 1790 have jurisdiction of murder or robbery committed on high seas on vessel held by pirates, p. 417.

Rule applied in *United States v. Kessler*, 1 Bald. 28, 29, F. C. 15,528, holding our courts have no jurisdiction of crime on French



vessel on high seas; *United States v. Davis*, 2 Sumn. 485, F. C. 14,932, holding our courts were without jurisdiction when native was killed on his ship by shot fired from ours; *The Ambrose Light*, 25 Fed. 416, defining piracy; *People v. Tyler*, 7 Mich. 214, 74 Am. Dec. 709, holding when private ship enters a foreign jurisdiction, it becomes subject to its laws; *Smith v. United States*, 1 Wash. Ter. 274, holding it is no less a crime to murder a foreigner than a citizen within jurisdiction of United States.

**Admiralty.**—In criminal prosecution defendant is *pro hac vice* person considered as belonging to nation under whose flag he sails, p. 417.

Rule applied in *In re Ross*, 140 U. S. 476, 35 L. 590, 11 S. Ct. 904, holding foreigner entering mercantile marine of a nation becomes subject to its laws.

**Miscellaneous.**—Cited in *Forsyth v. United States*, 9 How. 572, 13 L. 263, as an instance of certificate of division to Supreme Court of question of law in criminal cases; *Andersen v. United States*, 170 U. S. 496, 42 L. 1118, 18 S. Ct. 692, but to no point decided.

5 Wheat. 420-424, 5 L. 124, *OWINGS v. SPEED*.

**Constitutional law.**—State statute enacted before the Constitution went into operation and affecting previously vested rights, not invalid although impairing the obligation of contracts within the meaning of the Federal Constitution, p. 421.

Rule applied in *Scott v. Jones*, 5 How. 377, 379, 12 L. 197, 198, holding Supreme Court has no jurisdiction to test validity of statute passed by public body not admitted into the Union; dissenting opinion, *McElvain v. Mudd*, 44 Ala. 65, majority holding ordinance avoiding contracts for sale of slaves unconstitutional; *Shorter v. Cobb*, 39 Ga. 298, holding courts of Georgia have no authority to enforce a debt whose consideration was slaves; *Blanque's Syndic v. Beale*, 1 Mart. (La.) (N. S.) 429, holding law in force at change of government, on subject of cession bonorum, is constitutional; Opinion of the Justices, 66 N. H. 643, 33 Atl. 1083, holding State legislature could confiscate no private property without remuneration; *Commonwealth v. Collins*, 8 Watts, 339, holding after the adoption of State Constitution, governor could not appoint judge, without consent of senate; dissenting opinion of same case, 350; *Cocke v. Calkin*, 1 Tex. 551, holding before Statehood the laws of Texas were in force to the exclusion of laws and Constitution of the United States. Cited, *arguendo*, in *Campbell's Case*, 2 Bland Ch. 229, 233, 237, 20 Am. Dec. 370, 374, 378. Cited without special application in *Willow R. Club v. Wade*, 76 N. W. 274, 100 Wis. 86, 42 L. R. A. 313, and n.

**Witness** having no interest in pending suit may testify, p. 423.

Rule applied in *Bork v. Norton*, 2 McLean, 425, F. C. 1,659, holding witness must be interested in the event of the suit to be disqualified;

*Stewart v. Conner*, 9 Ala. 821, holding it must appear that the witness will gain or lose by the effect of the judgment.

**Constitution** went into effect March 3, 1789, p. 423.

Cited in *United States v. New Bedford Bridge*, 1 Wood. & M. 430, F. C. 15,867, discussing exclusive power of congress.

**Evidence.**—Books of a corporation established for public purposes are evidence of its acts, p. 424.

This holding is affirmed and applied by the following citing cases: *Warner v. Daniels*, 1 Wood. & M. 106, F. C. 17,181, holding record of the organization is the best evidence of that fact; *Merchants' Bank v. Rawls*, 7 Ga. 198, 50 Am. Dec. 398, holding defendant having introduced books of bank may show particular items are wrong; *Fitch v. Pluckard*, 4 Scam. (Ind.) 76, holding original minutes of board of trustees admissible to show acceptance of act incorporating a town; *Ryder v. Railroad Co.*, 13 Ill. 523, holding books of corporation are prima facie evidence that prerequisites of statute have been complied with, and that the corporation has an existence; *Dudley v. Grayson*, 6 T. B. Mon. 262, holding copies of records of trustees of town, proved to be correctly transcribed, competent evidence in controversies about titles; *Coffin v. Collins*, 17 Me. 442, holding where records of corporation are obtainable, parol evidence is admissible to prove the acceptance of charter, or to show membership; *Barker v. Fogg*, 34 Me. 394, admitting public records to show location or alteration of a street; *Penobscot & K. R. R. Co. v. Dunn*, 39 Me. 596, holding records are prima facie evidence that required number of shares have been taken; dissenting opinion, *Amherst Bank v. Root*, 2 Met. 544, majority holding record may be modified by parol evidence; *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 491, 492, holding books of a corporation are evidence as between the members, when proved to be its books; *Haven v. The N. H. Asylum*, 13 N. H. 535, 38 Am. Dec. 513, holding parol evidence of vote in records of corporation inadmissible; *Haynes v. Brown*, 36 N. H. 567, holding books must have been kept by the proper officers; *North River Meadow Co. v. Shrewsbury Church*, 22 N. J. L. 428, 53 Am. Dec. 261, holding books of corporation admissible as evidence of its acts; *State v. Van Winkle*, 25 N. J. L. 76, holding minutes of trustees not conclusive evidence of their acts; *Denning v. Roome*, 6 Wend. 656, holding original minutes are competent evidence of the acts of a corporation without further proof of their verity; *People v. Zeyst*, 23 N. Y. 143, declaring minutes of a town meeting are conclusive; *Power v. Athens*, 99 N. Y. 602, 2 N. E. 612, holding books of corporation are best evidence to show corporate acts; *Glenn v. Orr*, 96 N. C. 415, 416, 2 S. E. 539, holding records of a corporation are prima facie evidence of its existence; *Grays v. Turnpike Co.*, 4 Rand. 580, holding books of a corporation are proper evidence of its existence; *Vanderwerken v. Glenn*, 85 Va. 14, 6 S. E. 809, admit-



ting books of corporation to show defendant's membership; *Grafton v. Reed*, 34 W. Va. 181, 12 S. E. 769, holding authenticated records of a municipal corporation admissible as evidence; *Rollins v. Board of Commissioners*, 90 Fed. 581, admitting entries in records of a county made by clerk in course of official duty. See also note to 74 Am. Dec. 310, on this subject; note, 13 Am. St. Rep. 550, on conclusiveness of the records of a corporation.

5 Wheat. 424-428, 5 L. 125, *CONNECTICUT v. PENNSYLVANIA*.

**Appeals.**—In appeals from Circuit Court in chancery cases, the parol testimony at trial in court below ought to appear in the record, p. 425.

Cited and applied in *New Orleans v. United States*, 5 Pet. 450, 8 L. 188, and *Blease v. Garlington*, 92 U. S. 4, 7, 23 L. 522, 523, ruling similarly; *Appleton v. Ecanbert*, 45 Fed. 282, holding it is the rule to allow exceptions to be noted so they may go on the record in case of appeal; *Harris v. Cole*, 2 Fla. 401, holding an appeal is the only proper method to bring up a decree of chancery for revision; *Bennett v. Welch*, 15 Ind. 333, declaring it error to admit oral evidence against infant in appeal of chancery cause. See also note to *Gallion v. McCaslin*, 1 Blackf. 94, as to removal of equity cases to Supreme Court.

**Proof in equity.**—Judiciary act directs that the mode of proof shall be by oral testimony, p. 425.

Cited in *Bronson v. La Crosse & M. R. Co.*, 4 Fed. Cas. 224, holding provision of Constitution of Wisconsin that testimony in equity cases shall be taken in the same manner as at law, prevents the application of judiciary act provision to Federal courts in that State; *White v. Toledo, etc., R. R. Co.*, 79 Fed. 134, 51 U. S. App. 56, holding, under equity rule 67, a Circuit Court has power to appoint special examiner to take testimony of a witness in another circuit, to be used in the suit.

**Parties.**—A final decree or an interlocutory one, deciding the merits, cannot be pronounced until all parties to the bill and in interest are before the court, p. 428.

Distinguished in *Wilson v. Castro*, 31 Cal. 427, holding this rule will not be enforced, where its observance would be attended with great inconvenience and answers no substantially beneficial purpose.

**Dismissal by court of equity**, where party asking aid refuses to comply with its conditions, is not a bar, p. 427.

Rule applied in *Badger v. Badger*, 1 Cliff. 244, F. C. 717, holding bill dismissed without any hearing or objection is no bar to subsequent suit.

5 Wheat. 429–433, 5 L. 126, **CAMPBELL v. PRATT.**

**Subrogation.**—Co-obligor discharging debt acquires interest of the others in mortgage, p. 431.

Cited and applied in *Dowdy v. Blake*, 50 Ark. 211, 7 Am. St. Rep. 90, 6 S. W. 898, holding joint party paying note is subrogated to security of creditors.

**Attachment** upon an equity of redemption is valid, p. 432.

Cited and applied in *Coombs v. Jordan*, 3 Bland Ch. 319, 22 Am. Dec. 267, holding an equitable interest in land may be taken on execution.

5 Wheat. 433, 5 L. 127, **THE ATALANTA.**

No citations.

5 Wheat. 434, 435, 5 L. 127, **UNITED STATES v. LANCASTER.**

**Certificate of division.**—District judge cannot divide in opinion with circuit judge on appeal from his own decision so as to give Supreme Court jurisdiction, p. 434.

Rule applied in *United States v. Emholt*, 105 U. S. 415, 26 L. 1078, under similar facts; *American Construction Co. v. Jacksonville Ry. Co.*, 148 U. S. 387, 37 L. 492, 13 S. Ct. 764, granting a rule to show cause why decree of Circuit Court of Appeals should not be quashed, where a circuit judge took part in decree setting aside his own order; *In re Kaine*, 14 Fed. Cas. 86, defining power of district judge in Circuit Court.

Distinguished in *Harmon v. United States*, 43 Fed. 820, holding district judge, when holding Circuit Court in another district, could, by consent of parties, determine writ of error from District Court.

**Miscellaneous.**—Cited in *Bruguier v. United States*, 1 Dak. Ter. 7, 46 N. W. 502, not in point.

5 Wheat. Appendix, 16, 17, 5 L. 133.

**Judicial controversy** is one which has taken shape for judicial decision, pp. 16, 17.

Cited in dissenting opinion, *Florida v. Georgia*, 17 How. 515, 15 L. 192; *Connor v. Scott*, 4 Dill. 246, F. C. 3, 119.

5 Wheat. Appendix, 19, 5 L. 134.

**Functions** of executive and judicial departments discussed, p. 19.

Cited in *In re Metzger*, 17 Fed. Cas. 233, holding extradition of a fugitive from justice of foreign country can only be effectuated through the judiciary.



The Citations in the foregoing annotations include all from the following Reports and all preceding them in each State or series :

U. S. . . . .	173	Mo. Ap. . . . .	74
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# REPORTS

OF

## CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of the United States,

IN FEBRUARY TERM, 1821.

---

BY HENRY WHEATON.

Counselor at Law.

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VOLUME VI.





# RULES AND ORDERS

## OF THE SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1821.

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RULE XXX. After the present term, no cause standing for argument will be heard by the court, until the parties shall have furnished the court with a printed brief or abstract of the cause, containing the substance of all the material pleadings, facts, and documents, on which the parties rely, and the points of law and fact intended to be presented at the argument.

RULE XXXI. Whenever pending a writ of error, or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined, as in other cases; and if such representatives shall \*not voluntarily become parties, then the other party may suggest the death on the record; and thereupon, on motion, obtain an order, that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing, have the same reversed, if it be erroneous. Provided, however,

that a copy of every such order shall be printed in some newspaper at the seat of government, in which the laws of the United States shall be printed by authority, three successive weeks, at least sixty days before the beginning of the term of the Supreme Court then next ensuing.

RULE XXXII. In all cases where a writ of error, or an appeal, shall be brought to this court, from any judgment or decree rendered thirty days before the term to which such writ of error or appeal shall be returnable, it shall be the duty of the plaintiff in error, or appellant, as the case may be, to docket the cause, and file the record thereof with the clerk of this court, within the first six days of the term; on failure \*to do which, the defendant [\*vii in error, or appellee, as the case may be, may docket the cause, and file a copy of the record with the clerk, and thereupon the cause shall stand for trial in like manner as if the record had been duly filed within the first six days of the term; or at his option, he may have the cause docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause, and certifying that such writ of error or appeal had been duly sued out and allowed.





JUDGES  
OF THE  
SUPREME COURT OF THE UNITED STATES,  
DURING THE TIME OF THESE REPORTS.

---

The Hon. JOHN MARSHALL, *Chief Justice.*  
The Hon. BUSHROD WASHINGTON, *Associate Justice.\**  
The Hon. WILLIAM JOHNSON, *Associate Justice.*  
The Hon. BROCKHOLST LIVINGSTON, *Associate Justice.*  
The Hon. THOMAS TODD, *Associate Justice.*  
The Hon. GABRIEL DUVALL, *Associate Justice.*  
The Hon. JOSEPH STORY, *Associate Justice.*  
WILLIAM WIRT, Esq., *Attorney-General.*

\* Mr. Justice WASHINGTON was absent during the whole of this term from indisposition.





## REPORTS OF THE DECISIONS

OF THE

# Supreme Court of the United States.

FEBRUARY TERM, 1821.

1\*]

[\*PRIZE.]

### THE AMIABLE ISABELLA.

MUNOS, *Claimant.*

Whether the capture is made by a duly commissioned captor, or not, is a question between the government and the captor, with which the claimant has nothing to do.

If the capture be made by a non-commissioned captor, the government may contest the right of the captor after a decree of condemnation, and before a distribution of the prize proceeds; and the condemnation must be to the government.

The 17th article of the Spanish treaty of 1795, so far as it purports to give any effect to passports, is imperfect and inoperative, in consequence of the omission to annex the form of passport to the treaty.

*Quære*, Whether, if the form had been annexed, and the passport were obtained by fraud and upon false suggestions, it would have the conclusive effect attributed to it by the treaty.

*Quære*, Whether sailing under enemy's convoy be a substantive cause of condemnation.

By the Spanish treaty of 1795, free ships make free goods; but the form of the passport, by which the freedom of the ship was to have been conclusively established, never having been duly annexed to the treaty, the proprietary interest of the ship is 2\*] to be proved according to the ordinary rules of the prize court, and if thus shown to be Spanish, will protect the cargo on board, to whomsoever the latter may belong.

1.—As the form of the commission issued to the privateer in this case is one of the points discussed in the argument, it is thought necessary to insert it.

*James Madison, President of the United States of America, to all who shall see these presents, greeting:*

Be it known, that in pursuance of an act of Congress, passed on the 26th day of June, one thousand eight hundred and twelve, I have commissioned, and by these presents do commission, the private armed schooner called the *Roger*, of the burthen of 184 tons, or thereabouts, owned by Thomas E. Gary, Hy. Gary, James B. Cogbill & Co., Brogg & Jones, Hannon & High, Robert Ritchie, Robert Birchett, John Wright, Wm. C. Boswell, Samuel Turner, John G. Heslop, Wm. & Charles Carling, Thomas Shoe, Richard B. Butte, Richard Drummond, Littlebury Estambuck, John Davis, Spencer Drummond, Peter Nestell, and Roger Quarles, mounting fourteen carriage guns, and navigated by ninety men, hereby authorizing Captain —, and John Davis, lieutenant of the said schooner *Roger*, and the other officers and crew thereof, to subdue, seize, and take any armed or unarmed British vessel, public or private, which shall be found in the jurisdictional limits of the United States, or elsewhere, on the high seas, or within the waters of the British dominions; and such captured vessel, with her apparel, guns and appurtenances, and the goods or effects which shall be found on board the same, together with all the British persons and others, who shall be found acting on board, to bring within some port of the United States; and also to retake any vessels, goods, and effects, of the people of the United States, which may have been captured by any British armed vessels, in order that proceedings may be had concerning such capture or recapture, in due form of law, and as to right and justice shall appertain. The said is further authorized to detain, seize, and take all vessels and effects, to whomsoever belonging, which shall be liable thereto, according to the law of nations, and the rights of the United States, as a power at war, and to bring the same within some port of the United States, in order that due proceedings may be had thereon—this commission to continue in force during the pleasure of the President of the United States, for the time being.

Given under my hand, and the seal of the United States of America, at the city of Washington, the 24th day of April, in the year of our Lord one thousand eight hundred and thirteen, and of the independence of the said states the thirty-seventh.

(Signed) JAMES MADISON.  
By the President,  
(Signed) JAMES MONROE, Secretary of State.

Wheat. 6.

By the rules of the prize court, the *onus probandi* of a neutral interest rests on the claimant.

The evidence to acquit or condemn, must come, in the first instance, from the ship's papers, and the examination of the captured persons.

Where these are not satisfactory, further proof may be admitted, if the claimant has not forfeited his right to it by a breach of good faith.

On the production of further proof, if the neutrality of the property is not established beyond reasonable doubt, condemnation follows.

The assertion of a false claim, in whole or in part, by an agent, or in connivance with the real owner, is a substantive cause of condemnation.

### A PPEAL from the Circuit Court of North Carolina.

This was the case of a ship and cargo, sailing under Spanish colors, and captured by the privateer *Roger, Quarles*, master,<sup>1</sup> on an ostensible voyage \*from Havana to Ham- [\*3 burg, but really destined for London, or with an alternative destination, and orders to touch in England for information as to markets, and further instructions. The ship sailed from the Havana, on the 24th of November, 1814, under \*convoy of the British frigate *Ister*, [\*4 with which she parted company on the 1st of December, the frigate having gone in chase of an American privateer; and on the 3d of December, was captured by the privateer *Roger*,

purtenances, and the goods or effects which shall be found on board the same, together with all the British persons and others, who shall be found acting on board, to bring within some port of the United States; and also to retake any vessels, goods, and effects, of the people of the United States, which may have been captured by any British armed vessels, in order that proceedings may be had concerning such capture or recapture, in due form of law, and as to right and justice shall appertain. The said is further authorized to detain, seize, and take all vessels and effects, to whomsoever belonging, which shall be liable thereto, according to the law of nations, and the rights of the United States, as a power at war, and to bring the same within some port of the United States, in order that due proceedings may be had thereon—this commission to continue in force during the pleasure of the President of the United States, for the time being.

Given under my hand, and the seal of the United States of America, at the city of Washington, the 24th day of April, in the year of our Lord one thousand eight hundred and thirteen, and of the independence of the said states the thirty-seventh.

(Signed) JAMES MADISON.

By the President,  
(Signed) JAMES MONROE, Secretary of State.



and carried into Wilmington, North Carolina, for adjudication. The ship and cargo were condemned as prize of war in the District Court of North Carolina, and the sentence was, after the admission of further proof in the Circuit Court, affirmed by that court. An appeal was then allowed to this court, with permission to introduce new proof here, if this court should choose to receive it.

The original evidence consisted of the papers found on board the captured vessel, and delivered up to the captors, by the master, at the time of the capture; and of certain other documents afterwards found concealed on board, or in the possession of Rahlives, the supercargo, or of one Masuco, *alias* Burr, a passenger on board the *Isabella*. Some of the ship's papers were mutilated, and attempted to be destroyed, and others were thrown overboard, and spoiled.

The paper of which the following is a translation, was the only one delivered up by the master, at the time of the capture: "Don Jose Sedano, Administrator-General of the Royal Revenues of this port of Havana, in the island of Cuba, &c., certify that by authority and knowledge of the general administrator of the revenues under my charge, permission has been given to ship in the Spanish ship called the *Isabel*, Captain Don Francisco Cacho, with destination for Hamburg, viz.:

5\*] \*Don Alonzo Benigno Munos, registered on the day of this date, six hundred and seventy-six boxes brown sugar, two hundred and twenty-eight boxes white ditto, and two hundred quintals dye-wood, which he has shipped on his own account and risk, consigned to Don Juan Carlos Rahlives, and paid 6290, and that it may so appear, I sign the present.

(Signed) SEDANO.  
Havana, 10th Nov., 1814.

Among the papers found on board, and brought into the registry, with an explanation of the circumstances under which they were discovered, were:

(1) A passport or license granted by the Governor and Captain-General of the island of Cuba, of which the following is a translation:

Number 94.

PROVINCE OF THE HAVANA.

Don Juan Ruiz de Apodaca y Eliza, President, Governor, Captain-General of the place of Havana, and island of Cuba, Commandant-

1.—The original of this passport, or license, is as follows:

Numero 94.

PROVINCIA DE LA HABANA.

D. Juan Ruiz de Apodaca y Eliza, Presidente, Gobernador, Capitan General, de la plaza de la Habana, é Isla de Cuba, y Comandante General de Marina del Apostadero, &c., &c.

A falta de Reales Pasaportes expido este documento á favor del Capitan Dn. Franc. Cacho Vecino de esta Ciudad de la Habana para que con su Fragata mercantile Española nombrada Amable Ysabel de ported e 208½ toneladas, pueda

General of the naval forces of the Apostadero, &c., &c.

For want of royal passports, I dispatch this document in favor of Captain Don Francisco Cacho, inhabitant of the city of Havana, that with his Spanish \*merchant ship called [\*6 Amable Isabel, of the burthen of 208½ tons, he may sail from this port, with cargo and register of free trade, and proceed to that of Hamburg, there to trade, and return to his port of departure, with the express condition of performing his voyage outward and inward, directly to the fixed places of his destination, without deviating, or touching at any port, national or foreign, in the islands or continent of the Indies, unless compelled by inevitable accident.

Gratis. (Signed) APODACA.  
Sebastian de la Cadena.<sup>1</sup>

\*(2) A clearance granted by Don Pedro Ace- [\*7 vido, captain of the port of Havana, permitting the said Cacho "to proceed with the Spanish ship La Amable Isabel, from this port to England," with a muster roll of the officers and crew annexed. (3) A letter of instructions from Munos, the claimant, to Cacho, of which the following is a translation:

Havana, 10th Nov. 1814.

"Don Francisco Cacho.

"SIR: Intrusted as you are with my ship La Amable Isabel, which sails bound for Hamburg, or some other port of that continent, or for those of England, I hope that you will perform your duty with the exactness you have always used, and which was my motive for making choice of you. Consequently I will omit all further advice, particularly as there goes in the vessel the supercargo, Don Juan Rahlives, with my full power and instructions. You will observe all his directions as if they were dictated by myself. Wishing you a prosperous voyage, &c.

(Signed) MUNOS."

(4) Articles of agreement between Munos and the master and crew of the ship. (5) A general procuration from Munos to one Von Harten, of London, dated at Havana, May 29th, 1812, with a substitution by the latter to Rahlives the supercargo, executed at London. (6) A letter from one Tieson, dated London, November 4th, 1813, to his brother, F. Tieson, at Rio Janiero, introducing Rahlives, \*as the [\*8 conductor of certain commercial operations, which he had concerted with several friends, referring his correspondent to Rahlives himself for the details. (7) A letter from one Rhodes, dated London, to Messrs. Glover & Co. at Rio Janeiro, introducing Rahlives, who the writer states "goes as supercargo in the ship *Isis*, and acts for Mr. John Gobel, of Havana, and Mr. Von Harten, of London," &c. (8) A letter from Hawkes & Malloret, dated Liverpool,

salir de este Puerto, con carga y registro del libre comercio, y transferirse al de Hamburgo para comerciar en el, y restituirse al de su salida con expresa condicion, de hacer su derrota de ida y vuelta directamente á los señalados parages de su destino sin extraviarse ni hacer arribada á Puertos nacionales, ó extrangeros, en islas, ó tierra firme de Indias á menos de verse obligado de accidentes de otra suerte no remediabiles. Habana, diez de Novembre de mil ochocientos catorze.

Gratis. (Signed) APODACA.  
SEBASTIAN DE LA CADENA.

October 28th, 1803, to Brown & Co., at Rio Janiero, introducing Rahlives as "particularly connected with our intimate and respectable friend Mr. George Von Harten, of London, and John Gobel, of Havana, on whose behalf he will probably visit you very shortly. It is probable Mr. Rahlives may entrust to your management some transactions for account of said friends, and others, and we beg to assure you we feel convinced every satisfaction will result from such business as he may have to conduct." (9) The following circular: "Havana, 1st May, 1812. On the 15th last May, we took the liberty of addressing our friends from London, requesting their countenance to an establishment we intended to form in this city under the firm of Von Harten, Gobel & Co. We now have the satisfaction to inform you of our complete success in organizing and consolidating the same, and that we are in every respect enabled to procure to our correspondents all those advantages which may result from intelligence, activity, and the most respectable connections in this island. Political considerations, however, induce us to carry on our affairs for the future under the sole [9\*] \*name and firm of Mr. John Gobel, who is permanently to reside in this country," &c. (10) An account of sales, dated Havana, November 16th, 1814, signed by J. Gobel, of the cargo of the English brig Portsea, received from Rio de Janeiro, on account of Messrs. Brown, Weston & Co., and of Rahlives, amounting to \$20,313 net proceeds, leaving to the credit of Rahlives, in Gobel's hands, half of that sum. (11) A charter-party, executed at Rio de Janeiro, May 11th, 1814, between Weston and Gobel, letting to him the Portsea, and consigning the cargo to the charterer. (12) The following letter from Munos to Rahlives: "Havana, 10th Nov. 1814. Sir, I enclose you invoice and bill of lading showing to have shipped in my ship called La Amable Isabel, Capt. Don Francisco Cacho, 1,104 boxes of sugar, and 40 half boxes of ditto, and 200 quintals of dye-wood, the principal amount of which and charges amounts to \$60,642.3, which cargo consigned to you, you will please to take charge of on your arrival at Hamburg, or at any other port you may find convenient to go, proceeding to sell it on the most advantageous terms you can obtain, that with the proceeds you may make the returns according to the instructions I have verbally communicated to you. In like manner I recommend to you, and place under your care, my said vessel, in order that the adventure may have the most favorable termination, to which end I have given definitive orders to the Captain, Don Francisco Cacho, that he may observe the instructions you may communicate to him in my name. As I am so well satisfied with [10\*] \*your care and diligence, and the friendship my house entertains for you, I shall omit any further advice, wishing you a prosperous voyage, and that you may duly advise me of your proceedings, and communicate such instructions as you may think fit. Yours, &c." (13) A bill of lading signed by the master, Cacho, acknowledging the receipt of the cargo, and engaging to deliver it to Rahlives at Hamburg, or at the port where his register might be verified. (14) A manifest, entitled "Manifesto." Wheat. 6. U. S., Book 5.

fest of the cargo of the Spanish ship La Amable Isabel, in its voyage from this port of Havana to that of London;" and signed by the master: being stated in the margin that he had signed bills of lading therefor "to Don Alonzo Benigno Munos, which he has registered on his own account and risk, and to the consignment of Horace Solly, of London."

Among the mutilated papers found on board were, (1) various accounts between Rahlives and F. Thieson. (2) An invoice of jerked beef and tallow, shipped from Rio de Janeiro to Havana. (3) Another invoice of the same, "for account and risk of Mr. Alonzo Benigno Munos at Havana," per brig Isis, Capt. Brenner, amounting to \$22,371. (4) Invoice of sugars, &c., shipped on board the Isis at Havana by order of Rahlives, signed by Gobel, and amounting to \$50,671. (5) Another invoice of the same, shipped on board the Isis, "for Falmouth and a market, to the orders of G. Van Harten, Esq., in London," signed by Rahlives, and various accounts between the different parties.

\*A claim was given in for the ship and [\*11 cargo, as the property of Don Alonzo Benigno Munos, by Rahlives, the supercargo, as agent for the alleged owner; and the captured persons were examined on the standing interrogatories.

Upon the order for further proof, the affidavits of the claimant and his clerks, to the proprietary interest of the ship and cargo, in him, were produced, and the proceedings before the tribunal of the Consulado, at the Havana, under which the ship, which had arrived at that port from New Providence, was sold under the bottomry bond alleged to be given for repairs by one John Cook, to the claimant, and was naturalized as a Spanish vessel. A great mass of testimony was also produced, tending (among other things) to show that the claimant, who was father-in-law of Gobel, had not been actively engaged in trade for many years before this shipment was made; and that Gobel, not being a Spanish subject, all his foreign business, and his transactions with the custom-house, had constantly been carried on in the name of Munos.

Mr. Gaston, for the appellant and claimant, argued: 1. That the prize allegation, in this case, ought to be dismissed, because the libellants had shown no lawful authority to make the capture in question, and, therefore, condemnation could not be pronounced in favor of the captors; but, even if the proprietary interest were proved to be enemy's it must be condemned as a droit of admiralty to the use of the government. It is a well-established principle \*of the law of prize, that the captors [\*12 must show an authority to capture as prize, and exhibit their title deeds.<sup>1</sup> Here the commission is issued to the vessel itself, without naming the commander who is to direct her operations as a cruiser. The commander, by whom the seizure was actually made, had no commission or authority whatever, other than what was delegated to him by the owners of the vessel. The capture is, therefore, null, so far as respects the captors. On general principles, no persons can rightfully carry on war but those who have a particular authority from

1.—The Melomasne, 5 Rob. 43.



the sovereign power of the state. With regard to private armed vessels, unless they have a public commission, their acts are absolutely unlawful, and all on board may be treated as pirates.<sup>1</sup> At all events, they can derive no title under captures thus made, unless they have a commission. *In bello porta cedunt rei-publicæ*; and all the rights of prize are derived from the grant of the sovereign power. Nor can the commission be issued to the inanimate machine. It must be to the organized association of human beings who are to control and direct its force. Without a head to control and govern them, such an association would be nothing but a band of pirates. The interests of mankind will not tolerate the existence of such a monster as a ship of war without a lawful commander. Even when thus governed, they require to be watched with vigilance, and controlled by the government, least they involve **13\*** the nation with its allies, \*or with neutrals.<sup>2</sup> For this purpose it is necessary that the government should designate and commission their officers. So strict is the doctrine of the Court of Admiralty on this subject, that a capture made by a public commissioned ship, the commander not being on board at the time, is regarded as if made without a commission.<sup>3</sup> So, also, by our own law, the act declaring war, June 18th, 1812, c. 425, authorizes the President to issue commissions or letters of marque and reprisal, in such form as he shall think proper to dictate; and in the form which he has actually prescribed, the names of the captain and lieutenant are required to be inserted. The prize act of June 26th, 1812, c. 430, imposes very strict duties upon the commander, which he is to perform personally, and cannot devolve upon another. He is, among other things, to give bond, and is made responsible for his own misconduct and that of the crew; is to receive and execute the President's instructions; is to keep a journal of the ship's transactions; and by his personal negligence or misconduct, may forfeit the commission, and the rights of prize derived under it. Most clearly the government has a right to judge of the merits and qualifications of the person to be invested with a trust so high and important. But the government has not delegated it to the captors, in the present case, and, therefore, they have no right to demand condemnation to their use. Nor has the government itself in **14\*** \*terposed; nor, indeed, can it interpose, to require condemnation to its own use, until the preliminary question of prize or no prize is determined and the court is about to distribute the proceeds.<sup>4</sup> No final decree of condemnation can, therefore, now be pronounced.

2. The testimony furnished by the papers found on board the captured vessel is such, as, according to the treaty between the United States and Spain of 1795, is conclusive on the question, and entitles the claimant to immediate restitution. This treaty forms a conventional law on the subject of neutral commerce, essentially different from the general law on the same subject.<sup>5</sup> By the 15th article it is stipu-

lated, that the ships of either nation may sail from any port to those of a country which may be at war with either or both nations, and may go to neutral places, or to other enemy ports; and that every article on board, except contraband, to whomsoever belonging, shall be free. In order to carry into effect this stipulation for the unlimited liberty of commerce, and that free ships shall make free goods, it is provided by the 17th article, that the vessel shall be furnished with a passport expressing her national character, and with certificates to show that the cargo is not contraband. To this passport a conclusive effect is attributed. It establishes the national character of the ship; and that being proved, \*renders it immaterial [**\*15** to inquire respecting the cargo, except so far as to ascertain by the certificate that it is not contraband. The 18th article requires the cruisers of either party, meeting the merchant vessels of the other upon the high seas, to remain out of cannonshot, and only authorizes them to send on board two or three men, and if the passport be exhibited, the vessel is not to be molested; and by the 17th article, if the prescribed documents are not exhibited, she may be sent in for adjudication, and condemned as prize, unless testimony entirely equivalent shall be produced. The ship now in question, was furnished with such a passport and certificate as the treaty prescribes. It is true, that the form of passport, intended to have been annexed to the treaty, never was, in fact, annexed by the negotiators, owing to accident or negligence, or some other cause which we cannot now explain. We are not, however, without the means of ascertaining what will satisfy the requisitions of the treaty. A passport, or sea-letter, is a well-known document in the usage of maritime commerce, and is defined to be a permission from a neutral state to the master of a ship to proceed on his proposed voyage, usually containing his name and residence, and the name, property, tonnage and destination of the ship.<sup>6</sup> Although it evidences the permission of the state to navigate the seas, yet it does not, therefore, follow, that it must issue directly from the supreme power \*of the state; and some authority ought to [**\*16** be shown to support such a position. This erroneous notion, probably, arises from the practice of our own country, which is different from that of all other nations. Previous to the year 1793, no other documents were furnished to the merchant vessels of the United States but the certificate of registry and clearance; but the depredations upon our commerce having commenced with the European war which broke out in that year, a form of sea-letter was devised, and to give it greater effect, was signed by the President. On the 28th of November, 1795, a treaty was made with Algiers, by which a passport was to protect our vessels from capture by Algerian cruisers. By the act of the 1st of June, 1796, c. 339, Congress authorized the Secretary of State to prepare a form, which, when approved by the President, should be the form of the passport. Neither the treaty nor

1.—Vattel, Droit des Gens, l. 3, c. 15, sec. 226.

2.—The Thomas Gibbons, 8 Cranch, 421.

3.—The Charlotte, 5 Rob. 251.

4.—The Thomas Gibbons, 8 Cranch, 421.

5.—For the provisions of this treaty, *vide* Appendix, Note No. I.

6.—Marshall on Ins. 406.

the law required the President's signature, but the form prepared was signed by the President, as the sea-letter had been. But this, our peculiar practice, forms no rule of conduct obligatory on others; and will not authorize us to give a more restricted meaning to the term used in a treaty than the general usage of nations will warrant. The word passport,<sup>1</sup> thus used, is taken from the same word, signifying a permission given to individuals to remove from one **17** place to another, and the documents are analogous. Vattel states, that, "like every other act of supreme cognizance, all safe-conducts or passports flow from the sovereign authority; but the prince may delegate to his officers the power of furnishing them, and with this they are invested, either by express commission, or in consequence of the nature of their function. A general of an army, from the nature of his post, can grant them; and as they are derived, though mediately, from the same prince, all his generals are bound to respect them."<sup>2</sup> So, also, Blackstone speaks of the offense of violating passports, or safe-conducts, granted by the king or his ambassadors.<sup>3</sup> It is, then, incidental to the commission of an admiral or general, or public minister, to issue these documents of protection for persons or property.<sup>4</sup> By the usage of all commercial countries, they are issued by the superior officers superintending the marine affairs of the kingdom, province, city, or colony, where granted, and as representing the sovereign in those places. In France, they have always been issued by the admiral of France, except during the revolution when they were issued by the minister of **18** marine.<sup>5</sup> \*In the King of Prussia's ordinance of neutrality, passports and sea-letters are spoken of as issuing from admiralties, maritime colleges, or magistrates of cities.<sup>6</sup> And in the celebrated answer to the Prussian *Exposition des Motifs*, it is said, that until the year 1746, the usual document was a certificate from the admiralty that the ship was Prussian. Afterwards a pass under the royal seal of the regency of Pomerania at Stettin was used.<sup>7</sup> In our treaty with Holland, the form of a sea-letter is given, which is in the name of the burgomasters and regents of the city, acting under an ordinance of the states general. In England such documents are issued by the lords commissioners of the admiralty, as is shown by the papers in the case of *The Nereide* in this court;<sup>8</sup> and on foreign stations, they may be issued by the admirals commanding those stations. In the famous Black Book of the Admiralty, we find it laid down, that all intercourse with the enemy is prohibited, unless under a special license from the king or his admiral.<sup>9</sup> In the case of the ships taken at Ge-

noa,<sup>10</sup> Sir W. Scott declares, that Lord Keith, as admiral commanding the expedition, had a right to grant passports to protect the ships sailing under them. And in this court the licenses issued by Admiral Sawyer, and countersigned by a \*British consul, were deter-[**19** mined to be passports which would protect against British capture.<sup>11</sup> At Gibraltar, these documents are issued in the name of, and signed by, the commissioners of the admiralty at that place.<sup>12</sup> As to the usage of Spain, it appears by a royal passport, found on board the *Isabella*, and issued for another ship called the *Clara*, to be usually issued at home by the secretary of the marine in the king's name; but it also appears by an indorsement on this very paper, that the Spanish commandants of foreign stations, or *Apostaderos*, may alter such passports, and grant liberty to change the course of the voyage. And they may also issue original passports, in their own name, where there is a deficiency of royal passports, and the vessel has not been previously documented. Such is the passport which was issued to the *Isabella* in the present case. The power to issue such documents of protection, is necessarily incident to the vast authorities conferred on the Spanish colonial governors; and the ease of the British ship of war *Eliza*, which was compelled to enter the port of Havana in distress, in time of war, and to which the captain-general, after relieving her wants, gave a passport to protect her from capture, is an example of the exercise of the power in question highly honorable to the generosity of the Spanish character.<sup>13</sup> The treaty under which \*protection is [**20** now claimed, was conceived in the spirit of that benevolent policy so long cherished by the United States, and which Spain has reciprocated. It has for its object to limit the range of warfare on the high seas, and to extend the immunities of the neutral flag. In this spirit it ought to be construed. A comparison of its provisions with those of other conventions for the same object, will show the correctness of the interpretation for which we contend. In the French treaty of 1778,<sup>14</sup> which was the forerunner of the armed neutrality of 1780, a passport or sea-letter in a certain form is provided to protect the ship. But there is nothing from which it can be inferred that this document is to issue from the supreme executive of the respective nations. To show how subordinate a consideration was that of form, it is deserving of remark, that the form actually annexed to the treaty, omits a circumstance which the text of the treaty expressly requires—"the place of residence of the master." So that a passport precisely corresponding with the form annexed, was adjudged by the Court of K. B.

1.—"Passaporte. Passeport. Lettre ou brevet d'un prince ou d'un commandant pour donner la liberté de voyager, d'entrer et de sortir librement de ses terres. Fides publica." Sobrino, Nouv. Dict. Espagnol, Français, et Latin.

2.—Vattel, Droit des Gens, l. 3, c. 17, s. 265, et seq.

3.—4 Bl. Comm. 68.

4.—Wheat. Capt. 59.

5.—"Passeport. C'est une permission de l'Amiral pour voyager en sûreté et être reconnue par tout. C'est sur ce passeport que les bâtimens de commerce naviguent." Encyclop. Meth. art. Marine.

6.—2 Azuni, Appx. No. 9, p. 401; Johnson's Trans.

Wheat. 6.

7.—Wheat. Capt., Appx. No. I., p. 334; Report of Sir George Lee, &c. Vide Appendix, Note No. II.

8.—9 Cranch, 388.

9.—Wheat. Capt. 159.

10.—4 Rob. 317.

11.—The Julia, 8 Cranch, 181; The Aurora, 8 Cranch, 203; The Hiram, 8 Cranch, 444; The Ariadne, 2 Wheat. Rep. 143.

12.—Reeves' Law of Ship., Appx. No. 9, in fin.

13.—Raynal Hist. tom. 7, p. 455.

14.—For the provisions of this treaty, vide Appendix, Note No. III.



in England, who had not seen the annexed form, to be substantially defective in this respect, and thus to falsify the warranty of neutrality in a policy of insurance.<sup>1</sup> So the treaty with Holland, of 1782,<sup>2</sup> contains analogous stipulations with those of the Spanish treaty. It **21\*** gives the form \*of a passport, and of a sea-letter, which are afterwards spoken of as the same, or at least, as equipollent documents. The passport does not show by whom it is to be signed; but it shows that it may be issued by individuals signing their own names, and affixing their own private seals, and that it was not thought necessary that it should issue in the name of the chief magistrate; and the sea-letter is unequivocally to be issued by an authority less than the supreme power of the state. The treaty of 1783, with Sweden,<sup>3</sup> repeats the same stipulations of the unlimited liberty of commerce, and that free ships should make free goods; and to prevent disputes, a passport or sea-letter is to be furnished, showing that the vessel belongs to a subject, which is to protect from all further inquiry, and is to be made out in "good form." Here the form is avowedly left to the exercise of an honest discretion on each side. In the treaty with Prussia, of 1785,<sup>4</sup> the same conclusive effect is attributed to the sea-letter or passport, the former of which was to be subsequently concerted by the contracting parties. From these the treaty with Spain was copied, whose government gloried in being the first among the southern powers of Europe that acceded to the principles or the armed neutrality.<sup>5</sup> One of the leading principles asserted by that confed- **22\*** eracy, went to exclude \*from the jurisdiction of the belligerent prize courts whatever was done under the neutral flag, and to render it matter of negotiation between state and state. A national contract made to carry into effect this principle, is to be construed according to its intention and spirit, which meant to rely upon the justice and honor of both nations, that neither would impart to enemy vessels the immunities which were intended to be confined to neutral property. Enlightened views of interest would induce the neutral state not to permit any but its own subjects to avail themselves of the concession; and though every possible abuse might not be prevented, yet cases of fraud would rarely occur, and the evils produced would be far outweighed by the immense importance of the general security of commerce, and the consequent mitigation of the evils of war. The authority of the Spanish government to issue a passport certifying the proprietary interest in the vessels of its own subjects is unquestionable, and the local law and usage must determine its form, and the authority by which it is to be issued.

3. But supposing the passport produced not to be precisely such as the treaty intended, yet it is insisted, that, with the other documents, it furnishes testimony "entirely equivalent," according to the expression used in the 17th arti-

cle. It is important to fix the precise meaning of the last clause of that article. The preceding clauses stipulated, that the ship shall have a passport to show that she belongs to the neutral state, and a certificate to show that her cargo \*(to whomsoever belonging) is not **\*23** contraband. By the 18th article, if she is furnished with these documents, she is to be exempt from all detention or molestation. If not furnished with them, she may be carried in for adjudication, and then must account for the omission, and furnish other testimony, which, considering all the circumstances, shall be of equal value with that omitted. Suppose the omission satisfactorily accounted for, what is the equivalent testimony required by the treaty? Most certainly it is that which completely proves the same facts which the omitted documents would have proved. Even a passport, in due form, does not prove that the ship is, in fact, neutral. With whatever formal solemnities it may be clothed, it must issue from the custom-house of the power by whom it is granted. It may be issued improperly. The officers authorized to issue it, may be deceived by fraud and perjury. The possession of the document only proves the fact that the property of the ship has been decided to be neutral by the competent authorities, by those to whom the sovereign power of the state has entrusted the examination of the question. Their determinations are made conclusive by the treaty, and import absolute verity, in the same manner as the solemn judgments of the courts of justice. If, then, this document cannot be had, but its absence is accounted for, and other papers are produced, which however inferior in formal solemnity, unequivocally prove such a decision by the competent authority of the neutral state, then this secondary evidence is completely equivalent to the passport and certificate provided \*for in the treaty. This exposition **\*24** is the only one consistent with the spirit of the treaty, and is in furtherance of its avowed object, which was that the flag should protect the property sailing under it, if used by authority of the neutral nation. This exposition is conformable to the English version of the treaty, but is absolutely required by the Spanish; and even if there were any difference of meaning, we are bound in honor and good faith to adopt the latter, since Spain has always acted upon it, and has seldom or never thought it necessary to document her ships according to the literal requisitions of the treaty. Unless this exposition is admitted, the whole of the clause in question is nugatory. By the universal law and usage of nations, every captured vessel is at liberty to account for the want of formal documents.<sup>6</sup> It would, therefore, have been superfluous to insert a provision in the treaty to this effect. Something more must have been intended by the use of the terms, which are to be found in no other treaty. In the case now before the court, the omission of the required document is fully accounted for by the actual state of the mother country at the time, and by the declaration of the colonial governor when he granted the substituted document. This ought to be considered as equivalent proof, because it next in dignity, and approaches very

1.—Baring v. Christie, 5 East's Rep. 393.

2.—For the provisions of this treaty, see Appendix, Note No. III.

3.—For the provisions of this treaty, see Appendix, Note No. III.

4.—For its provisions, see Appendix, Ib.

5.—2 Azuni Appendix, No. 31.

6.—The Pizarro, 2 Wheat. Rep. 244.

nearly to a level with the royal passport itself. It is issued by an officer who is only not king; who would have been charged with the delivery and control of royal passports; who expressly declares, that it was issued in \*lieu of such; and certifies every fact which would have been stated in a royal passport. The other documents are superadded to that which would alone have been required, had the formal requisitions of the treaty been complied with, and are abundantly sufficient to establish the proprietary interest in the ship. They are supported by the depositions of the captured crew, who are required by the navigation laws of Spain to be Spanish subjects, and whose national character conforms to this requisition.

4. Again. If there be no passport such as is required by the treaty, and no such equivalent testimony as the treaty provides, still the claim to the ship is established by evidence such as the law of nations requires to establish it; and if the property of the ship is shown to be Spanish, that is sufficient to protect the cargo to whomsoever belonging.<sup>1</sup> She is furnished with all the usual documents, and none are of a suspicious or irregular character. They are supported by the testimony of all the witnesses, except one; and he was improperly examined, not being produced in his regular order, but kept back until other witnesses had been examined, contrary to the well-known rule of the prize court, which requires the captors to introduce all the witnesses in succession.<sup>2</sup> Even if the proprietary interest in the cargo should be thought doubtful, that being included in the same claim with the ship, will not necessarily involve both in condemnation; for, an attempt [\*26\*] to conceal enemy's property only affects the right to further proof.<sup>3</sup> But we insist that further proof is not required in this case; and if the national character of the ship be established by the original evidence, the conventional law entitles us to restitution of the cargo, as a matter of course.<sup>4</sup>

5. Lastly. Supposing the original evidence in the cause insufficient to entitle the claimant to restitution, either according to the provisions of the treaty, or by the general law of nations, it is insisted that all the difficulties of the case are removed by the further proof produced, which establishes the proprietary interest of both ship and cargo as claimed.

Mr. Wheaton, for the captors and respondents, (1) answered the objection taken by the claimant's counsel to the validity of the commission under which the capture was made. This is exclusively a question between the captors and the United States. The claimant has no *persona standi in judicio* to assert the rights of the United States, and it is not until after the determination of the principal question of prize or no prize, that the claim of the government can be interposed.<sup>5</sup> This is not

only our own practice, but is the prize law of France and England, and of the whole maritime world.<sup>6</sup> Even \*if the present capture [\*27\*] be a droit of admiralty, as taken by non-commissioned captors, that will not invalidate the capture, if it be of enemy's property. This is to be determined after a general decree of condemnation is entered, and before a final distribution of the prize proceeds. If the government shall interpose a claim at that stage of the proceedings, it will then be time enough to consider a question in which the foreign claimant has no interest or right to interfere.

2. The vessel and cargo in this case are liable to condemnation as prize of war, having left the Havana with a false destination. The claim sets up an alternative destination, to an enemy's or a neutral port; but it is contradicted by the documentary evidence and the depositions of the captured persons. This false destination is not excusable on the ground of the necessity of deceiving an enemy by clearing out for a neutral port. Spain was at that time at peace with all the world, except her revolted colonies; and both London and Hamburg were equally neutral ports in respect to the South-American cruisers. A false destination under such circumstances is damnable, if the case be so infirm as to require further proof; because it could only be intended to conceal enemy interests, and if alternative, it ought to appear to be such on the face of the papers, in order that captors may not be misled.<sup>7</sup>

\*3. The proofs of proprietary interest, [\*28\*] upon the original evidence, are not such as to entitle the claimant to restitution, without further proof. As to the ship, there is no doubt that if *bona fide* Spanish property, and documented according to the treaty, she must not only be restored, but the cargo also must be included in the restitution, even if proved to be enemy's property. But it is insisted that the treaty does not extend to a fraudulent use of the Spanish flag to cover enemy's property in the ship as well as the cargo.<sup>8</sup> The passport, even supposing it to be such as the treaty requires, is falsified by the muster-roll and other documents; and it was not produced, as the treaty requires, to the captors, but found on board after the capture. Fraud will vitiate even a judgment, and the most solemn instruments and assurances. This is a principle of universal law, and it would be indecent to suppose that Spain countenances such an improper use of her flag and pass. Is there, then, that equivalent testimony which the treaty substitutes for the formal passports? The law very properly requires the bill of sale to be on board where the vessel is transferred from the original proprietor.<sup>9</sup> Even Hubner, the great champion of neutral rights, admits this to be the rule.<sup>10</sup> But here the vessel is not Spanish built; yet no bill of sale is found on \*board, and the [\*29\*

1.—The Pizarro, 2 Wheat. Rep. 227.

2.—The Speculation, 2 Rob. 242; The William & Mary, 4 Rob. 312.

3.—The Madonna del Burso, 4 Rob.

4.—The Pizarro, 2 Wheat. Rep. 227.

5.—The Dos Hermanos, 2 Wheat. Rep. 94.

6.—2 Bro. Civ. & Adm. Law, 524; 2 Woodes. Lect. 432; 3 Bulstr. Rep. 27; 4 Inst. 152, 154; Zoueh. Adm. Jurisd. c. 4, p. 101; Comyn's Dig. tit. Admiralty E. 3; The Georgiana, 1 Dodson's Rep. 397; The Dili-  
Wheat. 6.

gentia, 1 Dodson's Rep. 403, Valin. Comm., l. 3, tit. 9, des Prises, art. 1; Pothier, de Propriété, No. 93; Casaregis. Disc. 24; Consolato del Mare., c. 287.

7.—The Juffrow Anna, 1 Rob. 125; The Welvaart, 1 Rob. 122; The Nancy, 3 Rob. 125; The Mars, 6 Rob. 79, 86; The Vrouw Hermina, 1 Rob. 164.

8.—The Minerva, 1 Marriott's Adm. Dec. 235; The Ciudad de Lisboa, 6 Rob. 353; The Eendracht, 1b. note (a.); The Estern, 2 Dall, 36.

9.—The Welvaart, 1 Rob. 122.

10.—De la Sais. des Batim. Neutr. Part. 1, c. 3, s. 10.



circumstances strongly point to the previous existence of enemy interests in the vessel, which it appears came from New Providence. The purchase of enemy's vessels by neutrals is entirely prohibited by the ordinances of some countries; and our law regards it as suspicious.<sup>1</sup> If still continued to be employed in the enemy's trade, or under the control of an enemy, this is deemed a badge of fraud, and conclusive evidence that there has been no *bona fide* transfer.<sup>2</sup> The ship then is not documented *bona fide*, as the treaty requires, nor is the substituted proof equivalent to that for which it is substituted. The ship, therefore, will not protect the cargo, nor is the latter so documented as to protect itself, or avoid being involved in the same fate with the vessel. To be sure, there are the usual formal documents, and so there are in every case. But they contradict each other; and being fraudulently blended in the same false claim with the ship, they must be included in the same condemnation. Both being alleged to belong to the same claimant, and he having attempted to assert a false claim to the ship, the entire claim must be rejected as a penalty for his fraudulent conduct.<sup>3</sup>

4. But the passport in this case, even supposing it not to have been fraudulently obtained and used, is not such as the treaty requires, being issued by an authority incompetent to grant **30\*** such a document of \*protection. It is insisted that nothing less than the solemnly pledged faith of the supreme power of the neutral state to the verity of the facts stated in the passport can possibly satisfy the belligerent. The terms used in the treaty are "sea-letters or passports." One of the contracting parties might understand it as intending a document in the nature of a permanent muniment of the title to the ship. Our laws recognize no other such document, than one signed by the President. The presumption, therefore, is, that our vessels were to be furnished with a sea-letter thus signed, and the Spanish vessels with a royal passport signed by the king. The cases cited on the other side, to show that such a document of protection may be granted by an authority inferior to the supreme power of the state, are not in point. In the British license cases, although this court condemned our vessels sailing under them, yet the British prize courts denied the authority of their admirals and consuls to issue them, and condemn the vessels taken by British cruisers although sailing under these licenses.<sup>4</sup> All the other cases cited are of passports issued by the Lord High Admirals of England or France, acting as the immediate delegates of the royal prerogative, and as the ministers of the crown. There is no doubt that admirals and generals, commanding fleets or armies, have the power of issuing passports for the temporary protection of persons or property, within the limits of their command. But this arises from the necessity of the case, and is incidental to the performance of their **31\*** official duties. But it is not incidental to

any official duty of the Governor and Captain-General of the Island of Cuba, that he should have the power of naturalizing foreign ships, giving them all the privileges of Spanish-built vessels, and grant passports to protect them against belligerent scrutiny. *Non ei rei proponitur*. It is highly improbable that the government of this country would have agreed to a stipulation so improvident, under which the whole navigation of our enemy might be screened from capture by a mere fictitious adoption, fraudulently or corruptly obtained for this purpose. The form of this important document being omitted, either from accident or design, there is the more necessity of looking to the substance of the contract; since, if the form had been annexed, there is no doubt that it would have required the highest authority of the state to grant a document so conclusive. The passport or sea letter provided by this treaty, is not a mere ordinary license or safe-conduct given by a general or admiral, for a temporary purpose, and within the limits of his command. It is the supreme power of the neutral state solemnly pledging itself to the belligerent, that the property of the ship is truly and *bona fide* neutral. The doctrine contended for on the part of the claimant, would go the length of entirely abolishing maritime captures; since the passport may be issued by any authority, however inferior and however remote his functions may be from such a duty. The treaty provides, that the certificates which are required relative to the cargo, shall be issued by the officer of the place \*whence the **[32]** vessel sails, and the same proviso would have been made as to the passport, had it been intended to entrust the local magistrates with the power of granting it. Neither does an examination of the forms of similar documents annexed to other treaties, containing the same stipulation, that free ships shall make free goods, justify the inference, that they may be issued by any authority less than the highest. So, also, the celebrated convention of 1801, between Great Britain and Russia, though it does not contain such a stipulation, but, on the contrary, subjects enemy's property in neutral vessels to capture, yet it provides for similar documents of protection, and in the formula annexed, it is stated, that they are "to be delivered in the respective admiralties of the two high contracting parties."<sup>5</sup> But the question has already been determined in this court, in the case of *The Pizarro*.<sup>6</sup> In that case, the court say: "It is certainly true, that the vessel was not furnished with such a sea-letter, &c., as are described in the 17th article." But she had on board the proceedings under which she was naturalized in East Florida, and a certificate from the Spanish consul at Liverpool, certifying that "Captain Don Antonio Martinez, commanding the Spanish ship called the Pizarro, of the burthen of 273 tons, registered at the port of St. Augustine de la Florida, which came to this port from the island of Amelia, with a cargo, now sails for the port of

1.—The *Bernon*, 1 Rob. 102; The *Sechs Gedchwis-tern*, 1 Rob. 100; The *Argo*, 1 Rob. 153.

2.—The *Jemmy*, 4 Rob. 31; The *Omnibus*, 6 Rob. 71.

3.—The *St. Nicholas*, 1 Wheat. Rep. 417; The *Fortuna*, 3 Wheat. Rep. 236.

4.—The *Hope*, 1 Dodson's Rep. 226; *Id.* Appendix, (D.)

5.—For the provisions of this treaty, *Vide* Appendix, note No. IV.

6.—2 Wheat. Rep. 244.

**33\*]** Corunna, in \*Spain." Here, then, was a certificate, stating the name, burthen, and property of the ship, and the name of the master, and issued by an authority as competent as the Governor of Cuba. Yet the court held it not to be a compliance with the terms of the treaty, and required further proof of the proprietary interest.

5. Supposing, however, this vessel and cargo to be documented as the treaty requires, it is insisted that they are liable to condemnation for sailing under the protection of enemy's convoy. It is true, that the *Isabella* parted company with the convoying ship before the capture; but it was a mere temporary separation, the latter having gone in pursuit of one of our privateers. Although the court has determined, in the cases of *The Nereide*<sup>1</sup> and *The Atalanta*,<sup>2</sup> that a neutral may lawfully put his goods on board an armed enemy's vessel, yet it has not determined that he may put his vessel and goods under convoy of the enemy's fleet. The distinction between the two classes of cases is stated by one of the learned judges of this court, in delivering his opinion in *The Atalanta*,<sup>3</sup> and the Lords of Appeal in England have held the offense of sailing under the protection of enemy's convoy to be a conclusive cause of condemnation.<sup>4</sup> So, also, where certain merchant ships belonging to the Hanse towns had **34\*]** put themselves under \*the protection of Swedish convoy, the latter having assumed a hostile character for the purpose of resisting the right of search, they were equally held liable to confiscation.<sup>5</sup> Such, also, is the law of Denmark, a state that has always professed to maintain the mildest principles of prize law.<sup>6</sup> In his correspondence with the Danish government, Mr. Erving, our minister, admits the extreme difficulty of upholding the contrary doctrine; and only seeks to escape from it by contending that the rule could not extend to vessels forced into the convoy, or accidentally involved in the enemy's fleet; and this may readily be admitted without at all weakening the force of the general rule.

6. This is an aggravated case of spoliation and concealment of papers. Were this Spaniard to be tried by his own law, he would be instantly condemned. By the law of the whole world, except that of the United States and Great Britain, spoliation of papers is *per se* a cause of confiscation; and by our law it is all but damnatory. If the spoliation is unexplained, or the explanation is unsatisfactory; if the cause labors under heavy suspicions or gross prevarications, further proof is denied, and condemnation inevitably follows.<sup>7</sup> And it is a relaxation of the rules of the prize court to

allow further proof even where there has been a mere concealment of \*papers.<sup>9</sup> But [**\*35** here are both suppression and spoliation; and a case which escapes from this imputation (to use the emphatic language of Sir W. Scott), "is saved as by fire."<sup>8</sup> In the present case, the spoliation and concealment are not only unexplained, but inflame the other circumstances of suspicion. The acts of the *supercargo*, in this respect, bind the owners, because he is their confidential agent; and the ship-owner is always bound by the misconduct of the master in all respects.<sup>10</sup> So, also, the act of the master binds the owner of the cargo, if he is also the owner of the ship;<sup>11</sup> and according to a decision of the Lords of Appeal, whether he is owner of the ship or not.<sup>12</sup> The act of the agent or consignee of the cargo is conclusive upon the owner of the cargo.<sup>13</sup> And if the case be such as to require further proof, it is to be granted or denied under the Spanish treaty, precisely in the same circumstances in which it would be granted or denied by the pre-existing law of nations.<sup>14</sup> But by the general law, this is a case in \*which it would [**\*36** be refused, and therefore it is an exception to the immunity secured by the treaty.

7. Finally. Even if further proof were admissible, the further proof produced does not establish the proprietary interest in a satisfactory manner. It is not incumbent on the captors to show to whom the property really belongs. It is sufficient that it does not belong as claimed.<sup>15</sup>

The *Attorney-General*, on the same side, insisted that the case was not within the protection of the treaty, because the vessel was not documented according to its provisions, and the only paper which could possibly answer to the description of the sea-letter or passport, required by the 17th article, was concealed, and not shown by the master to the captors, as provided by the 18th; so that they had a right to detain and send in the vessel for adjudication. Being thus subjected to the ordinary jurisdiction of the prize court, she is to be tried by the ordinary rules of the prize law, independent of the treaty. This court has already determined in another case, that the equivalent testimony, required by the 17th article, is to be such as the prize court would require, independent of the stipulations of the treaty.<sup>16</sup> No other testimony could give the "legal satisfaction" which the treaty demands. In a case requiring further proof, the equivalent testimony is that further proof; and the grant or denial of this \*must rest upon the ordinary rules of the [**\*37** court.<sup>17</sup> But here the claimant has forfeited his right to further proof, by his own aggra-

1.—9 Cranch, 388.

2.—3 Wheat. Rep. 409.

3.—Per Mr. Justice Johnson, 3 Wheat. Rep. 423.

4.—The *Sampson*, *Barney*, cited by Mr. Justice Story, in a note to *The Nereide*, 9 Cranch, 442.

5.—The *Elsebe*, 5 Rob. 173.

6.—4 Hall's Law Journ. 467; *Ordonn.* of 1810.

7.—The *Pizarro*, 2 Wheat. Rep. 421; *The Rising Sun*, 2 Rob. 106; *The Hunter*, 1 Dodson's Rep. 486.

8.—The *Fortuna*, 3 Wheat. Rep. 245.

9.—The *Hunter*, 1 Dodson's Rep. 4.

10.—The *Rising Sun*, 2 Rob. 108; *The Vrow Judith*, 1 Rob. 150; *The Adonis*, 5 Rob. 256; *The Imina*, 3 Wheat. 6.

Rob. 167; *The Mars*, 6 Rob. 79; 2 Valin Comm. 253; 1 Emerigon des Assur. 449.

11.—The *Rosalie & Betty*, 2 Rob. 343; *The Alexander*, 4 Rob. 93; *The Elsebe*, 5 Rob. 173.

12.—The *Franklin*, 2 Aeton, 106.

13.—The *St. Nicholas*, 1 Wheat. Rep. 417; *The Vrow Judith*, 1 Rob. 150; *The Baltic*, 1 Aeton, 14; 2 Binney, 308; 15 East's Rep. 78.

14.—The *Pizarro*, 2 Wheat. Rep. 242.

15.—The *Odin*, 1 Rob. 227; *The Neptunus*, 4 Rob. 68.

16.—The *Pizarro*, 2 Wheat. Rep. 242.

17.—The *Pizarro*, 2 Wheat. Rep. 242.



vated misconduct in concealing the destination, and spoliating and suppressing the ship's papers, which it was his duty, both by the treaty and the general law of nations, to exhibit to the captors voluntarily and fairly. But supposing the passport to have been delivered to the captors at the time of the seizure, as it ought to have been, and suppose the usage of Spain to supply the omission of the form being annexed to the treaty, still the document produced is not such a passport as that usage requires. This is shown by the very terms of the document produced, which state it to have been issued "for want of royal passports." It is said that this is justified by the local usages of the colony; but we are not bound to know those usages, or to admit that this governor had the authority to substitute his passport for one signed by the king. The document required by the treaty, then, not being found on board, the parties are to give "legal satisfaction of their property by testimony entirely equivalent." This testimony is to be, according to the course of the prize court, the papers found on board, and the examinations *in preparatorio*. But these papers and depositions, so far from satisfying the conscience of the court, increase the suspicions excited by the want of the documents required by the treaty; documents so easily procured where the property is **38\*** really Spanish, and the vessel \*fairly entitled to the privileges of a Spanish ship, that it is incredible any such vessel should want them. The *onus probandi* is on the claimant in such a case under the treaty, precisely as it would be by the general law of nations, independent of the special provisions of the treaty; and the question of proprietary interest is to be determined just as that question would be in any other case of prize. The investigation in the prize court is substituted in lieu of the investigation by the captors at sea, which last was to be entirely concluded by the treaty documents, if the ship was furnished with them; if not, she was liable to be brought in to ascertain the character of the ship, which, if adjudged to be Spanish, the same consequence of protection to the cargo will follow, as if the ship had been regularly documented according to the treaty. It is not the possession of papers equivalent, in formal effect, to those required by the treaty which will protect her from further inquiry, but she must have papers which will produce the effect of giving satisfactory evidence of the proprietary interest according to the ordinary rules of the prize court. If the substituted documents were fraudulently obtained and used, would that be satisfactory evidence? The spirit and intention of a treaty is always to be regarded in its interpretation.<sup>1</sup> Every object of such a treaty would be entirely defeated by permitting an enemy to avail himself of provisions contained in it, and intended for the exclusive benefit of a friend; and even **39\*** if a \*Spanish subject, by perpetrating a fraud upon his own government, leads the protection of its flag to a foreigner, that Spaniard becomes himself an enemy, and cannot justly complain if he suffers the fate of an enemy.

It is no disrespect to Spain, or disregard of her national rights, to refuse the benefit of her flag and pass, where they have been obtained by practicing an imposition upon her officers. She can claim no greater respect for their acts than is conceded to the judgments of the highest courts of justice. But even these are vitiated by fraud, according to the law of every country. Great Britain so understands the effect of a similar treaty stipulation. In the case of the *Cittade de Lisboa*,<sup>2</sup> which was determined under the British treaty with Portugal, containing the principle of free ships, free goods, though the vessel had the Portuguese flag and pass, she was condemned because a box of papers was found on board falsifying the claim, and showing the property to be enemy's; and to give more solemnity to the judgment of the court, the Portuguese consul was called in to witness it, and admonished to advise his government to be more vigilant over the conduct of its officers in this respect. So, also, our own court of appeals in prize causes, during the war of the revolution, held the general maxim of free ships, free goods, which had been temporarily recognized in an ordinance of Congress, not to extend to a case of fraudulent combination between the enemy and neutrals to defeat the belligerent rights of the United States and her ally.<sup>3</sup> In that case, the court observed, \*that Congress had not said that [**40** a violated neutrality should protect; and the mention of some exceptions to the general immunity (such as contraband, &c.), does not exclude others, equally flagrant, though not mentioned. So in this case, the exceptions of blockade and contraband do not exclude other cases of unneutral conduct; and some implied exceptions there must be, or how could the court engraft the exceptions of the property, of citizens of the United States trading with the enemy, or of Spanish subjects not actually domiciled within the dominions of Spain, both of which cases are excluded from the general operation of the treaty, according to the opinion of this court in *The Pizarro*.<sup>4</sup> If, then, the case is not within the protection of the treaty, does either the original evidence, or the further proof, satisfy the court of the property of the ship and cargo being as claimed? This inquiry cannot be limited to the ship, because if that was really Spanish, it would be sufficient to protect the cargo also; but both are included in the same claim, which is given for the same person; and if the claim for the cargo be false, that will also affect the claim to the ship. If the ship was Spanish property, why seek to show that the cargo was Spanish also? The proprietary interest in the ship is supposed to have been acquired under a judicial sale upon a bottomry bond. But the previous history of the ship is not satisfactorily explained, and so far as it is given, points to an enemy origin; and the proceedings under which the sale was \*had, are manifestly collusive and fraud- [**41** ulent. The claim to the cargo is also supported by mere formal documents, unsupported by the oaths of witnesses, and contradicted by the *evidentia rei*. The spoliation and concealment of the papers are not satisfactorily explained.

1.—Vattel. Droit des Gens, l. 2, c. 17, s. 268-270, 274-282.

2.—6 Rob. 353.

3.—Darby v. The Estern, 2 Dall. 35.

4.—2 Wheat. Rep. 245, 246.

Such explanation could only proceed upon the ground of the papers being innocent in themselves, and that they were destroyed from a necessity unconnected with an attempt to evade the right of search. But as to the papers thrown overboard, all that we know of their character is, that they came from the counting house of the claimant, who ordered them to be thrown overboard, in case of capture; and as to the supposed necessity of destroying them, the only reason alleged is the fear of South American cruisers. This could not be the true reason, since the papers retained on board would equally show the Spanish ownership of the ship and cargo, which it is now insisted they are sufficient to establish. And as to the papers mutilated and concealed, a careful inspection of them will satisfy the court that they point to the English origin of the adventure, and to English interests in its results. The learned counsel concluded by a very minute and able analysis of the proofs of proprietary interest.

Mr. Harper, for the claimant and appellant, in reply, (1) insisted that the destination of the vessel, in this case, was not a false destination; and that even a false destination is not **42\*** a substantive cause of condemnation. \*A false destination, is an unlawful destination concealed; but here the alternative destination did, in fact, appear on the face of the papers, and both London and Hamburg were equally lawful ports for Spanish vessels to trade with. In the cases of *The Suffolk Anna*<sup>1</sup> and *The Welvaart*,<sup>2</sup> the false destination was combined with other circumstances of illegal conduct or suspicion, and the condemnation did not proceed upon that ground alone. In the case of *The Nancy*,<sup>3</sup> it was also connected with the offense of carrying contraband goods on the outward voyage. So the case of *The Mars*,<sup>4</sup> was that of engaging in the colonial trade of the enemy, attempted to be concealed by a false destination; and further proof being necessary, it was refused on account of those circumstances of fraud and illegality.

2. Nor ought the present case to be affected by the fact of the vessel having set sail from the Havanna under convoy of a British frigate. This protection was necessary against South American cruisers, to whom Spanish property would have been good prize. But the *Isabella* intended to leave her convoy off the coast of Florida, and such an intention admits of a *locus penitentie* which was availed of; for she had in fact left the fleet, before the capture. The case of the Hanse vessels taken under Swedish convoy was very different from this.<sup>5</sup> The Swedish **43\*** armed vessels prepared to resist, and only yielded to the terror of a superior force; and the Hanse vessels were affected by what was considered as an actual resistance of the convoy, having associated themselves under its protection.

3. As to the spoliation and concealment of papers, the facts do not warrant the inference of its having been done for unlawful purposes. There is no evidence whatever that the papers thrown overboard were connected with this

transaction. The concealed papers were innocent; and were even essential to show the Spanish interest in the cargo; and as to the mutilation, if practiced at all, it must have been by the captors themselves, as they alone had an interest in defacing papers which were material to the claimant's proofs of property. The fact as to the papers thrown overboard was frankly and freely disclosed by the parties who alone had any knowledge of it, and a satisfactory reason for their conduct assigned by them on their first examination. Even supposing, however, that the fact of the spoliation and suppression of papers would, under other circumstances, exclude the claimant from the benefit of further proof, it is now too late for the captors to object, an order for further proof having been granted in the court below, without any objection on their part.<sup>6</sup>

4. The passport in this case is sufficient to establish the national character of the ship, so as to protect both her and the cargo under the treaty with \*Spain. It is one of a series [**\*44** of passports issued by the Governor of the Island of Cuba; is numbered 94, showing that many more of the same kind had been issued; and the words "for want of royal passports" are printed, which circumstance shows that it was an established formula. The circumstances of the Spanish nation at that period, when Ferdinand had been just restored to the throne, sufficiently explain the cause of the defect of passports, with the king's sign-manual. The very act of exercising such an authority on the part of the colonial governor, is strong *prima facie* evidence of his possessing the power; and until rebutted by some contrary proof, must be considered as conclusive that such is the usage of Spain. There is no substantial difference between such a document and royal passports; since the latter must be issued in blank, and sent to the different ports throughout the extent of the Spanish dominions, and the distribution of them entrusted to subordinate officers, so that the same frauds may be perpetrated, as are imagined in the present instance. What better security have we that the royal passport itself will not be employed to protect the trade of our enemy? It may be safely admitted, that you may inquire so far as to ascertain that the passport is not forged, or obtained by criminal means, or fraudulently applied to a vessel, for which it was not issued. But if none of these circumstances occur, and the passport regularly issues, from an authority which is competent to grant it according to the local usages of the neutral country, the treaty makes it conclusive, on the question of \*property. In [**\*45** this case, the passport was granted, under a judicial decree of the Consulado, at the Havanna, proceeding according to the course of the Court of Admiralty, to enforce a bottomry bond, given for repairs to the ship. The sentences of foreign tribunals, having jurisdiction of the subject-matter, and proceeding *in rem*, are considered as conclusive, by the law of this, and every other country, wherever the title to the thing comes incidentally, or directly, in controversy. Here it is the very question in issue

1.—1 Rob. 125.

2.—1 Rob. 122.

3.—3 Rob. 125.

Wheat. 6.

4.—6 Rob. 79.

5.—The *Elsebe*, 5 Rob. 173.6.—The *Pizarro*, 2 Wheat. Rep. 227, 240.



before the court; and the decision of the Spanish tribunal not only warranted the Governor of Cuba in granting the passport, but even if he had not issued it, would bind this court to consider the property as Spanish. Therefore, admitting that the captors had a right to bring in this vessel for adjudication, because she had not the passport required by the treaty, or because it was not exhibited to them at the time of the capture, still the equivalent proof is more than sufficient to supply the want of a passport in any form that can be conceived; because, it shows that the ship was entitled to every document which could prove her to be a Spanish ship, the tribunal of the Consulado having adjudged her to be Spanish property. The captors may possibly be exempt from costs and damages; but it does not, therefore, follow, that the case is taken entirely out of the special provisions of the treaty, and left at large to be determined under the law of nations. The object of the treaty was to provide, that neutral vessels should protect goods to whomsoever belonging, with the exception of contraband only. 46\*] The \*passport was to be conclusive of the neutrality of the ship, and the certificate was to show, that the cargo was not contraband. If these documents are wanting, then the property of the ship is to be established by equivalent testimony; and that being shown to be neutral, will protect the cargo, even if enemy's property, unless, indeed, it consist of contraband articles. The "equivalent testimony" required, must mean, that other documents shall be produced which will prove precisely the same facts that were intended to be proved by the passport and certificate; and not that sort of evidence which the technical rules of the prize court demand in a case requiring further proof. Doubtless the intention of the contracting parties is to be regarded in construing treaties, as it is in the interpretation of all other instruments; but that intention is to be gathered from the words they use. Although there are many treaties consecrating the maxim, that free ships shall make free goods, there is no other example of a treaty stipulating what should be conclusive evidence of the freedom of the ship. The parties to this treaty intended to exclude the jurisdiction of the prize courts of the belligerent as far as possible, by forbidding the detention of vessels having the required documents, and where they were carried in for adjudication for want of these documents, limiting the inquiry of the prize courts to such testimony as should be equivalent. All the cases cited on the other side, of the supposed exception to the general immunity, are cases arising under treaties or ordinances, merely recognizing the principle, 47\*] that free \*ships should make free goods, without providing any rule of evidence to establish the national character of the ship, and leaving that question to be determined by the general law of nations. But here the conventional law adopts a new rule of evidence, from which the court is not at liberty to depart.

The learned counsel also argued the question of proprietary interest with great minuteness and ability.

The court directed the cause to be re-argued upon the point as to the form and effect of the passport.

*The Attorney-General*, for the captors and

respondents, insisted, that the form of passport to which an effect so important was attributed, not having been annexed to the original treaty by the contracting parties, could not now be supplied by the judicial tribunals of either. Such an attempt would be an encroachment on the treaty-making power, which, in our government, is exclusively confided to the President and senate. The office of this court is to construe, not to make or amend treaties. The treaty (art. 17) provides, that "the ships and vessels belonging to the subjects or people of the other party must be furnished with sea-letters or passports, expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master of the said ship, that it may appear thereby that the ship really and truly belongs to the subjects of one of the parties, which passport shall be made out and granted according to the form annexed to this treaty." These particulars were required to be inserted for \*the purpose of identifying the vessel to which the passport was intended to apply, and to satisfy the other contracting party that she is really entitled to the immunities stipulated in the treaty. The passport in the present case was either intended to certify that the ship was Captain Cacho's, or not. The words are, "Captain — Cacho, with his Spanish ship called," &c. If Cacho was meant to be certified to be the owner, the claim does not conform to it. He expressly swears that it is not his, but that it belongs exclusively to Munos, who claims. Nobody else can have restitution but the actual claimant, and he is not certified in the passport to be the owner. But the term, "his Spanish ship," is evidently a mere figurative expression, and means nothing more than the ship of which he is master. What, then, is the import of the term "Spanish ship?" A certificate that a ship of a certain name, and bulk, and master, is a Spanish ship, is not a certificate that it is Spanish property, or in other words, the property of Spanish subjects, which is alone intended to be protected by the express terms of the article. A vessel may be a Spanish ship by adoption, by having a license to trade with the Indies, without ceasing to be the property of foreigners, or becoming the property of Spanish subjects. It is not sufficient to certify the national character of the ship merely. There must be a certificate that it is the individual property of particular subjects of Spain, for to such alone does the protection of the treaty extend. The treaty being left imperfect in omitting to annex the form of \*passport, it is very questionable [\*49 whether the stipulation as to its effect as evidence is not wholly void. But admitting that the court can supply the form, how is it to be done? Two modes may be selected. First, to take the literal words of the treaty; and then the passport should have stated the ship to be the property of Munos, the claimant; or, second, the form may be supplied by referring to other treaties similar in their nature. In the form of passport annexed to the French treaties of 1778 and 1801, the master is required to swear that "the ship belongs to one or more of the subjects of ——. The act whereof shall be put at the end of these presents," &c. No form of the oath which is to be thus appended is given; but the Dutch treaty of 1782

shows what the form of the oath would probably be: "C. D., of —, personally appeared before us, and declared by solemn oath that the ship or vessel called, &c., does rightfully and properly belong to him or them only," &c. The terms of these treaties are the same with the Spanish treaty, and require "the name, the property, and the burthen of the vessel," to be expressed. It is not property in the abstract, the national character merely, acquired by a fictitious adoption into the navigation of Spain, but the individual proprietary interest of some Spanish domiciled subject that is to be protected.

*Mr. Harper*, contra, contended, that the treaty merely required the national character of the property, and not its individual ownership, to be expressed in the passport. There can **50\*** be no doubt that this passport \*must be according to the regular Spanish form, because both this and the royal passport for the Clara, which was also found on board, have the same expression, viz., "his Spanish ship." This is precisely equivalent to a certificate that the ship belongs to Spanish subjects. A warranty in a policy of insurance that a ship is an American ship, is a warranty that she is the property of citizens of the United States. The form of passport which was intended to have been annexed having been omitted, good faith requires that it should be supplied by construction, since it must be concluded that the parties intended to waive it. A construction has been given to the stipulation by the usage of the two countries, which is sufficient for all practical purposes. What good purpose would be answered by inserting the name of the owner? The court could not inquire even whether such a person existed, much less as to his national character or domicile. The conclusive effect attributed to the passport would prevent any such extrinsic investigation, and therefore a fictitious name might be inserted which would satisfy all the requisites of the treaty. So that a general certificate of the national character of the property is as efficacious as would be a certificate that it was the property of some particular person.

The cause was again argued, upon the application of the executive government to the court, on the question of the construction of the Spanish treaty, and the form and effect of the passports.

**51\*** *Mr. Pinkney*, for the captors and respondents, stated four points for the consideration of the court:

1st. That the passport produced in this case, was not within the terms of the treaty, because it was obtained by fraud.

2d. That it was not within the treaty, because not issued by the Spanish sovereign, or his known authorized substitute.

3d. That it was not within the same, because the only article which professes to provide for it is incomplete and inofficious, the form never having been annexed, according to the terms of the article.

4th. Because the passport issued for this ship is not conformable either with the terms or the substance of the article; since it does not state that the ship is the property of a Spanish subject, nor name any Spanish subject as the owner.

Wheat. 6.

This treaty is, unquestionably, to be interpreted by a just regard to the public faith, but only so far as the public faith is actually pledged by it. The spirit which animated the parties to the armed neutrality is to be regarded; but it must be remembered that the celebrated confederacy which has received that name was intended to introduce new rules, to the disparagement and repeal of those which then existed, and in derogation of the ancient law of nations. The intention of the parties to the Spanish treaty is also to be taken into view. But this intention is to be collected from the language they have used; if that be clear and plain, there is no room for interpretation; but, if ambiguous in itself, then the intention may be fairly collected from the \*object and **[52]** circumstances of the stipulation in question. In a word, the treaty is to be executed as it is, and no new treaty to be made by the labor of exposition.

1. The object of the stipulation is expressed in the article to be "the ships and vessels belonging to the subjects or people of the other party," &c. This necessarily excludes all other ships or vessels. Consequently, it cannot be applied to vessels which are not really those of Spanish subjects, but only fraudulently represented to be such. It is a principle, not only of the common law, but of universal jurisprudence, that fraud vitiates every act, whether public or private; contracts, deeds, and judgments, are all affected by it, even as to *bona fide* purchasers. No record, however solemn, estops an allegation of fraud. Judgments of courts of competent jurisdiction import absolute verity, wherever they are brought in question; but if obtained by fraud, they are set aside, either in the same or any other tribunal; and a person affected by the fraud may show it and avoid the judgment, though not a party to the suit. Thus a stranger may avoid a recovery in a real action, if covenous or fraudulent, and he is prejudiced by it. These analogies of the municipal law are applicable to similar cases arising under the law of nations. The comity which is due to foreign states, does not require us to respect the acts of their administrative or judicial officers when they are contaminated with fraud, and still less where this fraud has deceived those very officers, and induced them to issue Spanish papers to a British \*ship. **[53]** In such a case, even if a royal passport had been issued, we should have a right to say, in the language of the common law, "the king has been deceived in his grant." A repetition of such transactions as the present case discloses, would bring the entire treaty into jeopardy. The honor and interest of both nations equally require that they should be repressed. The only mode of preserving the amicable relations between the two powers, is by judicial interposition, preventing the effect of such violations of the spirit of the treaty before they grow too mighty to be controlled by diplomatic remonstrance. Make these frauds successful, and encourage them by your decisions, and such violations will be frequent. On the other hand, by arresting them *in limine*, the presumed and declared purposes of the contracting parties will be fulfilled, and dissensions and hostilities prevented. That there must be some implied exceptions to the conclusive effect attributed to



the passport by the letter of the treaty, is manifest. Such would be the case of a royal passport, signed in blank, obtained by corruption of the officer in whose custody it was, and filled up fraudulently, and applied to a vessel not entitled to the privilege. Here is a passport *de facto*, with all the solemnities upon its face, yet certainly examinable in this particular; and if shown by extrinsic evidence to be thus fraudulently obtained and used, not only would the captors be excused from costs and damages for detaining the vessel, but she must be condemned under the ordinary rules of prize law. So that all the mischiefs of stopping vessels at sea **54\***] may arise \*notwithstanding this stipulation; and, indeed, all such attempts to limit the range of maritime warfare will be found in practice to be quite illusory, unless, indeed, the capture of private property be entirely prohibited; and even then contraband and breach of blockade must be excepted. A passport, as in the present case, actually filled up by the proper authority, and intended for the ship for which it is actually used, if issued upon false suggestions, is no more a legal passport than the one just supposed. The will of the grantor does not concur. The fraud makes it no passport. But it is objected, that by the 18th article, the passport, if in due form, is to be conclusive when shown at sea, and the belligerent cannot detain the vessel after this document is exhibited. If the precise letter of the treaty be adhered to, this objection will be found to be groundless. "If the ships of the said subjects, &c., shall be met with," &c., "the master or commander of such ship shall exhibit his passports concerning the property of the ship, made out according to the form inserted in this present treaty." &c. Suppose a ship exhibiting such a passport, should be proved by other evidence found on board, not to be a "ship of the said subjects;" then the letter of the treaty does not apply to her. If not a "ship of the said subjects," her passport is no absolute and conclusive protection. On the other hand, if the spirit of the treaty be regarded, the result is precisely the same. The intention of the contracting parties was to protect Spanish ships, and not enemy ships; to give effect to the **55\***] \*maxim of free ships, free goods; not to make enemy ships protect enemy goods. Even admitting, that the contracting parties meant to confide in the good faith of each other, that they would grant their respective passports only to their own vessels; still it is not to be supposed, that they meant to confide in the good faith of their enemies, that these last would not attempt to deceive their officers. It would, indeed, be an imputation on their good faith, to suppose that they wished such frauds to be successful. Every such national stipulation must receive a fair and reasonable construction. One which subverts its object, which encourages fraud and perjury, and makes the stipulation destructive to the rights of both parties, and benefits their enemies only, cannot be just. So pernicious a construction destroys all the advantages of the treaty. Look at its consequences to our belligerent rights. The passport, however obtained, and attended with whatever concomitant proof of fraud and falsehood, is supposed to be incontrovertible. However clumsy and barefaced the imposition may be,

still it must prevail; and while our enemy is warring upon us in all directions, and by every means, we must suffer his trade to pass unmoled in his own ships, wearing a Spanish veil which disguises nothing, and only compels us to affect blindness. On the other side, the evils flowing from the interpretation we insist upon amount to nothing. The passport is still protecting evidence to all reasonable and honest purposes. The captor who disregards it, does so at the \*peril of exemplary costs and **[\*56** damages, to be inflicted in the discretion of the court, according to the peculiar circumstances of every case. There is, then, the moral restraint of a great responsibility. It is sufficient to give protection where it is due, and was intended to be given. It provides for the consequences of slavish submission to the letter of the instrument on the one hand, and guards against vexatious interruptions of neutral commerce on the other.

2. But, if the document can be issued by any inferior functionary, the argument on the first point is entitled to still more weight. It is impossible to conceive that any nation would be so unwise as to consent that subordinate officers, at a distance from the sovereign authority, of great facility, surrounded by corrupt agents, or perhaps themselves corrupt, should grant such an omnipotent document, sacred, infallible, and conclusive even against the manifest fact and truth. Where is the authority of this court to countenance the issuing of such a document, by an authority less than the highest? The treaty is here silent. If the form had been annexed, it would probably have provision on this subject also. If this omission is to be supplied by construction, the court will remember the high dignity and vast power of the document, and will not too easily confide in the responsibility of subordinate agents, remote from the control of their sovereign. The passport now in question, professes to be issued "for want of royal passports." But why want them? Their absence proves a want of confidence in the \*officer who has here assumed the **[\*57** authority to substitute his own, for the passport of his prince. In the absence of any evidence of a right to exercise an authority so high, or of the fact that any royal passports had ever been entrusted to his distribution, the court cannot recognize the validity of a document thus issued.

3. The 17th and 18th articles of the treaty, so far as they provide for the form and effect of passports, are inofficious and incomplete, for want of the annexation of the form intended. The 17th provides, that the "passport shall be made out, and granted according to the form annexed to this treaty." The ships of the two nations are to be "provided, with passports as above mentioned," &c., "without which requisites they may be sent to one of the ports," &c. The 18th, stipulates that the master "shall exhibit his passports, concerning the property of the ship, made out according to the form inserted in this present treaty, and the ship, when she shall have showed such passport, shall be free, and at liberty to pursue her voyage," &c. So that there is nothing in these articles which gives a conclusive effect to any other passport than one, which it is impossible to have under the treaty, as the parties have left it. The first

part of the 17th article does indeed give some of the qualities of the passport; but it must have others, and they are unattainable by reason of the omission of the form. The court then must either strike out the reference to a form, or imagine a form, and annex it. To do either, would be a high act of legislation, to **58\*** which the court is \*incompetent. But let us try to discover the form; and taking the 17th article for a guide, it must express the name, property, and bulk of the ship, and the name and habitation of the master. Still there are several things more to be ascertained. Who is authorized to grant the passport? This is an essential circumstance; is ascertained by the forms of passport annexed to several treaties; and would probably have been expressed in this form had it been annexed. How is the proprietary interest to be stated: as the general property of the subjects of the state, or as the special property of some individual named? Is the national character of the ship, as a part of the navigation of the country under whose flag she sails, sufficient; or must it appear to be the property of subjects in general, or of some individual owner? Under what sanctions and solemnities, and accompanied by what proofs, is the document to issue? These, too, are regulated by the forms annexed to several treaties, which were brought to the notice of the court, at the former argument. The court may supply these requisites, conjecturally, but it can have no assurance that it will not err, and defeat, instead of promoting the intention of the parties. The stipulations of the treaty are nothing, and profess to be nothing without the form of passport. The contracting parties have made no effectual contract on this matter, without the form. The court cannot finish, what they have left imperfect, any more than it could frame new articles, and insert them in the treaty. The contracting parties give conclusiveness **59\*** to no passport \*but one according to a form to be annexed. The court knows not what that form would have been. It might have explained, varied, or added to the requisites of the passport contained in the body of the treaty. Can the court give conclusive effect to any other passport than the one intended to be provided by the treaty? If it can, the treaty would, to a certain extent, be made by the court. But the judiciary has no portion of the treaty-making power under our constitution; and cannot exercise it under the pretext of interpreting treaties made by the President and Senate. Here is no room for interpretation. The language of the treaty is express and intelligible, as far as it goes. It creates but one *casus fœderis*. The court cannot vary it, or superadd another. The 14th article of the Prussian treaty of 1785, contains a similar stipulation with that of the Spanish treaty. The passport is to express the "name, property, and burden of the vessel, as also the name and habitation of the master, which passports shall be made out in good and due forms (to be settled by conventions between the parties, whenever occasion shall require"), &c. Suppose that no such conventions were ever concluded (and in fact they never were), could the court supply the form, or give effect to the stipulation in the treaty with Prussia? Yet the two cases are the same: for the omission of a

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convention settling the form, or of the annexation of the form, equally fail to complete the stipulation. If one can be judicially supplied, why cannot the other? It is a gratuitous assumption to say, that by the non-annexation, the \*parties intended to refer the form to [\***60** each other's good faith and discretion. If they had changed their minds in this respect, when they executed the treaty, a supplemental article would have been added; and the only fair inference from their silence is, that they meant to leave the stipulation of free ships, free goods, to support itself by the ordinary rules of evidence as to the property of the ship. The court cannot alter the treaty by mere implication, and that, too, not a necessary implication, for the non-annexation might have been the result of inadvertence. It might also have been the result of an intention to abandon the scheme of conclusive passports, or of passports more than usually efficacious, by omitting to perfect the treaty in that respect. If the defect proceeded from accident, the parties might have supplied it by a subsequent convention: and if they have not thought fit to do it, the proper inference is, that they did not wish to do it; and if wishing it, they have neglected it, they have no reason to complain that the court acts upon the treaty as it finds it. The inadvertence, therefore, was remediable in a regular manner, by the treaty-making power on both sides; and the court has no right to say that it was not an inadvertence; or if by design, that it was not intended to leave the stipulation abortive as to the effect of passports. And where is the mighty mischief of leaving it unaccomplished? The great object of the treaty was the principle of free ships, free goods. Take away the conclusiveness of the passport, and that principle remains in full force. It stands in many a treaty without it. The passport would still \*have its proper [\***61** effect. It would be entitled to respect as *prima facie* evidence, but it would not be conclusive against further examination. No doubt the public faith is to be preserved but the care of it is devolved upon this court to a limited extent only; the executive government is answerable for the rest. The jurisdiction of the court to carry the treaty into effect, arises out of the constitution, which declares it to be the supreme law of the land, and it is only as a law that the court can deal with it. Where a treaty gives a legal rule, the court may enforce it directly in the exercise of its ordinary and regular jurisdiction. But where it fails to give such a rule, the court is without power. As a court of the law of nations, it cannot, by analogy to its equitable jurisdiction, supply the defective execution of a treaty, as chancery supplies the defective execution of a power, or a trust. A court of equity supplies a remedy where there is a right merely equitable. It has a control over the parties to compel them to do justice, although there be no legal obligation. But this court cannot deal with treaties in this manner. It must execute them as it finds them, since it acts upon them as written laws merely, and has no control over the parties to make them conform their conventions to their actual intentions. Suppose the United States had refused to make a convention providing the form of passports under the Prussian treaty, could this court compel the government to do it, or con-



sider it to be done, because in equity it ought to be done? An equitable jurisdiction over treaties, implies a control over parties. But **62\***] the \*power of the court over treaties is incidental merely; it makes the treaty act where it professes to act, and does not supply rules of conduct which the treaty does not give. Its province is interpretative, as in the case of other laws; and it can no more assume the treaty-making power, than any other legislative power.

4. But putting the last objection out of the question, the passport produced does not conform to the 17th article of the Spanish treaty. The requisition of the treaty is, that the passport shall state "the name, property and bulk of the ship," &c., "that it may appear thereby that the ship really and truly belongs to the subjects of one of the parties," &c. But this passport merely licenses the master, by name, "to proceed in his Spanish ship," &c. How does it appear by this that the ship is the property of any subject of Spain? The words of the treaty, or absolute synonyms, are essential, and cannot be dispensed with without frustrating the object of the stipulation. Unless, therefore, the substituted words necessarily, and under all circumstances, mean the same thing, and give the same security to the belligerent, the departure is fatal. The pronoun "his," as here used, does not relate to property, but to the official character of the master; nor is it pretended that he is owner. The words "Spanish ship," do not necessarily denote Spanish property. Spain may adopt, or naturalize foreign vessels, for temporary, or for permanent purposes, without making their owners her subjects. Even a Spanish passport given to a vessel, documented in other respects as a foreign vessel, may be held to communicate the Spanish national character. It depends on Spain to make any vessels Spanish vessels, and thus to give the protection of her flag and pass to the whole navigation of our enemy. The words here substituted, do not then necessarily import the same with the words of the treaty; they are susceptible of evasion; they may be true, and yet the requisitions of the treaty remain unsatisfied.

*Mr. Harper*, contra, referred to the former argument on the part of the claimant and appellant on all the points, except that relative to the omission of the form of passport provided by the treaty, which he insisted did not defeat the conclusive effect meant to be attributed to the passport by the treaty. The construction contended for, on the part of the captors, would destroy the benevolent object of the contracting parties. It is highly improbable that the two nations would have suffered so important an alteration to be worked in their original intentions, either by an accidental or designed omission of the form of passport. The annexation could hardly have been omitted from negligence; and if the entire effect of the stipulation was meant to have been waived, the parties would have distinctly expressed this change in their views. The fair inference, therefore, is, that they meant to refer the form to each other's good faith, and to be satisfied if it contained a compliance with the substantial requisitions of the treaty. Under this confidence, our vessels have been furnished with the sea-letter, and

the vessels of Spain with a royal passport, or a passport substituted \*for it by the Spanish [**64** authorities, to whom the issuing of royal passports is entrusted, and containing the same particulars as to the property of the ship, &c., which the royal passport contains. It is not contended, that the passport may be issued by any Spanish authority, however inferior, or however alien his functions to the matter in question; but only by such officers as the Spanish government authorizes to grant them. If, notwithstanding a vessel has such a passport or sea-letter on board, she is liable to be interrupted in her voyage, and carried in for adjudication, under the ordinary rules of the prize-court, independent of the conventional law, the object of the contracting parties will be entirely defeated. It is true, that free ships will still make free goods; but if the freedom of the ship must be established by the tedious process of judicial investigation, notwithstanding the provisions of the treaty intended to exclude such investigation, very little will be gained for the security of neutral commerce. The terms used in the passport, with which the ship was furnished, are precisely synonymous with those of the treaty. The treaty does not say, that the passport shall express the individual proprietary interest of any particular Spanish subject, but that it shall express the property of the ship. How can a ship be a "Spanish ship" without being Spanish property? And how can it be Spanish property without being the property of the subjects of Spain? This is the effect of the terms, as used in a policy of insurance, and other commercial transactions. A mere license to a foreign ship, \*docu- [**65** mented as a foreign ship, conferring on her the privileges of Spanish trade, by a fictitious adoption similar to that which gave rise to the British rule of 1756, relative to the colonial trade, would not make her a Spanish ship. And even if Spain should abuse the immunity conferred by the treaty, it is no reason why this court should dispense with its obligations. It is for the legislative authority to determine when political considerations will justify this country in suspending any of the provisions of a foreign treaty. The court must take the law from the treaty-making power, or from the higher legislative power dispensing with the obligations of a treaty.

The cause was continued to the next term for advisement.

At the present term the opinion of the court was delivered by

*Mr. Justice STORY*: This cause was heard upon the whole evidence, introduced by both parties, at the last term; and as it embraced several points of great importance and difficulty, the court *ex mero motu*, directed one of those points to be re-argued; and another, including a final construction of the Spanish treaty in matters of deep and universal interest, was re-argued upon the application of the government itself. The last argument was heard at so late a period of the session, that it was found impracticable for all of us to prepare deliberate opinions, and the cause was ordered by the court to be \*continued for advisement. The court [**66** has now come to a result, which I am directed to pronounce.

A preliminary question was raised at the original argument, that the libel ought to be dismissed, because the capture was made without public authority, and by a non-commissioned vessel. Whether this be so or not, we do not think it material now to inquire. It is a question between the government and the captors, with which the claimant has nothing to do. If the ship and cargo be enemy's property, it cannot be restored to the claimant. If the captors made the capture without any legal commission, and it is decreed good prize, the condemnation must, under such circumstances, be to the government itself. If with a commission, then it may be to the captors. But in any view, the question is matter of subsequent inquiry after the principal question of prize is disposed of; and the government may, if it chooses, contest the right of the captors by an interlocutory application after a decree of condemnation has passed, and before distribution is decreed. The claimant can have no just interest in that question, and cannot be permitted to moot it before this court.

Having disposed of this point, which, indeed, has been long recognized as a settled principle of the law of prize, the path is open for the consideration of the other points of the cause.

The captors contend, that the whole evidence establishes, that the ship and cargo are enemies' property, the property of British subjects disguised under Spanish documents, and bound **67\*** to a British port. \*That the voyage had its origin in London, and was to terminate there; and that the usual frauds of false papers, false destination, and suppression of evidence, have been resorted to for the purpose of giving a neutral character to hostile interests.

The counsel for the claimant deny the matter of fact, and assert, that the proprietary interest of ship and cargo is *bona fide* Spanish; and endeavor, with great ingenuity and force, to explain away the difficulties with which it is admitted, on all sides, this part of the cause is surrounded. If this ground should be thought not to be entirely and satisfactorily made out, the counsel for the claimant further contend, that the ship was duly documented as a Spanish ship, according to the stipulations of the Spanish treaty of 1795; and that the effect of those stipulations is to preclude all inquiry into the proprietary interest of ship and cargo. Of the former, because the passport is conclusive evidence of the national character and ownership of the ship, which all persons are estopped to deny; of the latter, because, by the treaty, free ships make free goods, and the national character of the cargo becomes wholly immaterial.

To this point, which, if settled one way, is decisive of the cause, the counsel for the captors have given several answers: 1. That the passport of this ship was obtained by fraud, and this is always inquirable into, and vitiates all, even the most sacred instruments and records. 2. That the passport is not conformable to the treaty, not having been issued by royal authority, or authenticated by the royal government, **68\*** but issued by a mere colonial governor; and that, such as it is, it does not state the ship to be owned by Spanish subjects, which is indispensable under the treaty. 3. That the substituted proof required by the

17th article of the treaty, where the passport is not regular, must be such as is subject to the thorough examination of the prize court. 4. That the form of the passport, referred to in the 17th article of the treaty, never having been annexed to it by the contracting parties, that article, so far as it purports to give any effect to passports, is inoperative and imperfect, and the imperfection cannot be supplied by any judicial tribunal.

Such are the leading propositions, pressed with great ability and earnestness into the discussion of this cause, by the respective parties. They embrace principles of international law of vast importance; they embrace private interests of no inconsiderable magnitude; and they embrace the interpretation of a treaty which we are bound to observe with the most scrupulous good faith, and which our government could not violate without disgrace, and which this court could not disregard without betraying its duty. It need not be said, therefore, that we feel the responsibility of our stations on this occasion, and that in delivering our opinion to the world, we have pondered on it with great solicitude and deliberation, and have looked to consequences no further than the sound principles of interpretation and international justice required us to look.

The point to which the court will first direct its attention, is that last made, viz., whether the 17th article of the treaty of 1795, [**69** so far as it respects passports, is inoperative and imperfect in consequence of the omission to annex the form of the passport to the treaty. This is a very delicate and interesting question.

The 17th article provides, "that in case either of the parties hereto shall be engaged in a war, the ships and vessels belonging to the subjects or people of the other party, must be furnished with sea-letters or passports (*patentes de mar o pasaportes*), expressing the name, property (*propiedad*), and bulk of the ship; as, also, the name and place of habitation of the master or commander of the said ship, that it may appear thereby, that the ship really and truly belongs to the subject of one of the parties, which passports (*dichos pasaportes*) shall be made out and granted according to the form annexed to this treaty." The article proceeds to declare, "that such ships, being laden, are to be provided not only with passports, as above mentioned, but also with certificates containing the several particulars of the cargo, the place whence the ship sailed, that so it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed, in the accustomed form; and if anyone shall think it fit or advisable to express in the said certificate, the person to whom the goods on board belong, he may freely do so; without which requisites they may be sent to one of the ports of the other contracting party, and adjudged \*by the competent tribunal, according to what is above set forth, that all the circumstances of the above omission, having been well examined, they shall be adjudged to be legal prizes, unless they shall give legal satisfaction of their property by testimony entirely equivalent." In point of fact, no form of a passport was made out and annexed to the



treaty. The case, then, now before us, is not within the letter of the treaty, for as no form is prescribed, the documents found on board cannot be compared with any form; and until that comparison is made, it is impossible to say whether the stipulations originally intended by the treaty have been exactly and literally complied with or not. There is no room here left for interpretation, on account of ambiguous language of the parties. They have expressed themselves in the clearest manner, and it is to the passport, whose form is to be annexed to the treaty, and to none other, that the effect intended by the treaty, whatever that may be, either as conclusive or *prima facie* evidence of proprietary interest, is attributed. Into the reasons why this form was omitted to be annexed to the treaty, we are not permitted judicially to inquire. It may have been by accident, or by design, from difference of opinion as to what should be the solemnities accompanying it, or from a willingness to leave it to future negotiation. Can this court annex a form to the treaty? Can it supply the deficiency of the treaty, and give effect to it in the same manner as if no form were referred to? Can it look to the stipulations, and decide for itself what the parties regarded as substance, **71\***] and what as mere form? \*Can it say that the stipulations in the text would have been agreed to without the auxiliary form of the passport? Can it decide judicially, that under no circumstances the form of the passport could be of the essence of the stipulations? These are grave questions, and are not to be lightly answered. They deserve and require deliberate consideration. We have given it; and our opinion will now be delivered.

In the first place, this court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this court supply a *casus omissus* in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind. The parties who formed this treaty, and they alone, have a right to annex the form of the passport. It is a high act of sovereignty, as high as the formation of any other stipulation of the treaty. It is a matter of negotiation between the governments. The treaty does not leave it to the discretion of either party to annex the form of the passport; it requires it to be the joint act of both; and **72\***] that act \*is to be expressed by both parties in the only manner known between independent nations—by a solemn compact through agents specially delegated, and by a formal ratification.

Nor is there anything strange or singular in leaving matters of this sort to be settled by future negotiations. In our treaty with Prussia of 1785, the 14th article contains a provision as to passports, in substance like that of the 17th

article of our treaty with Spain, except that it declares that these “passports shall be made out in good and due form, to be settled by conventions between the parties, whenever occasion shall require.” This stipulation manifestly contemplates that the form of the passport is to be a solemn act of the treaty-making power of both governments, and that neither government has authority in its discretion to use a form which shall be binding, without its consent, upon the other contracting party.

In the next place, this court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise. We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice. The terms which the parties have chosen to fix, the forms which they have prescribed, and the circumstances under which they are to have operation, rest in the exclusive discretion of the contracting parties, and whether they belong to the essence or the model \*parts of the [**\*73** treaty, equally give the rule to judicial tribunals. The same powers which have contracted, are alone competent to change or dispense with any formality. The doctrine of a performance *cy pres*, so just and appropriate in the civil concerns of private persons, belongs not to the solemn compacts of nations, so far as judicial tribunals are called upon to interpret or enforce them. We can as little dispense with forms as with substance.

In the next place, we cannot admit that the annexation of the form of the passport was, in itself (supposing we had a right to inquire into it), a matter of small moment or importance, so that the omission could be dispensed with, as not belonging to the substance of the treaty. It was competent to the parties, by the particularity of the form, to have qualified the general expressions of the article, and to have made that determinate, which, upon the face of the article, stands indeterminate. It is, for instance, indeterminate upon the face of the article, whether there is to be a specification of the names of the owners of the ship, or only a general declaration that the owners are Americans or Spaniards. It has also been contended here, and is certainly susceptible of doubt, whether the passport was to express the individual ownership, or the national character of the ship. So the solemnities to be observed in granting the passport, the oaths to be made by the parties, the persons by whom they were to be verified, are all left indeterminate by the treaty. These might have been, and looking to the requisitions of other treaties, must have been explained and settled by the form annexed \*to this treaty. The 25th article of the [**\*74** Dutch treaty of 1782, is substantially the same as the 17th article of the Spanish treaty; and the form of the passport, certificate, and sea-letter annexed to that treaty, reduce to a perfect certainty every circumstance which has been already mentioned. Other qualifications and limitations might have been added, in the pleasure of the parties. It is impossible, therefore, for this court, judicially, to say what such passport might or would have contained. We

may indeed conjecture, but in this conjecture we may err; and to assert what it would be *in literis*, would be to exercise a sovereign control over the compact itself.

Nor are the circumstances already stated, mere form, or diplomatic ceremony. They might well have entered into the very substance of the stipulation. The counsel for the claimant alleges, that the passport, intended by the treaty, was to import perfect, unimpeachable verity; that it was to have a sanctity beyond that which is granted to any other solemn instrument. Fraud would not vitiate it, nor the most direct, unequivocal breach of good faith, or abuse of the passport, bring its protecting virtue into question. Assuming, for the purpose of argument, that this is true, the form of the passport, and the solemnities accompanying it, were of the deepest interest and importance to both nations. It was vital to the treaty; vital to the acknowledged rights derived under the law of nations. The immunity intended by the treaty, in this view of it, was a derogation from the general belligerent rights of both parties. They might be willing to concede **75\*** the issuing of such passports to the Spanish high officers of state with the royal approbation and signature, or with the corresponding signatures of our own Secretary of State and President. They might have full faith and confidence, that under such guards, the danger of abuses would be very much diminished, if not entirely checked. But they might not be willing to trust to the integrity, discretion, and watchfulness of subordinate agents; to officers of the customs; to colonial governors, or commanders in distant provinces. In point of fact, our own passports have issued under the authority and signatures of our highest executive officers. What reason has this court to presume that our government would accept of a verification by inferior officers of Spain? What reason has this court to presume that our government would have been satisfied with a passport signed by a colonial governor for want of royal passports? It has not been so stipulated in the treaty. It has not, in terms, dispensed with the annexation of the form of the passport to the treaty. Even if one government had been willing to dispense with it, it remains to be shown, that the other was also willing. And if both were willing, it would still remain to be shown that the act of dispensation was consummated by a solemn renunciation; for the obligations of the treaty could not be changed or varied but by the same formalities with which they were introduced; or at least by some act of as high an import, and of as unequivocal an authority. All that can be said in the present case, is, that the subject of the annexation of the passport was **76\*** taken *ad referendum* by the parties. They had competent authority so to do; and this court is bound to presume, that they had good reasons for their conduct. It is far more consistent with every fair interpretation of the acts of the government, to suppose, that the form of the passport was postponed with a view to the suspension of the article until the subject was more deliberately considered, or could be more conveniently attended to, than to suppose that words of reference were used without meaning, and forms carrying with them such

important and interesting solemnities, and such obligatory force and dignity, were hastily abandoned at the very moment they were studiously sealed to the text. Unless this court is prepared to say, that all forms and solemnities were useless and immaterial; that neither government had a right to insist upon a form after having assented to the terms of the article; that a judicial tribunal may dispense with what its own notions of equity may deem unimportant in a treaty, though the parties have chosen to require it; it cannot consider the 17th article of this treaty as complete or operative, until the form of the passport is incorporated into it by the joint act of both governments.

Upon the whole, it is the opinion of the court, in which opinion six judges agree, that the form of the passport not having been annexed to the 17th article of the treaty, the immunity, whatever it was, intended by that article, never took effect; and therefore, in examining and deciding on the case before us, we must be governed by the general law of prize.

\*This view of the case renders it unnecessary to consider the other points made by the counsel for the captors, as to the effect of the treaty; and we therefore give no opinion upon them.

It remains, then, to consider whether the ship and cargo, now in judgment, are, in fact, neutral or hostile property. The facts are extremely complicated, and the evidence, in many instances, clashes so as to forbid all hopes of reconciling it. It cannot be disguised, too, that the claim is involved in much perplexity, and is shaded by some circumstances that have not been entirely cleared away. If it were not a task from which we could derive no general instruction, the whole evidence might be minutely examined, as to the questions of false destination, suppression of papers, and use of false papers. But the labor would be very great, and after all, would conduce to no important purpose. We shall content ourselves, therefore, with a brief statement of the result of our opinion.

It is to be recollected, that by the settled rule of prize courts, the *onus probandi* of a neutral interest rests on the claimant. This rule is tempered by another, whose liberality will not be denied—that the evidence to acquit or condemn, shall, in the first instance, come from the ship's papers, and persons on board; and where these are not satisfactory, if the claimant has not violated good faith, he shall be admitted to maintain his claim by further proof. But if, in the event, after full time and opportunity to adduce proofs, the claim is still left in uncertainty, and the neutrality of the property is not established beyond reasonable **78** doubt, it is the invariable rule of prize courts to reject the claim, and to decree condemnation of the property. There is another rule, too, founded in the most salutary and benign principles of justice—that the assertion of a false claim, in whole or in part, by an agent of, or in connivance with the real owners, is a substantive cause of forfeiture, leading to condemnation of the property. These principles are not alluded to in this case, for the purpose of founding our present judgment upon them; for we do not rely upon it as a case merely



of reasonable doubt; but to show that a case less strong might justly have supported the decree we feel ourselves bound to pronounce—of condemnation.

We cannot resist the conclusion, looking to the whole evidence, that this is a case where the whole mercantile adventure had its origin, in the house of trade of Messrs. Von Harten & Gobel, a house domiciled in London. The ship was, beyond all question, a foreign ship; but of what nation, and in whose ownership at the time when she acquired her ostensible Spanish character, is studiously concealed. She came just before her naturalization from New Providence; and that naturalization was procured, as we feel ourselves constrained to believe, by an imposition practiced upon the Spanish judicial authorities, by means of a pretended lien under a bottomry bond, supposed to be given for repairs. The holder of the bond procured a judicial sale of the vessel, became himself the purchaser, and afterwards obtained the Spanish character by a negotiation with **79\*** the Spanish colonial government, \*making awkward apologies for his asserted ignorance of the former ownership, and endeavoring to allay the well-founded distrust of that government. To this very hour the claimant has observed a profound silence on this point, a source of just and pregnant suspicion, although he has loaded the cause with documentary proofs and affidavits on other points. He has not chosen to give any information as to the origin of the bottomry bond, or former ownership of the vessel, or of the circumstances under which the supposed lien was acquired. Yet these facts would seem to have lain immediately within his reach. On board, too, of the vessel at the time of the capture, was the special and confidential agent of Messrs. Von Harten & Gobel, and also the brother-in-law of Mr. Von Harten. Some papers were thrown overboard, others were concealed, and others spoliated. The testimony of the witnesses upon the standing interrogatories, was far from satisfactory; and it is extremely difficult to exempt the agents on board the vessel from the imputation of designed suppression of facts and prevarication. The claimant, Mr. Munos, is the father-in-law of Mr. Gobel, and claims this very valuable shipment as his own property, asserting himself to be a merchant now engaged in business. And yet it is proved by a weight of testimony that seems difficult to resist, that Mr. Munos has not been known to be engaged in commercial business on his own account for at least fifteen years before the time of this shipment. And it is established in the most satisfactory manner, and is indeed admitted by the **80\*** claimant himself, \*that on account of the foreign character of Mr. Gobel (the son-in-law of Mr. Munos), all the foreign business of Mr. Gobel has been constantly carried on for several years under the cover of Mr. Munos. These are a few of the extraordinary facts of this case, and combining them with the indications of the papers found on board, and the suppressed documents which have reached the light; the vehement presumption, and almost written proof, that Mr. Gobel, the admitted partner of the English house of Von Harten & Gobel, was the stationed agent of that house at Havana;

and the fact, that the destination was alternative, or double, to London or Hamburg, or both; the conclusion is difficult to overcome, that the cargo was the property of Messrs. Von Harten & Gobel, or some other unknown enemy proprietor, and covered by the Spanish character of Mr. Munos. And the court is constrained to consider the proceeding at Havana as mere machinery to neutralize an enemy's ship, and that the ship, either previously belonged to Messrs. Von Harten & Gobel, or some other enemy proprietor, or was purchased at New Providence on his or their account. It is perfectly immaterial whether Mr. Munos had any subordinate interest in the ship and cargo or not. If his claim be substantially false in the manner in which it is framed, having been adopted by him, he has justly incurred a forfeiture of any such interest, by attempting an imposition upon the prize court.

It is the judgment of the court, that the decree of the Circuit Court, condemning the ship and cargo, \*be affirmed, with costs. From [**\*81** so much of this opinion as respects the question of proprietary interest of vessel and cargo, three judges dissent.

*Mr. Justice JOHNSON.* This is an appeal from the sentence of the Circuit Court of North Carolina, condemning this vessel and cargo as prize of war to the Roger, privateer.

The condemnation below appears to have proceeded on evidence of an hostile interest existing in the ship. For, as to the cargo, it is not denied that the proprietary interest is immaterial; since, if the ship be Spanish, the existence of an enemy interest in the cargo, does not affect it. Yet, much of the evidence and argument have been introduced to prove the existence of an hostile interest in the cargo; but it has been with a view to maintain two positions: 1st. That it is a strong circumstance to prove the vessel to be British property; and, 2d. That, though it be not enemy owned, yet, as both vessel and cargo are claimed by the neutral, if it be proved that he has attempted a fraud, the penal consequence is the forfeiture of his own interest.

It cannot be denied, that there are many circumstances in the case, going strongly to prove too intimate a connection, between this adventure, and the mercantile transactions of the house of Gobel, consisting of Gobel and Von Harten, a British merchant. Nor is it entirely clear that Rahlives, who appears in the machinery as supercargo, is not himself a participator in interest. If I felt myself now called upon to decide this case on the ordinary principles \*which govern the decisions of [**\*82** prize courts on neutral claims, it must be acknowledged that there is a good deal of evidence which must be rejected, in order to clear it from the tissue of difficulties in which the circumstances involve it. Yet there is one important consideration which rides over all the unaccountable combinations of interest which present themselves to the view of the court. Why should British property on board a Spanish vessel have been disguised as Spanish? There are obvious reasons why Spanish property should have been disguised as British; for, it would have afforded protection against the only

enemy a Spaniard had to fear—the patriot privateer. But, as England was at peace with all the world except America, and enemy property secure from American capture in a Spanish vessel, it is difficult to conceive a reason why this disguise should have been thrown over a British cargo. The course, however, which I will pursue in coming to a conclusion, precludes the necessity of disentangling the web, in which the interests of the claimant are wound up by the various circumstances of the destruction, mutilation, and concealment of papers, and the questionable shape in which several of the actors in the drama present themselves to the view of this court.

The claimant finds his right to restitution on his Spanish character, and the sufficiency of his Spanish documents under the treaty. The captor contends, that the documents found on board, were not of the first order under the **83\*** treaty, and that when let in to \*the production of substitutes, a plenary inquiry is opened in to proprietary interest.

Before entering upon these more general questions, it is necessary to take notice of a preliminary ground of condemnation, which, if it can be sustained, anticipates every other inquiry. It appears that the vessel left the Havana under convoy of a British frigate, and, it is contended that this circumstance is, *per se*, a ground of condemnation.

This is, at least, a new ground in this court; and it cannot be expected that it will meet with a very favorable admission from a court which has manifested no disposition to multiply causes of condemnation. Without being supposed to express any inclination to adopt the principle, I deem it sufficient to remark, that if it could be admitted, it ought not to be applied to a nation which needed that protection against an existing and enterprising enemy; and which ought, therefore, to be considered, as having sought it for that purpose, and not against a neutral, whose principles of conduct it had then no reason to distrust. The Gulf of Florida, at that time, swarmed with patriot privateers; and the convoying ship had, moreover, parted from the fleet before this capture was made. The conduct of this vessel was perfectly pacific when overhauled by the American cruiser. The utmost to which the courts of Great Britain have gone, has been to affect the merchant vessel actually taken under convoy, with the resistance or character of the convoying ship; and when such a case shall occur, it will be time enough for this court to de- **84\*** termine on the course it \*will adopt. At present I feel no inclination to go so much beyond those decisions as has been here contended for.

On the principle question, it appears that this vessel was provided, at the time of her sailing, both with a passport and certificate of her cargo. That these papers were on board at the time of the capture, cannot be doubted; they were both delivered by the captain to the registrar of the District Court, the former marked A. No. 7; the latter, B. No. 1. Some doubt arises whether they were both exhibited prior to the capture; but this is wholly immaterial in the question of condemnation.

In behalf of the claimant it is contended, that on the production of the passport and certi-  
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ficate, or bill of lading of the cargo, he is entitled to restitution. To this the captor objects, that the 17th article of the treaty with Spain, contemplated a form of passport intended to be attached to that treaty; that as no such form was settled by the two nations, the claim must rest altogether upon the provisions of the 15th article, and the proprietary interest is to be inquired into as in ordinary cases. But, if the contracting parties are to be permitted to devise forms of passports for themselves severally, then that this is not a passport in the language of the treaty, but a substitute for one, and is defective in not expressing unequivocally that the ship was Spanish property.

On this part of the case it is proper to remark, that it is not always easy for the criticising eye of the common law to expand to the enlarged views and \*remote perceptions which [**85** should govern the mind in the construction of treaties. Yet nothing could be more inconsistent with international law, than to apply to such instruments those scrutinizing principles, which enter into the construction of a special plea or a criminal statute. From history, analogy, and policy, as well as language, are to be gathered the views of the contracting parties; and however either may be pressed by the application of conventional stipulations to particular cases, or under particular circumstances, not less is the obligation to execute them in a spirit, not only of good faith, but of liberality. Where no coercive power exists for compelling the observance of contracts but the force of arms, honor and liberality are the only bonds of union between the contracting parties, and all minor considerations are to be sacrificed to the great interests of mankind.

In the case before us, I see no reason for nullifying the operation of the 17th article, for want of the form which was in contemplation to be drawn up and attached to the treaty. The substance of the passport intended to be prescribed, is so copiously exhibited, as to render it a matter of the simplest effort to throw it into form. This, no doubt, was the cause why the contracting parties manifested so much indifference about carrying their intention into effect. I am, therefore, content to give the same effect to any instrument complying substantially with this article, as ought to have been given to a passport in a prescribed form. What is that effect?

\*This is easily ascertained by compar- [**86** ing the provisions of the 15th, 17th, and 18th articles. By the 15th the principle is established that free ships shall make free goods, and that several branches of commerce which the modern law of nations has prohibited to neutrals, shall, notwithstanding, be freely prosecuted. But, knowing the endless litigation which questions of proprietary interest give rise to, and the sad depravity of morals exhibited by witnesses in prize courts, the enlightened statesmen who formed that treaty, resolved, by the 17th and 18th articles, to make the freedom of the ship to rest upon documentary evidence in the first instance; and evidence of property in those cases only, in which the vessel was unprovided with the necessary documents; that each nation should be sovereign to judge for itself in conferring upon its own vessels the immunity secured by the treaty, and that the ac-



knowledge right of adjudication in the courts of the capturing power, should be superseded, when a vessel was found on the ocean provided with the documentary evidence stipulated for by treaty; and only revert, when the vessel, being unprovided with such documents, was obliged to resort to evidence of property of a less solemn nature.

It is contended, that this is yielding an important national right. What if it is? It is a mutual relinquishment, and one made by the government, not by this court. And although it operate against us now, the time may come when the comity of Spain, or her colonies, may extend the benefits of it to the commerce of **87\*** this country. But, be that as it may, \*if the relinquishment has been made, it is incumbent on us to observe it. And although it may not be so sensibly felt at present, the time is scarce gone by when it was thought a highly beneficial stipulation to this country. Spain was, at the date of that treaty, a respectable naval power. Her relations with Europe and the Barbary powers often involved her in wars. America abounded with ships and seamen, and her prospects were favorable for the enjoyment of peace. To carry on the commerce of the West Indies and Mediterranean, as the favorite carriers of belligerent cargoes, was, therefore, to us, a highly flattering object. And though occasional impositions might be practiced, it was, comparatively, a trivial consideration, and the chances mutual. When abuses should become flagrant and intolerable, it would have presented a just cause for dissolving the treaty; but it does not rest with courts of justice to dissolve a treaty.

As to considerations drawn from the impolicy of discouraging the spirit of cruising, I attach to them very little importance. The most serious doubts may well be entertained of the policy of giving encouragement to that species of enterprise. Certain it is, that no nation can pursue it long without feeling its demoralizing influence. It draws together a race of men, from every quarter, who want for nothing but a legal pretext for indulging their appetite for blood and violence; and while their habits and examples become popular, the rapid fortunes which are occasionally acquired, render the most valuable classes of a community dissatisfied with seeking \*competence by the slow progress of useful labor. It will not, perhaps, be too much to say, that this country is, at this time, experiencing something of the baneful effects which flow to the world from letting loose the passions of men to gratify themselves with plunder. But, be this as it may, it is the direct object of these articles, of this treaty, to cover commerce from capture; and if a treaty is to be construed with a view to effectuate its intent, that construction which will afford the most ample protection to commerce, will be most consistent with the views which dictated this treaty. Could the language of the treaty leave a doubt on this subject, it is historically known, that the policy of the United States, at the time of its date, was, if possible, to annihilate the right of cruising against commerce. With many ships, and a most flourishing trade, she had not a vessel of war; and while every other nation was likely to be embroiled in wars, her policy was peace, and her prospects favor-

able to the enjoyment of it. To become the carriers of the world, was the object to which her negotiations were directed; and could she have obtained the same stipulation from all the rest of the European nations, she must have succeeded greatly.

The example of other nations in the construction of treaties is brought to the notice of this court. But, besides that the analogy in the cases referred to is very remote, I cannot admit the force of any example that contravenes general principles. It is a melancholy truth, that nations and their courts are too often inclined to restrict or enlarge construction, \*under a temporizing policy suggested by **[\*89]** the pressure or allurements of present circumstances. I will endeavor to give this treaty the same construction against an American captor, as ought to be given it in the courts of the opposite contracting party. And the day may arrive when American commerce will have no cause to regret that our courts have pursued liberal and enlarged views in adopting this construction.

On the exceptions taken to the form of the passport it is to be observed, that on the face of the instrument it is declared to be issued in default of royal passports. From this circumstance, a doubt arose whether it was an instrument of the highest authority. This led to an inquiry at the highest sources of information relative to the powers of the Governor of Cuba to issue such passports. From the information thus obtained, I am satisfied that his powers are amply sufficient to support the authority of that document. Some very serious doubts also have been raised relative to the form of the instrument, particularly that passage of it which has relation to the national character of the ship. The treaty requires that it should set forth the name, property, and bulk of the ship; also, the name and habitation of the master or commander. These requisites are all minutely complied with, unless we except that part which relates to the property of the vessel. The words used with that view are simply *fragata mercante Espanola*; and a doubt has existed whether this be a sufficient affirmation of the property or national character of the vessel. Nor has this doubt \*been removed without a care-**[\*90]** ful reference to the passports of various nations. The result is, that in all of them the affirmation is general, without specifying the individual proprietor. It is also in evidence that this is the form known and used in Spain and her colonies, as the passport of regularly documented and acknowledged Spanish vessels; and I feel myself bound to receive and acknowledge it as sufficient in form and substance.

Thus far the opinion was written, and prepared to be delivered, prior to the argument ordered at the instance of the executive. I have seen no reason to change a word of it, from anything since heard. On the contrary, the last argument has fully confirmed me in its correctness. Thousands of imaginary cases of fraud and collusion have been suggested to alarm the court; and it may be, that our government, having now a prospect of becoming a respectable naval power, and having experienced the activity and enterprise of our privateers in the late war, may feel less disposed to promote the principles of the armed neutrality, than they

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did formerly. This conviction of former error has generally grown out of the same change of circumstances in other states. But it is not through the medium of courts of justice that this change of sentiment is to develop itself. If this treaty was ever binding, it is equally binding now; and in adjudicating between individuals, the same rules which would ever have been applicable, ought to be religiously adhered to, under all possible changes of interest or policy.

But the interests and apprehensions so eloquently pressed upon the notice of this court are not real. They are factitious; and may have their effect on a client's cause, but they are not the well-understood interest, or the well-founded apprehensions of the government. The execution of one treaty in a spirit of liberality and good faith, is a higher interest than all the predatory claims of a fleet of privateers.

What has this country to fear? A practical answer is always most satisfactory on such a question; with similar treaties existing with various other powers, what real injury was sustained in the late war? The truth is, and every one conversant in national policy well knows, that there is always less danger of imposition in reality than a limited view of the operation of such a stipulation would suggest. It is not the interest of the belligerent to foster the carrying trade of a commercial rival; hence, Great Britain would rather, in time of war, compel her own vessels to sail under convoy, than permit her merchants to use a neutral bottom. Nations are generally jealous of permitting foreigners to hold domestic tonnage, or use domestic names. There are, commonly, privileges of trade attached to the ship's character, and severe laws enacted against a practice which is always viewed as a fraud upon the government whose flag is thus acquired. Witness the severity of our own laws in such cases.

If there is any nation in the world more interested than all others in the liberal support of the doctrine contended for by this claimant, it is the United States. Our chances of enjoying peace are much greater than any other; and if there be a tendency to war, it is with a nation which will not be driven to the necessity of making use of neutral bottoms. I cannot, therefore, really see why our administration should have been so seriously alarmed at the prospect of our deciding in favor of this Spaniard, as has been urged upon this court.

But, considerations of policy, or the views of the administration, are wholly out of the question in this court. What is the just construction of the treaty, is the only question here. And whether it chime in with the views of the government or not, this individual is entitled to the benefit of that construction.

The more I have examined this subject, the more thoroughly I have been convinced that my view of the construction of the treaty is the correct one, viz., that national protection was to depend upon authentic documents, and not proprietary interest; or more correctly, that each nation should be restricted from looking beyond those documents. There is one provision contained in all these treaties, which sets this point, in my opinion, beyond all doubt. Which is, that in the case of convoy, the word

of the commander of the convoying ship is to be taken conclusively for the neutral character of every vessel in the fleet. This is the substitute in the case of a fleet for the passport of a single vessel. I speak of authentic documents; for the absurdity never was imagined that a passport stolen or seized by violence was to have the force of one regularly issued.

But it is contended, that it is due to Spain to pursue these inquiries into proprietary interest, and due to the peace of both nations that such questions should be examined in courts of justice, rather than leave them to be the subjects of diplomatic remonstrance. This is a specious, but very unsound argument. Have not the vexations of courts of vice-admiralty, and the violence of armed cruisers, been the pregnant sources of half the commercial alterations of the last century? This was the evil intended to be remedied, and whatever impositions might flow from the remedy, it was well understood, that the benefits of a commerce uninterrupted by the cupidity of cruising vessels, would more than compensate. There is one consideration, which, on this subject, is conclusive. No sovereign can appear in courts of justice to defend his subjects, and it was, therefore, that a method was devised for taking such questions from courts of justice if possible, and referring them to another tribunal. Every stipulation in the treaties of that day, teems with the project of ridding commerce of vexatious capture, and more vexatious litigation. A better practical illustration of the wisdom of such a measure cannot be imagined than that which the present case presents.

But it has been earnestly and successfully contended, that if such was the intention of the treaty, it must fail altogether for want of the form of a passport, contemplated in the 17th article.

Yet if there is any one question more clear of doubt than all others, I think it is this. For the fallacy of the proposition admits almost of mathematical demonstration. This omission must have been the result of either accident or design. It may have proceeded from accident between the negotiators in Europe; but after the receipt of the treaty, and its submission to the cabinet and the senate here, the omission could not have been the result of accident when it received the sanction of our government. It must, then, have been designedly omitted by our constituted authorities. And for what purpose? Will anyone presume to suggest that it was a deliberate fraud upon the other government? calculated to leave our courts at liberty, on some subsequent day, to declare the 17th and 18th articles in effect void? Did we hold out to them the idea of having adopted the provisions of those articles into our national code, when we were conscious that they contained an innate vice, calculated to defeat every beneficial effect? If the argument on this point could meet the sanction of our government, I would blush for it. From the advocate of a captor, it might have been expected; but cannot lay claim to the sanction or countenance of the American government. I am sensible that the cabinet would disavow such a doctrine.

But, it is urged with much emphasis, that



we have no right to annex a form, or to add a clause to the treaty. It is not contended that we have. No member of this bench entertains such a thought. But why may not the contracting parties supply one? All the requisites being prescribed in language, the form and the substance are the same thing. If the contract is complied with, what matters form? Whether it is substantially complied with or not, must be a question for the courts of the contracting parties. But how ridiculous would it be, to be 95\*] trying \*form, and shape, and size, like the ignorant Arab, where the treaty is substantially complied with. Had it merely stipulated, that a passport, in a form prescribed, should be given mutually, there would have been something in the argument; but in expressing with precision the substance of the instrument to be given, it renders the devising of a form a mere work of supererogation. If no other conclusion is to be drawn from its omission, certainly this may, that it was too trivial to be remembered.

In order to support the argument, that the absence of the form nullifies the 17th and 18th articles of this treaty, the attention of this court has been drawn to the provisions of the 14th article of the treaty with Prussia. And it has been contended, that until a form of a passport be adjusted between the two nations, that article is also a dead letter. The construction is one which could not be supported even on a common law instrument. The words are, "which passports shall be made out in good and due forms (to be settled by conventions between the parties whenever occasion shall require)." If the Spanish treaty is to be construed by analogy to this, the argument is directly on the other side. For these words, obviously leave "the good and due forms" of these instruments to be devised by the parties severally, and only stipulate for settling a form by convention, "whenever occasion shall require;" that is, whenever either shall be dissatisfied with the form used by the other. The nations which, in the very same article, could repose such implicit faith in each other's candor, as to leave the neutrality 96\*] of \*whole fleets to be determined on the word of the convoying officer, merit more the confidence of each other, than to have imputed to them an evasion so obvious.

As it became indispensable to assign some reason for retaining these two articles in the treaty, if they were to be held a dead letter for want of the form, it has been suggested, that

the only operation intended by them was to prescribe a law to the caprice or violence of cruisers, and subject them to more exemplary punishment than in ordinary cases.

No one who reads and compares these four articles, the 15th, 16th, 17th and 18th, and considers the historical events in which they originated, can for a moment suppose that this was the object which led to the insertion of the two latter of those articles. The intention was to ingraft into the law of nations a great and a new principle. And although power and cupidity may affect to sneer at it, and melancholy experience cannot dismiss the apprehension that it is too ethereal to subsist in this nether atmosphere, yet it is one which philanthropy will ever cling to, and justice cherish. To ingraft into this treaty the principles of the armed neutrality was the object, and for this purpose the 15th article declares those principles in detail. The 16th furnishes the exceptions to them; the 17th prescribes the evidence on which those privileges shall be conceded; and the 18th, after regulating the conduct of cruisers towards vessels so protected, proceeds to declare, that "the ship, when she shall have showed such passport, shall be free, and at liberty \*to pursue her voyage; so as it shall not [\*97 be lawful to molest or give her chase in any manner, or force her to quit her intended course." It is impossible for language to be stronger. That the violation of these stipulated privileges would aggravate the punishment to be inflicted on cruisers, is a consequence of the thing provided for, not the thing itself.

Upon the whole, I am decidedly of opinion that the claimant is entitled to restitution. Nor should I find much difficulty in supporting his right on the ground of proprietary interest. But entertaining the opinion that I do on this preliminary point, there is no necessity to examine into this part of the case.

*Sentence affirmed.*

Mr. Harper, for the claimant and appellant, moved to vacate the decree of condemnation entered in this cause, and that it should be again continued to the next term in order to enable the claimant to procure farther proof as to the annexation of forms of passports to the original Spanish treaty, and read an affidavit annexed to a printed copy of the treaty, published at the royal printing office in Madrid, which contained two forms of passport, which will be found in the margin.<sup>1</sup>

1.—*Modelo del Pasaporte, ó Patente de Mar que se concede á los Buques para navegar en América, citado en el Artículo XVII.*

Don Carlos, por la Gracia de Dios, Rey de Castilla, de Leon, de Aragon, de las dos Sicilias, de Jerusalem, de Navarra, de Granada, de Toledo, de Valencia, de Galicia, de Mallorca, de Sevilla, de Cerdeña, de Córcega, de Córcega, de Murcia, de Jaen, de los Algarbes, de Algezira, de Gibraltar, de las Islas de Canarias, de las Indias Orientales y Occidentales, Islas y Tierra-firme del Mar Océano; Archiduque de Austria, Duque de Borgoña, de Brabante y Milan, Conde de Abspurg, Flandes, Tirol y Barcelona, Señor de Vizcaya y de Molina, &c.

Por quanto he concedido permiso á para que con su nombrado de porte de Toneladas, pueda salir del Puerto de con carga, y registro de efectos de comercio, y transferirse al y restituirse á España al Puerto de con expresa condicion de hacer su derrota de ida y vuelta directamente á los señalados par-

ages de su destino, sin extraviarse, ni hacer arribada á Puertos Nacionales ó Extranjeros, en Islas, ó Tierra-firme de Europa, ó América, á ménos de verse obligado de accidentes de otra suerte no remediables: Por tanto quiero, que el Presidente de la Contratación á Indias ó el Ministro encargado del despacho de Navios á aquellos Dominios, y el Intendente, ó Ministro de Marina del Puerto en que se equipare, concurren á facilitarle quanto fuere regular ó este fin, cada uno en la parte que le tocare: el primero en lo respectivo á su habilitacion y carga; y el de Marina en lo que mira á Tripulacion, que deberá componerse de gente matriculada, y constar que lo sea por lista certificada, que ha de entregarle, obligándose á cuidar de su conservacion, y responder de sus faltas, segun previenen las Ordenanzas de Marina.

Y mando á los Oficiales Generales, ó particulares Comandantes de mis Esquadras y Baxcles, al Presidente, y Ministros de la Contratación á Indias, á los Comandantes, y Intendentes de los departamentos

**98\*]** \*The motion was opposed by the *Attorney-General* and *Mr. Wheaton*, for the captors and respondents.

**99\*]** \**Mr. Justice Story*. Without giving any opinion upon the sufficiency of the evidence, to establish the \*probability, that the forms of passport now offered to the inspection of the court were ever authoritatively **101\*]** \*annexed to the original treaty, in the possession of the Spanish government, the court is of opinion, that the motion for a continuance must be denied. The passport found on board the *Isabella*, is materially variant, both in form and substance, from the forms of passport now produced; and to the form of the passport actually annexed to the treaty, and to no other, was the effect intended by the treaty, whatever that effect may be, meant to be attributed. The possession of that form, and not of any other passport which might be substituted for it, was of the very essence of the treaty. It is clear, therefore, that even if the case were as the claimant's counsel supposes, he could derive no benefit whatever from it, because the treaty passport was not on board; and the case must, therefore, in this respect, be judged by the rules of the prize court, independent of the conventional law.

*Motion denied.*

Cited—8 Pet. 522 (n); 15 Pet. 595; Blatchf. Pr. 65, 309, 457, 539; Woolw. 156.

de Marina, Ministros de sus Provincias, Subdelegados, Capitanes de Puerto, y otros qualesquiera Oficiales, Ministros, y Dependientes de la Armada, á los Virreyes, Capitanes, ó Comandantes generales de Reynos y Provincias, á los Gobernadores, Corregidores y Justicias de los Pueblos de la Costa de Mar de mis dominios de Europa y América, á los Oficiales Reales, ó Jueces de arribadas en ellos establecidos, y á todos los demas Vasallos míos, á quienes pertenece, ó pertenecer pudiese, no le pongan embarazo, causen molestia, ó detencion; antes le auxilien, y faciliten lo que hubiere menester para su regular navegacion, y legitimo comercio: Y á los Vasallos y Subditos de Reyes, Principes y Repùblicas amigas y aliadas mías á los comandantes, Gobernadores ó Cabos de sus Provincias, Plazas, Esquadras, y Baxeles, requiero, que asimismo no le impidan su libre navegacion, entrada, salida ó detencion en los Puertos, á los quales por algun accidente se conduxere; permitiendole que en ellos se bastimente, y provea de todo lo que necesitare: A cuyo fin he mandado despachar este Pasaporte, refrendado de mi Secretario de Estado, y de la negociacion de Marina, el qual valdrá por el tiempo que durare su viage de ida y vuelta; y concluido que sea, le recogerá el Ministro que entendiere en su descarga: Y para su validacion y uso pondrá á continuacion la nota que corresponde, el que concurriere á su despacho. Dado en á de mil setecientos

Yo El Rey,

PEDRO VARELA.

*Modelo del Pasaporte, o Patente de Mar que se concede á los Buques para navegar en Europa, citado en el Artículo XVII.*

Don Carlos, por la Gracia de Dios, Rey de Castilla, de Leon, de Aragon, de las dos Sicilias, de Jerusalem, de Navarra, de Granada, de Toledo, de Valencia, de Galicia, de Mallorca, de Sevilla, de Cerdeña, de Cordoba, de Corcega de Murcia, de Jaen, de los Algarbes, de Algezira, de Gibraltar, de las Islas de Canarias, de las Indias Orientales y Occidentales, Islas y Tierra-firme del Mar Oceano; Archiduque de Austria; Duque de Borgoña, de Brabante y Milan; Conde de Abspurg, Flandes, Tirol, Barcelona, Señor de Vizcaya y de Molina, &c.

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[\*COMMON LAW. BILLS OF EXCHANGE.] \*102

BUSSARD v. LEVERING.

Where the second day of grace falls on Saturday, it is the last day of grace; and notice of non-payment given to the drawer of a bill on that day, after a demand upon the acceptor on the same day, is sufficient to charge the drawer.

Notice to the drawer, by putting the same into the post-office, where the persons live in different places, is good.

**E**RROR to the Circuit Court for the District of Columbia.

*Assumpsit* against the defendant below (Bussard), as drawer of an inland bill of exchange drawn at Baltimore on the 3d of October, 1816, upon one Martin Gillet, for \$1,244.79, payable six months after date, and accepted by Gillet. Plea, *non-assumpsit*. On the trial of the cause, the plaintiff produced and read in evidence to the jury, the bill, acceptance, and protest; the

NOTE—See note to *Feuwick v. Sears*, 5 Cranch, 259.

Notice of demand and non-payment of a note given on the last day of grace after demand of payment is sufficient. *Lidenberger v. Beull*, post, 104; *Mandeville v. Rumney*, 3 Cranch, C. C. 424.

When Saturday is the proper day for demand, notice on Monday, early enough to go by the mail of that day is sufficient. *Seventh Bank v. Hanrich*, 2 Story, C. C. 416; *Crawford v. Milligan*, 2 Cranch, C. C. 226; *McElroy v. English*, 2 Cranch, C. C. 523.

In such case, demand and notice on Saturday is good to hold the indorsers. *Doremus v. Burton*, 5 Biss. 57.

When second day of grace falls on Saturday, it is

Por quarto he concedido permiso á vecino de para que con su nombrado de parte de toneladas pueda uavegar, y comerciar en los Mares y Puertos de Europa, tanto de mis Dominios, como de Extranjeros; y singularmente en los con absoluta prohibicion de pasar á los de Islas, ó Tierra-firme de América: Por tanto quiero, que constando la pertenencia de la Embarcacion al referido ó á otro Vasallo mio de quien tenga poder, se le permita equiparla con gente de su misma Provincia, ó de otra de mis Dominios, habil á este efecto, segun lo prevenido en las Ordenanzas de Marina, para salir á navegar, y comerciar en ella, baxo las regas establecidas.

Y mando á los Oficiales generales, o particulares comandantes de mis Esquadras y Baxeles; á los Comandantes y Intendentes de los Departamentos de Marina; á los Ministros de sus Provincias, Subdelegados, Capitanes de Puerto, y otros qualesquier Oficiales y Ministros de mi Armada: á los Capitanes, ó Comandantes generales de Provincias; á los Gobernadores, Corregidores, Jueces y Justicias de los Puertos de mis Dominios, y á todos los demas Vasallos míos, á quienes pertenece, ó pertenecer pudiese, no le pongan embarazo, causen molestia, ó detencion alguna; antes le auxilien, y faciliten lo que hubiere menester para su regular navegacion y legitimo comercio: Y á los Vasallos y Subditos de Reyes, Principes y Republicas amigas y aliadas mías: á los Comandantes, Gobernadores, ó Cabos de sus Provincias, Plazas, Esquadras y Baxeles, requiero, que asimismo no le pongan embarazo en su libre navegacion, entrada, salida, ó detencion en los Puertos, á los quales deliberadamente, ó por accidente se conduxere, y le permitan exercer en ellos su legitimo comercio, bastimentarse, y proveerse de lo necesario para continuarle; á cuyo fin he mandado despachar este Pasaporte, refrendado de mi Secretario de Estado, y de la Negociacion de Marina, el qual valdra, y tendrá fuerza por termino de contado desde el dia en que usare de él, segun conste por la Nota que á su continuacion se pusiere. Dado en á de mil setecientos noventa.

Yo El Rey,

PEDRO VARELA.



handwriting of the respective parties being admitted; and gave evidence to prove that after bank hours, on Saturday, the fifth of April, 1817, being the second day of grace after the said bill became due, the same was presented by a notary to the acceptor for payment, and not being paid, was duly protested. And on the same day written notice was sent by the mail to the defendant, residing at Georgetown, D. C., notifying him of the non-payment and protest of the bill. And gave evidence that such protest and notice, on the second day of grace, under those circumstances, was conform-  
**103\***] able \*to the general usage in Baltimore. And no other evidence of demand or notice was offered. Whereupon the counsel for the defendant prayed the opinion and instruction of the court to the jury, that the defendant, under the circumstances so given in evidence, was not liable in this action, the drawer of the said bill not having received due notice of the dishonor of the same; but that the notice given upon the same day that the payment of the draft was demanded, to wit, on Saturday, the 5th of April, 1817, was not regular and sufficient to charge the defendant in this action. Which instruction the court refused, and the defendant's counsel excepted. A verdict and judgment thereon was rendered for the plaintiff, and the cause was brought by writ of error to this court.

This cause was argued by *Mr. Jones* for the plaintiff in error, and by *Mr. Key* for the defendant.

This court were unanimously of opinion that, by the general law merchant, notice of non-payment given to the drawer on the last day of grace, after a demand upon the acceptor on the same day (and Saturday, in this case, was the last day of grace, the next day being Sunday) was sufficient to charge the drawer; and that the notice in this case given to the drawer, by putting the same into the post-office, was good.

*Judgment affirmed.*

\*[COMMON LAW. PROMISSORY NOTES.] \*104

LINDENBERGER ET AL. v. BEALL.

After demand of the maker of a note, on the third day of grace, notice to the indorser on the same day, is sufficient by the general law merchant.

Evidence of a letter containing notice, having been put into the post-office, directed to the indorser, at his place of residence, is sufficient proof of the notice to be left to the jury, and it is unnecessary to give notice to the defendant to produce the letter before such evidence can be admitted.

**E**RROR to the Circuit Court for the District of Columbia.

*Assumpsit* against the defendant (Beall), as indorser of a promissory note, drawn by one Tunis Craven, dated at Baltimore, October 22d, 1811, in favor of the defendant, and by him indorsed to the plaintiffs, for \$191.17, negotiable at the Bank of Washington, payable six months after date. At the trial the note was given in evidence, and the handwriting of the drawer and indorser admitted. The plaintiffs further proved, by a notary, that the note was, by him, demanded of the drawer, on Saturday the 25th of April, 1812, being the day on which it became payable, that is, the last day of grace. And not being paid, notice of the non-payment thereof was inclosed in a letter addressed to the defendant, at the city of Washington, and put into the post-office at Georgetown. The notary testified, that he had no recollection of these facts, \*and only knew them from his [\*105] notarial book, and the protest made out at the time; by which it appeared, that a demand was then made of the drawer, and the protest made: and notice sent; and from its being his invariable practice to give notice either personally, or by letter, to the indorsers on the same day. Nor did he then recollect that he addressed the letter to the defendant in Washington, but he presumed from this book, and protest, and his uniform practice, that if he did not know where the defendant lived (which was probably the

NOTE.—See note to *Fenwick v. Sears*, 5 Cranch, 259, and note to *Bussard v. Levering*, *ante* 102.

the last day of grace. *Bussard v. Levering*, 6 Wheat. 102; *Kuntz v. Tempel*, 48 Mo. 75; *Barrett v. Allen*, 10 Ohio, 426; *Tassell v. Lewis*, 1 Ld. Raym. 743.

In such case the demand must be made Saturday. *Thornton v. Stoddert*, 1 Cranch, C. C. 534; *Irwin v. Brown*, 2 Cranch, C. C. 314; *Coleman v. Sayer*, 2 Stra. 829.

A demand on following Monday is too late. *Thornton v. Stoddert*, 1 Cranch, C. C. 534.

If a holiday (such as Christmas day) falls on the Saturday before the Sunday of the maturity of the bill or note, it would fall due on the Friday preceding. The latest business day within or before the period of grace is the day of payment, even though all grace be excluded. Story on Bills, 388; 1 Parsons N. & B. 402; 1 Dan. on Neg. Instr. sec. 627.

If a holiday or Sunday intervenes, or is the nominal day of grace, it is counted as one of the days of grace. *Woolley v. Clements*, 11 Ala. 229; 1 Dan. Neg. Instr. 465.

Where parties reside in different places, notice of protest through the post-office is sufficient; not necessary to prove that it was received. *Dickens v. Beal*, 10 Pet. 572; *Bussard v. Levering*, 6 Wheat. 102; *Lidenberger v. Beall*, 6 Wheat. 104; Bk. of U. S. v. Carneal, 2 Pet. 543; *Fowler v. Warfield*, 4 Cranch, C. C. 71; *Whitney v. Hunt*, 5 Cranch, 120; *Ellis v. Com. Bk.*, 7 How. (Miss.) 294; *Friend v. Wilkinson*, 9 Grat. 31; *Munn v. Baldwin*, 6 Mass. 316; *Miller v. Hackley*, 5 John. 375; *Sanderson v. Judge*, 2 H. Black, 509; *Woodcock v. Houldsworth*, 16 M.

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& W. 126; *Parker v. Gordon*, 7 East, 385; *Kufh. v. Weston*, 8 Esp. 54; *Shedd v. Brett*, 1 Pick. 401.

Where the holder and person entitled to be notified reside in the same town, notice to the latter should be given personally, either verbally or in writing, or written notice left at his dwelling-house, or place of business. *Williams v. Bk. of U. S.*, 2 Pet. 96; *Bowling v. Harrison*, 6 How. 248; *Hyslop v. Jones*, 3 McLean, 96; *Hill v. Norvell*, 3 McLean, 583; *Vowell v. Patton*, 2 Cranch, C. C. 312; *Bank of Columbia v. Lawrence*, 2 Cranch, C. C. 510; *Nashville Bank v. Bennett*, 1 Yerg. 166; *Boyd v. City Bank*, 15 Grat. 501; *Pierce v. Pendar*, 5 Metc. 352; *Shelburne v. Falls Nat. Bk.*, 102 Mass. 177; *Vance v. Collins*, 6 Cal. 535; *Kock v. Bringer*, 19 La. An. 183; *Davis v. Gowen*, 19 Me. 447.

And if his dwelling-house or place of business be in a compact part of a city within the district of a letter-carrier, a letter containing such notice, addressed to the party and left at the post-office, post paid, is sufficient. Bk. of Col. v. Lawrence, 1 Peters, 578.

If notice is duly received the manner of its transmission is wholly immaterial. *Hyslop v. Jones*, 3 McLean, 69; *Cayuga Bank v. Bennett*, 5 Hill, 236; *Maspero v. Pedeschiaux*, 22 La. An. 227; 1 Parson N. & B. 502.

Personal service in due time is good wherever made, and it is always sufficient if it reaches the party to be served in due season; and so, if sent by mail where parties reside in the same place, it is

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case when he received the note), he inquired, and ascertained his residence, and addressed it properly. Upon which evidence the defendant's counsel prayed the court to instruct the jury, that the above proof of notice was insufficient to charge the defendant as indorser of said note, and that the plaintiffs were not entitled to recover. Which opinion the court gave. The plaintiffs' counsel excepted to the opinion. A verdict and judgment thereon was rendered for the defendant by the court below, and the cause was brought by writ of error to this court.

*Mr. Key*, for the plaintiff, was stopped by the court.

*Mr. Jones* and *Mr. Law*, for the defendant, contended, that the notice was insufficient, (1) because it was on the third day of grace; and, (2) that there was no sufficient proof of notice having been sent by mail, or of the contents of the letter sent; and that before second-  
106\*] any evidence would be \*let in to prove the contents, notice should have been given to the defendant to produce it.

The court were unanimously of opinion, that after demand of the maker on the third day of grace, notice to the indorser on the same day was sufficient, by the general law merchant; and that evidence of the letter containing notice having been put into the post-office, directed to the defendant, at his place of residence, was sufficient proof of the notice to be left to the jury, and that it was unnecessary to give notice to the defendant to produce the letter before such evidence could be admitted.

*Judgment reversed.*

Cited—10 Pet. 580; 2 Cranch, C. C. 152, 167; 5 Biss. 58.

#### [LOCAL LAW. PRACTICE.]

### THE MECHANICS' BANK OF ALEXANDRIA

v.

### WITHERS.

The Circuit Court of the District of Columbia has authority to adjourn to a distant day, and the

adjourned session is considered as the same term.

Where the regular term began on the 3d Monday in April, and the court continued to sit, *de die in diem*, until the 16th of May, when it adjourned to the 4th Monday of June; held, that a defendant, against whom an office judgment had been entered on the 16th of May, had a right, under the laws and practice of Virginia, to appear at the adjourned session, and have the default set aside, on giving special bail, and pleading issuably.

\*THIS cause was argued by *Mr. Lee* and *Mr. Swann* for the plaintiff in error, and by *Mr. Taylor* for the defendant in error.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court:

This is a writ of error to a judgment rendered by the Circuit Court for the District of Columbia, sitting in Alexandria, in an action of debt; and the case depends on the laws of Virginia, as they stood when jurisdiction over the district was first exercised by Congress.

By the law of Virginia, the proceedings, until an issue is made up in a cause, are taken in the clerk's office at monthly rules, and judgments by default become final on the last day of the succeeding term, till which day the defendant in any such action has a legal right to set the judgment aside, and to plead to issue. The Circuit Court held its regular session in April, 1818, and continued to sit regularly till the 16th day of May, when it adjourned to the fourth Monday of the following June. The clerk, considering the day on which the court adjourned as the last day of the term, and the judgments at the rules as having, on that day, become final, issued an execution on one of these judgments, which had been obtained by the plaintiffs against Cave Withers and his common bail. When the court met in June, the defendant appeared, and, on motion, was allowed to set aside the office judgment, give special bail, and plead to issue. The execution was, consequently, quashed. In the course of the term judgment \*was confessed by the defendant, [\*108 for the sum claimed in the declaration, and a writ of error was then sued out, the object of which was to reverse the last judgment, and

good if it duly reaches the party addressed. *Bk. of U. S. v. Corcoran*, 2 Pet. 121; *Foster v. McDonald*, 5 Ala. 376; *Manchester Bank v. Fellows*, 8 Fost. (N. H.) 302; *Whitford v. Burekmeyer*, 1 Gill, 127; *Bradley v. Davis*, 26 Me. 45; *Cabot Bank v. Warner*, 10 Allen, 524; *Shelburne Nat. Bk. v. Townsley*, 107 Mass. 441; *Gilchrist v. Donnell*, 53 Mo. 591; 2 Daniels Neg. Instr. 53.

If the protest is made by a notary at a place different from that of the party's residence, the mail may then be used. *Hartford Bk. v. Stedman*, 3 Conn. 489; *Manchester Bk. v. Fellows*, 8 Fost. 302; *Warren v. Gilman*, 17 Me. 360; *Greene v. Farley*, 20 Ala. 322; *Eagle Bk. v. Hathaway*, 5 Mete. 212; 2 Daniels Neg. Instr. s. 1005; *Wymen v. Schappert*, 6 Daly, 558.

Notice by mail should be directed to the post-office at, or nearest to, the party's place of residence, unless he is used to receive his letters at another post-office, when it should be directed there; and if he live at one place, and has his place of business at another, notice may be sent to either; but more properly to the place where he usually receives his letters. *Bk. of Columbia v. Lawrence*, 1 Pet. 582; *Bk. of Geneva v. Howlett*, 4 Wend. 328; *Mercer v. Lancaster*, 5 Barr, 160; *Jones v. Lewis*, 8 W. & S. 14; *Bk. of U. S. v. Carneal*, 2 Pet. 549; *Williams v. Bk. of U. S.* 2 Pet. 96; *Cuyler v. Nellis*, 4 Wend. 398; *Reid v. Payne*, 16 John. 218; *Mont. Bk. v. Marsh*, 3 Seld. 481; *Van Vechten v. Pruym*, 3 Kern, 549; 2 Daniels, Wheat. 6.

*Neg. Instr.* 68; *Seneca Co. Bk. v. Neass*, 3 Comst. 442; 5 Denio, 329.

If notice be given by letter, its contents may be shown without a notice to produce the letter. If it were given by one of two duplicate notices, evidence may be given of sending one, and then the other offered to the jury without notice to produce the one sent. *Eagle Bank v. Chapin*, 3 Pick. 180; *Lindenberger v. Beall*, 6 Wheat. 104; *Leavitt v. Simes*, 3 N. H. 14; *Kine v. Beaumont*, 3 Brod. & B. 288; 7 J. B. Moore, 112; *Roberts v. Bradshaw*, 1 Stark, 28; *Aekland v. Pearce*, 3 Camp. 599; 2 Daniels Neg. Instr. sec. 1051.

A notice by mail may be deposited in a postal letter box. *Traders' Bk. v. Crow*, 5 Daly, 191; S. O. 60 N. Y. 85; *Greenwich Bank v. Degroot*, 7 Hun. 210.

In New York, a statute provides that the first of January, the 22d of Feby. the 30th May, (Decoration Day), the 4th of July, the 25th of Dec., any general election day, and any day appointed by the Governor, or President of the U. S., as a day of thanksgiving or fasting and prayer, or other religious observance, for all purposes regarding the presenting for payment or acceptance, or of the protesting and giving notice of the dishonor of bills, checks and notes, shall be treated and considered as Sunday, and as public holidays, and all bills, notes and checks, are presentable for acceptance or payment on the secular or business day next preceeding such holiday. *Laws of New York*, 1881, ch. 30.



set aside all proceedings subsequent to the 16th of May, on the idea, that the judgment rendered at the rules became final on that day.

The sole question in the cause is, whether the adjournment from the 16th of May to the fourth Monday in June, was a continuation of the April term, or constituted a distinct term?

There being nothing in any act of Congress which prevents the courts of the district from exercising a power common to all courts, that of adjourning to a distant day; the adjournment on the 16th of May to the fourth Monday in June, would be a continuance of the same term, unless a special act of Congress, expressly enabling the courts of the district to hold adjourned sessions, may be supposed to vary the law of the case. That act is in these words: "And the said courts are hereby invested with the same power of holding adjourned sessions that are exercised by the courts of Maryland." These words do not, in themselves, purport to vary the character of the session. They do not make the adjourned session a distinct session. They were, probably, inserted from abundant caution, and are to be ascribed to an apprehension, that courts did not possess the power to adjourn to a distant day, until they should be enabled so to do by a legislative act. But this act, affirming a pre-existing power, ought not to be construed to vary the nature of that power, unless words **109\*** are employed which manifest such intention. In this act, there are no such words, unless they are found in the reference to the courts of Maryland. But on inquiry, we find, that in Maryland, an "adjourned session" is considered as the same session with that at which the adjournment was made. Since, then, the term at which this conditional or office judgment was to become final, was still continuing when it was set aside, and the defendant permitted to plead to the declaration, there was no error in that proceeding.

*Judgment affirmed.*

[CHANCERY. COMMON LAW.]

HOPKINS v. LEE.

A judgment or decree of a court of competent jurisdiction is conclusive wherever the same matter is again brought in controversy.

But the rule does not apply to points which come only collaterally under consideration, or are only incidentally considered, or can only be argumentatively inferred from the decree.

In an action at law by the vendee, against the vendor, for a breach of the contract, in not deliver-

ing the thing sold, the proper measure of damages is not the price stipulated in the contract, but the value at the time of the breach.

This rule applies to the sale of real, as well as personal property: but, *Quære*, Whether it is the proper measure of damages in the case of an action for eviction.

**E**RROR to the Circuit Court for the District of Columbia.

This was an action of covenant, brought by the defendant \*in error (Lee), against [\***110** the plaintiff in error (Hopkins), to recover damages for not conveying certain tracts of military lands, which the plaintiff in error had agreed to convey, upon the defendant in error relieving a certain incumbrance held by one Rawleigh Colston, upon an estate called Hill and Dale, and which Lee had previously granted and sold to Hopkins, and for which the military lands in question were to be received in part payment. The declaration set forth the covenant, and averred that Lee had completely removed the incumbrance, from Hill and Dale. The defendant below pleaded, 1. That he had not completely removed the incumbrance; and, 2. That he (the defendant below) had never been required by Lee to convey the military lands to him; and on these pleas issues were joined. Upon the trial, Lee, in order to prove the incumbrance in question was removed, offered in evidence to the jury a record of the proceeding in chancery, on a bill filed against him in the Circuit Court by Hopkins. The bill stated, that on the 23d of January, 1807, the date of the agreement on which the present action at law was brought, Hopkins purchased of Lee, the estate of Hill and Dale, for which he agreed to pay \$18,000, viz., \$10,000 in military lands, at settled prices, and to give his bond for the residue, payable in April, 1809. That Lee, in pursuance of this agreement, selected certain military lands in the bill mentioned. That at the time of the purchase of Hill and Dale, it was mortgaged to Colston for a large sum, which Lee had promised to discharge, but had failed so to do, in consequence of which Hopkins had paid off the \*mortgage himself. The bill then [\***111** claimed a large sum of money from Lee for having removed this incumbrance, and prayed that the defendant might be decreed to pay it, or in default thereof, that the claimant might be authorized by a decree of chancery to sell the military lands, which he considered as a pledge remaining in his hands, and out of the proceeds thereof, to pay himself. On the coming in of Lee's answer, denying several of the allegations of the bill, the cause was referred to a master, who made a report, stating a balance

NOTE.—On a contract for the purchase of real estate, if the title prove bad, and the vendor is without fraud unable to make a good one, the purchaser is not entitled to damages for the loss of his bargain. *Flureau v. Thornhill*, 2 W. Bl. 1073; *Hammond v. Hannon*, 21 Mich., 374; *Bain v. Fothergill*, L. R. 7 Eng. & Ir., App. 158.

In action against vendee for damages for breach of contract to purchase land, the measure of damages is the difference between the contract price, and the price for which the land could have been sold at the time of the breach. *Old Colony R. R. v. Evans*, 6 Gray, 72 Mass. 25; *Griswold v. Sablin*, 51 N. H. 167.

American authorities differ from the English

rule above stated, as settled by the above case of *Bain v. Fothergill*. In an action by a purchaser of land to recover damages for a failure to convey, the value of the land at the time the conveyance is to be made, is the true measure of damages. *Plummer v. Rigdon*, 78 Ill. 222; *Hill v. Hobert*, 16 Me. 164; *Hopkins v. Lee*, *supra*; *Drake v. Baker*, 34 N. J. 358; *Lawrence v. Chase*, 54 Me. 194; *Boardman v. Keeler*, 21 Vt. 84; *Kirkpatrick v. Downing*, 58 Mo. 32; *Barnham v. Nichols*, 3 R. I. 187; *Wells v. Abernethy*, 5 Conn. 222; *Buckmaster v. Grundy*, 1 Seam. 310; *McKee v. Brandon*, 2 Seam. 339; *Gale v. Dean*, 20 Ill. 320; *Connell v. McLean*, 6 Harris & J. 297; *Warren v. Wheeler*, 21 Me. 484; *Pinkston v. Huie*, 9 Ala. 252; *Dyer v.*

*Wheat*, 6.

of \$427.77 due from Hopkins to Lee. This report was not excepted to, and the court, after referring to it, proceeded to decree the payment of the balance. To this testimony the defendant in the present action objected, so far as respected the reading of the master's report, and the decretal order thereon; but the objection was overruled by the court below, and the evidence admitted. The counsel for the plaintiff in error then prayed the court to instruct the jury, that in the assessment of damages, they should take the price of the military lands as agreed upon by the parties in the articles of agreement upon which the action was brought, as the measure of damages for the breach of covenant. But the court refused to give this instruction, and directed the jury to take the price of the lands, at the time they ought to have been conveyed, as the measure of damages. To this instruction the plaintiff in error excepted; and a verdict and judgment thereon being rendered for the plaintiff below, the cause was brought by writ of error to this court.

**112\*]** \**Mr. Pinkney* and *Mr. Swann*, for the plaintiff in error, argued, 1. That the proceedings in chancery were not admissible evidence in the action at law. A verdict and judgment are indeed conclusive evidence between the same parties; but the other proceedings in the cause, and all that which is merely inducement to the verdict or judgment, are not evidence. So, a decree in chancery is not conclusive evidence of all the facts in the course of the cause. Not that the decree is not conclusive as a *res judicata*, but the decree here is no otherwise conclusive than as giving the party, in whose favor it was pronounced, a right to have it executed. It is not evidence at all, unless it be conclusive evidence; but it cannot be conclusive evidence of the details of the cause, and of the incidental questions which arose in its progress. 2. The proper measure of damages in the action at law, was the price agreed by the parties. When a portion of the price of land is to be paid for in other land, the pecuniary price, with inter-

est, is the rule at law, where specific performance is not called for. It is thus subjected to the analogical rule in the Court of Chancery, where the contract is rescinded, instead of being specifically performed.

*Mr. Jones* and *Mr. Lee*, for the defendant in error, insisted, 1. That the proceedings in chancery were not only admissible evidence in the suit at law, but conclusive evidence. It may be safely admitted that the decree is not evidence of such facts as are only collaterally or incidentally drawn in question,\*or [\***113** can only be argumentatively inferred from the decree. But where the decree professes to be founded on a particular fact, which was the principal question in issue, and was ascertained by the master's report, it must be conclusive in any other suit between the same parties. 2. As to the proper measure of damages, it is the settled doctrine of this court, that in an action by the purchaser for a breach of the contract of sale, the rule of damages is the price of the article at the time of the breach.<sup>1</sup> It is true, that the case of *Shepherd v. Hampton* was a sale of goods; but it is not perceived that there is any difference in the application of the principle to real or to personal property.

*Mr. Justice LIVINGSTON* delivered the opinion of the court:

The first question which this court has to consider is, whether the proceedings in chancery were properly admitted in evidence in the court below.

It is not denied, as a general rule, that a fact which has been directly tried, and decided by a court of competent jurisdiction, cannot be contested again between the same parties, in the same or any other court. Hence a verdict and judgment of a court of record, or a decree in chancery, although not binding on strangers, puts an end to all further controversy concerning the points thus decided between the parties to such suit. In this, there is and ought to be, no difference between a verdict and judgment

1.—*Shepherd v. Hampton*, 3 Wheat. Rep. 200.

*Dorsey*, 1 Gill & J. 440; *Gibbs v. Jemison*, 12 Ala. 820.

In New York, the English rule, established by the cases of *Flureau v. Thornhill*, and *Bain v. Fothergill*, *supra*, is followed with some exceptions.

The general rule in N. Y., in the case of executory contracts for the sale of land, is that, in case of breach by the vendor, the vendee can recover only nominal damages, unless he has paid part of the purchase money, in which case he can also recover such purchase money and interest. *Baldwin v. Munn*, 2 Wend. 399; *Peters v. McKeon*, 4 Denio, 546; *Cooper v. Weaver*, 20 N. Y. 145; *Mack v. Patchin*, 42 N. Y. 167; *Margraff v. Muir*, 57 N. Y. 155; *Stanton v. Miller*, 14 Hun. 383.

In a later case the court say, that the rule is well settled that where the vendor enters into a contract to sell and convey real estate under a belief that he has a good title, and that the same is free from incumbrances, and he fails to perform for the reason that the title is defective, or an incumbrance unknown to him previously is discovered, which prevents a fulfillment of the contract, in an action by the vendee against him for a breach of the contract, the latter is only liable for nominal damages, aside from the purchase money paid and the expense of examining the title. *Cockroft v. N. Y. & H. R. Co.*, 69 N. Y. 201.

To this rule there are exceptions, based upon the wrongful conduct of the vendor, which are stated by Judge Earl, as follows: "As if he is guilty of fraud, or can convey but will not, either from per-

verseness or to secure a better bargain, or if he has covenanted to convey when he knew he had no authority to contract to convey, or where it is in his power to remedy a defect in his title, and he refuses or neglects to do so, or where he refuses to incur such reasonable expenses as would enable him to fulfill his contract. In all such cases, the vendor is liable to the vendee for the loss of the bargain, under rules analogous to those applied in the sale of personal property." *Margraff v. Muir*, 57 N. Y. 155.

And where the vendor knew at the time of contracting that he had not title, or the power of conveyance, although he acted in good faith and believed that he should be able to procure a good title, it was held that the vendee was entitled to recover of the vendor the difference between the contract price and the value of the land, at the time of the breach. *Pumpelly v. Phelps*, 40 N. Y. 59. See *Trull v. Granger*, 4 Seld. 115; *Brinkerhoof v. Phelps*, 24 Barb. 100; 43 Barb. 469.

In Virginia the same general rule has been laid down, and similar exceptions thereto made, as in N. Y. *Thompson's Ex'rs v. Guthrie*, 9 Leigh, 111; *Wilson v. Spencer*, 11 Leigh, 241.

Also in Kentucky. *Allen v. Anderson*, 2 Bibb, 415; *McConnell v. Dunlop*, Hardin, 41; *Handley v. Chambers*, 1 Littell's R. 358; *Patrick v. Marshall*, 2 Bibb, 40; *Fisher v. Kay*, 2 Bibb, 434. These latter cases were in equity, however. See *Stewart v. Noble*, 1 Iowa, 26; *Nichols v. Freeman*, 11 Ired. 99.



**114\*]** \*in a court of common law, and a decree of a court of equity. They both stand on the same footing, and may be offered in evidence under the same limitations, and it would be difficult to assign a reason why it should be otherwise. The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, an end could never be put to litigation. It is, therefore, not confined in England or in this country to judgments of the same court, or to the decisions of courts of concurrent jurisdiction, but extends to matters litigated before competent tribunals in foreign countries. It applies to sentences of courts of admiralty—to ecclesiastical tribunals—and, in short, to every court which has proper cognizance of the subject-matter, so far as they profess to decide the particular matter in dispute. Under this rule, the decree in this case was proper evidence, if it decided, or professed to decide, the same question which was made on the trial at law. For to points which came only collaterally under consideration, or were only incidentally under cognizance, or could only be inferred by arguing from the decree, it is admitted that the rule does not apply. On a reference to the proceedings at law, and in chancery, in the case now before us, the court is satisfied that the question which arose on the trial of the action of covenant, was precisely the same, if not exclusively so (although that was not necessary), as the one which had already been directly decided by the Court of Chancery. The bill, which was filed by the present plaintiff in error, states, that on the **115\*]** 23d of January, \*1807, which is the date of the agreement on which the action at law is brought, Hopkins purchased of Lee the estate of Hill and Dale, for which he was to pay \$18,000—that is, \$10,000 in military lands at settled prices, and the remainder in bonds, payable in April, 1809. That Lee, in pursuance of this agreement, selected certain military lands in the bill mentioned. That at the time of the purchase of Hill and Dale, it was mortgaged to Rawleigh Colston for a large sum, which Lee had promised to discharge, but that he had failed so to do, in consequence of which, Hopkins had paid the mortgage himself. The complainant then claims a large sum from Lee for having removed this incumbrance, and prays that the defendant may be decreed to pay it, or in default thereof, that the complainant may be authorized, by a decree of the court, to sell the military lands, which he considered as a pledge in his hands, and out of the proceeds to pay himself. Not a single demand is stated in the bill, except the one arising out of the complainant's extinguishment of the incumbrance, which Lee had taken upon himself to remove.

On Lee's answer coming in, denying several of the allegations of the bill, the cause is referred to a master commissioner, who, after a long investigation, in the presence of both parties, and the examination of many witnesses, makes a report by which Hopkins is made a debtor of Lee in the sum of \$427.77. On inspection of this report, it will be seen that the chief, if not the only controversy between the parties was, whether Hill and Dale had been **116\*]** relieved \*from its incumbrance to Colston, by funds furnished by Lee to Hopkins for

that purpose, and that unless that fact had been found affirmatively, a report could not have been made in Lee's favor. The court, after referring to this report, and stating that it had not been excepted to, proceeds to decree the payment of this balance by the complainant to the defendant. From this summary review of the proceedings in chancery, the conclusion seems inevitable, that the chief, if not sole matter in litigation in that suit, was whether Hill and Dale had been freed of the incumbrance to Colston, by Lee or by Hopkins, and that the report and subsequent decree proceeded on the ground, and established the fact, that Lee had discharged it, which was also the only point put in issue by the first plea of the defendant in the action of covenant. No rule of evidence, therefore, is violated in saying that this decree was properly admitted by the Circuit Court. But if the decree were admissible, it is supposed that the report of the master ought not to have been submitted to the jury. The court entertains a different opinion. No reason has been assigned why a decision by a proper and sworn officer of a court of chancery, in the presence and hearing of both parties, according to the acknowledged practice and usage of the court, on the very matters in controversy, not excepted to by either party, and confirmed by the court, should not be as satisfactory evidence of any fact found by it, as the verdict of the jury, on which a judgment is afterwards rendered. The advantage which a verdict may be supposed to possess over a report, from its being \*the decision of twelve, instead of the **\*117** opinion of a single man, is perhaps more than counterbalanced by the time which is allowed to a master for deliberation, and a more thorough investigation of the matters in controversy. But a better and more satisfactory answer is, that it is the usual, known, and approved practice of the court to whose jurisdiction the parties had submitted themselves. But if this document be withheld from a jury, how are they or the court to arrive at the grounds of the decree, or a knowledge of the points or matters which have been decided in the cause? Without it, the decree may be intelligible; but the grounds on which it proceeds, or the facts which it means to decide, may be liable to much uncertainty and conjecture. The report, therefore, as well as the decree, was proper evidence, not only of the fact that such report and decree had been made, but of the matter which they professed directly to decide. We are not now called upon to say, whether, in those respects, they were conclusive, as they do not appear to have been offered with that view; but without meaning to deny to them such effect, we only say, which is all that the present case requires, that they were competent and proper, in the absence of other testimony, to establish the fact of the removal of the incumbrance by the defendant Lee, from the estate of Hill and Dale.

In the assessment of damages, the counsel for the plaintiff in error, prayed the court to instruct the jury, that they should take the price of the land, as agreed upon by the parties in the articles of agreement upon which the suit was brought, for their government. But \*the court refused to give this instruction. **\*118** tion, and directed the jury to take the price of the lands, at the time they ought to have been

conveyed, as the measure of damages. To this instruction the plaintiff in error excepted. The rule is settled in this court, that in an action by the vendee for a breach of contract on the part of the vendor, for not delivering the article, the measure of damages is its price at the time of the breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor, if the article have risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket. Nor can it make any difference in principle, whether the contract be for the sale of real or personal property, if the lands, as is the case here, have not been improved or built on. In both cases, the vendee is entitled to have the thing agreed for, at the contract price, and to sell it himself at its increased value. If it be withheld, the vendor ought to make good to him the difference. This is not an action for eviction, nor is the court now prescribing the proper rule of damages in such a case.<sup>1</sup>

*Judgment affirmed.*

Cited—9 Pet. 534; 12 Pet. 492; 1 How. 148, 149; 3 How. 426; 7 How. 217, 218; 16 How. 77; 24 How. 579; 7 Wall. 101; 2 Wood. & M. 133; 4 Biss. 293, 383; 1 Cliff. 245; Crabbe, 191; 1 Paine, 556; 2 Paine, 542.

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[\*LOCAL LAW.]

THATCHER ET AL.

v.

POWELL ET AL., LESSEE.

The execution by a public officer of a power to sell lands for the non-payment of taxes, must be in strict pursuance of the law under which it is made, or no title is conveyed.

It is essential to the validity of the sale of lands for taxes, under the laws of Tennessee, that it should appear on the record of the court, by which the order of sale is made, that the sheriff had returned that there were no goods and chattels of the delinquent proprietor out of which the taxes could be made.

The publications which are required by law to be made, subsequent to the sheriff's return, and previous to the order of sale, are indispensable preliminaries to a valid order of sale.

In summary proceedings, where a court exercises an extraordinary power under a special statute, which prescribes its course, that course ought to be strictly pursued, and the facts which give jurisdiction, ought to appear on the face of the record. Otherwise, the proceedings are not merely voidable, but absolutely void, as being *coram non iudice*.

In construing local statutes respecting real property, this court is governed by the decisions of the state tribunals.

**E**RROR to the Circuit Court of West Tennessee.

This cause was argued at the last term, and at the present term the opinion of the court was delivered by *Mr. Chief Justice MARSHALL*:

1.—As to the damages recoverable upon an eviction of real property, *vide ante*, Vol. II., p. 62, note 1.

NOTE.—See Note to *Williams v. Peyton*, 4 Wheat. 77.

Wheat. 6.

This was an action of ejectment instituted by the defendants in error against the plaintiffs, to recover 640 acres of land in Montgomery county. Upon the trial in the court below, the lessors of the plaintiffs, in support of their title, read in evidence a grant from \*the state of North Carolina to Stokeley Donaldson, dated the 12th of January, 1797; also a deed for the same land from the said Donaldson to John Love, dated the 13th of January, 1797, and registered in Montgomery county, on the 25th of July, 1815, upon a probate made in the County Court of Grange county, at May term of the said court, 1814.

The defendants in that court, to support their title, read in evidence a transcript of a record from the County Court of Montgomery county, at their July session of 1801, as follows, viz.:

“Haydon Wells, who was appointed by the court of January term, 1801, to receive the list of taxable property in Captain Boyd's company, reports to court a list of taxable property in the county of Montgomery, not listed for the year 1799, nor taxes paid thereon, to wit, among others, ‘Stokeley Donaldson, 2,560 acres on Yellow Creek waters.’

“HAYDON WELLS, T. P.”

“Ordered, that the clerk make out a certificate of lands and tenements reported by Haydon Wells, Esq., for the year 1799, that are liable to the payment of taxes, agreeably to the 14th section of ‘an act to ascertain what property in this state shall be deemed taxable, and the mode of collecting, accounting for, and paying public taxes.’ And now, to wit, at January term, 1802, the following proceedings were had thereon, to wit, on motion, it is ordered, adjudged, and decreed, that the tracts of land entered in the names of the following persons, be subject \*to the payment of [\*121 taxes due thereon, agreeably to report of Haydon Wells, Esq., receiver of taxable property, as delinquent for the year 1799, agreeably to law, and that execution issue accordingly:” (among others) Stokeley Donaldson, \$11.90. Upon which order or judgment, an execution, bearing date the fourth Monday in March, 1802, was issued to the sheriff of Montgomery county, commanding him, that of the lands of Stokeley Donaldson, reported to be in arrears for taxes for the year 1799, he cause to be made the sum of \$11.90, as, also, the sum of \$1.40, and charges, &c. Upon this execution the sheriff made the following return:

“Levied on 2133, and advertised agreeably to the old; not sold, because the new act which requires it to be advertised in the Gazette did not come forward till the day of sale.

“JOHN SAUNDERS, Sheriff M. C.”

On the 1st of May, 1802, an alias execution issued, bearing date the fourth Monday in April, 1802, in the words of the former, on which the sheriff made the following return: “The within land sold agreeably to law, on the 23d of July, 1802, at seven mills per acre.” They also read in evidence a deed from John Coeke, sheriff of Montgomery county, to Samuel Vanee, one of the defendants, dated the 14th of April, 1808, reciting, that



whereas John Saunders, late sheriff of Montgomery county, did, on the 23d of July, 1802, by virtue of an execution or order of sale, to him directed, from the court of **122\*** Montgomery county, expose to sale 2,560 acres of land granted to Stokeley Donaldson, or so much thereof as would be sufficient to satisfy the taxes due thereon for the year 1799, agreeably to an act of Assembly in such cases made and provided. And whereas Morgan Brown became the purchaser of 2,229 6-7 acres of the said land at seven mills per acre, he being the highest and best bidder, the taxes and costs due thereon being \$17.10; and the said Morgan Brown having authorized a deed to be made therefor to Samuel Vance: Now, the said John Cocke, in consideration of the said sum being paid to the said John Saunders, sheriff, &c., doth sell and convey the said 2,229 6-7 acres of land, &c. The said deed then described one tract of 640 acres, the tract in question; also two other tracts of 640 acres each; also, one other part of a survey of land of 309 acres granted to Stokeley Donaldson.

The lessors of the plaintiffs then introduced grants from the state of North Carolina to Stokeley Donaldson, all dated about the same time, for two different tracts of land of 640 acres each, a part of which are those described in the said sheriff's deed, all lying upon the waters of Yellow Creek, and proved that the same lay in one connection of surveys adjoining each other, but those described in the sheriff's deed were of much the greatest value.

Upon this evidence the court instructed the jury, that it was for them to determine whether the said lands in the said Sheriff's deed mentioned, were the same lands which the former **123\*** Sheriff Saunders had \*sold or not. If not the same land, then the said sheriff's deed was not good in law. And the court farther instructed the jury, that the said record, or anything therein contained, was not sufficient in law to authorize the sale of the lands made by the said Sheriff Saunders, nor the deed aforesaid made to the said Vance by the said John Cocke, the said successor of the said Saunders, and that the said sale and deed did not in law vest any title to said lands in the said Samuel Vance.

To this instruction of the court, the counsel for the defendants excepted. In consequence of this instruction, the jury found a verdict for the plaintiffs, and the judgment was accordingly rendered in their favor. The cause was then brought by writ of error to this court.

The objections made on the record to the title papers of the plaintiff, so far as respects their registration, have not been pressed in this court, and do not appear to be sustainable. The plaintiffs in error rely principally on the deed made by John Cocke, the sheriff of Montgomery county, on the 14th of April, 1808, and insist that the instruction given by the Circuit Court to the jury, on this point, is erroneous.

The validity of this deed depends on the act passed by the legislature of the state of Tennessee, on the 25th of October, 1797, respecting the collection of taxes. The 3d section of that act directs the court of each county, at its session, in the month of January, in each

year, to appoint a justice of the \*peace, [**\*124** for each captain's district in the county, to receive lists of the taxable property, for the then present year."

The 5th section makes it the duty of the sheriff to discover, and report in writing, to the clerk of the court, such taxable property as may not have been returned within the time limited by law.

The 6th section directs non-residents to return to the court an inventory of their taxable property.

The 9th section enacts, that if any non-resident "shall fail, by himself, his agent, or attorney, to return his, her, or their taxable property, as by the act directed, the property of such person, so failing, shall be liable, and stand bound to pay a fine of fifty dollars, and a double tax, to be collected and paid, as by this act directed, and the justice shall report the said property to the best of his knowledge and information as aforesaid."

The 13th section directs the sheriff, in the event of non-payment of taxes by a specified time, "to levy the same by distress and sale of the goods and chattels of every person so neglecting."

And the 14th section directs the sheriff, in case there shall not be any goods and chattels on which distress may be made, to report the same to the court of the county, whose duty it is "forthwith to direct the clerk to make out a certificate of the lands and tenements liable for payment of the said taxes, together with the amount of taxes and charges due thereon." This is to be published, and if no person shall pay the taxes and other charges, within thirty days, the "court shall enter up judgment \*for the amount of taxes due," &c., for [**\*125** which execution shall issue, under which execution the land may be sold and conveyed by the sheriff.

That no individual or public officer can sell, and convey a good title to, the land of another, unless authorized so to do by express law, is one of those self-evident propositions to which the mind assents, without hesitation; and that the person invested with such a power, must pursue with precision the course prescribed by law, or his act is invalid, is a principle which has been repeatedly recognized in this court. The validity of the sale and deed made by the sheriff of Montgomery county will then depend on the regularity of the order under which the sale was made, and on the question whether that order, if erroneous, will still support the sale which has been made in pursuance of it.

Previous to an order for the sale of lands for the non-payment of taxes, the sheriff is ordered to levy them by distress and sale of the goods and chattels of the delinquent; and if there be no such goods and chattels, he is to report the same to the court, as the foundation of any proceeding against the lands. By this act, no jurisdiction is given to the court over the lands of a person who has failed to pay his taxes, until the sheriff shall report that there are no goods and chattels out of which the taxes may be made.

This being an important fact on which the jurisdiction of the court depends, it ought, we

Wheat. 6.

think, to appear on record, either in the judgment itself, or in the previous proceedings.

In this case no such report appears to have **126\*** been \*made. Could it even be contended that this report might be presumed, the answer is, that the terms of the order exclude such a presumption. It would appear, that the report of the magistrate, that the land in question had not been listed, was made in July, 1801, and that the court immediately made that order which the law directs to be made on the sheriff's report, that there are no goods and chattels; and this order refers not to any report of the sheriff, not to any deficiency of goods and chattels, but to the report of the justice of peace, that the lands have not been listed.

This is not the only defect which appears in these proceedings. Previous to an order for a sale of land, and subsequent to the report of the sheriff, certain publications are to be made in the manner and form prescribed by the act. These publications are indispensable preliminaries to the order of sale. They do not appear to have been made. The judgment against the land was given at January term, 1802, on motion, without its appearing by recital or otherwise, that the requisites of the law, in this respect, had been complied with, and that the tax still remained unpaid.

We think this ought to have appeared in the record.

The argument is, that the judgment, for these errors in the proceedings of the county court, may be voidable, but is not void; that until it be reversed, it is capable of supporting those subsequent proceedings which were founded on it.

**127\*** We think otherwise. In summary proceedings, where a court exercises an extraordinary power under a special statute prescribing its course, we think that course ought to be exactly observed, and those facts especially which give jurisdiction, ought to appear, in order to show that its proceedings are *coram judice*. Without this act of assembly, the order for sale would have been totally void. This act gives the power only on a report to be made by the sheriff. This report gives the court jurisdiction, and without it the court is as powerless as if the act had never passed.

In construing the acts of the legislature of a state, the decisions of the state tribunals have always governed this court. In Tennessee, the question arising in this cause, after considerable discussion, seems to have been finally settled on principles which are thought entirely correct. The case of *Francis' Lessee v. Washburn & Russell*, reported in 5 Haywood, is this very case, and was decided as this case was decided in the Circuit Court. On the authority of that case, and on principle, the court is of opinion, that there is no error in the judgment of the Circuit Court.

*Judgment affirmed.*

Cited—12 Wheat. 168; 6 Pet. 297; 4 How. 54; 9 How. 260; 16 How. 618, 619; 2 Wall. 319; 1 McLean, 328; 4 McLean, 25, 221, 499; Bald. 284; 2 Abb. U.S. 549 (n); 3 Cranch, C. C. 135; 1 Cliff. 290, 439; Hemp. 623; Gilp. 182; 17 Bank. Reg. 524.

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\*[PRACTICE.]

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RANDOLPH ET AL. V. BARBOUR ET AL.

An equity suit, where an appeal has been taken from the Circuit Court to this court, but not prosecuted, will be dismissed upon producing a certificate from the court below, that the appeal has been taken and not prosecuted.

**MR. B. HARDIN**, for the respondents, moved to docket and dismiss the appeal in this case, which was a suit in chancery, commenced in the Circuit Court of Kentucky, and a decree entered, from which an appeal was taken, but not prosecuted. He produced a certificate from the clerk of the court below to that effect.

The court stated that the case was within the spirit of the 20th rule of court, although that rule applied, in terms, only to writs of error.

*Motion granted.*

**ORDER.**—A certificate, from the clerk of the Circuit Court for the District of Kentucky, stating that an appeal had been taken in this case in May term, 1819, from the decree of the said Circuit Court, having been produced and filed, and it appearing that the record in said cause has not been filed: on motion of *Mr. Hardin*, of counsel for the respondents, it is ordered, that the said appeal be, and the same is hereby dismissed.<sup>1</sup>

[\*CONSTITUTIONAL LAW. LOCAL LAW.]

[\*129

MAYHEW V. THATCHER ET AL.

As by the laws of Louisiana, questions of fact in civil cases are tried by the court, unless either of the parties demands a jury; in an action of debt on a judgment, the interest on the original judgment may be computed and make part of the judgment in Louisiana, without a writ of inquiry and the intervention of a jury.

The record of a judgment in one state, is conclusive evidence in another, although it appears that the suit, in which it was rendered, was commenced by an attachment of property, the defendant having afterwards appeared and taken defense.

**ERROR** to the District Court of Louisiana.

This was an action of debt commenced by the defendants in error against the plaintiff in error in the District Court of Louisiana, upon a judgment obtained in the Circuit Court of Massachusetts. The original suit, in which the judgment was obtained, was commenced by a process of foreign attachment, according to the local laws of Massachusetts; but the defendant, Mayhew, subsequently appeared and took defense. The cause was referred to arbitrators, and judgment rendered upon their report against the defendant, Mayhew, for the sum of \$4,788.57 debt, and \$284.33 costs. The defendants in error having declared upon this judgment against the plaintiff in the District Court of Louisiana, the plaintiff in error pleaded *nil debet*, to which plea there was a gen-

1.—*Vide* new rule of court of the present term. *Ante*, Rule XXXII.



eral demurrer, and judgment being rendered thereon for the defendants in error, for the **130\*** sum of \$5,072.90 debt, with interest thereon, &c., and the cause was brought before this court.

This cause was argued by *Mr. C. J. Ingersoll* for the plaintiff in error, and by *Mr. Hopkinson* and *Mr. Mills* for the defendants in error.<sup>1</sup>

*Mr. Chief Justice MARSHALL* delivered the opinion of the court, that as by the local laws and practice of Louisiana, questions of fact in civil cases were tried by the court, unless either of the parties demanded a jury, the interest upon the original judgment in Massachusetts might be computed, and make a part of the judgment in Louisiana, without a writ of inquiry and the intervention of a jury. And that although the original suit was commenced by an attachment, yet that the defendant, Mayhew, had personal notice of the suit, and afterwards appeared and took defense, so that even supposing there was any objection to the proceeding by attachment, it was cured by the appearance of the defendant, and his litigating the suit.

*Judgment affirmed.*

Cited—7 Wall. 104; 7 Otto, 336; 2 Wood. & M. 4; 3 Wood. & M. 115.

### **131\*]** [\*CONSTITUTIONAL LAW.]

#### FARMERS' AND MECHANICS' BANK OF PENNSYLVANIA

v.

SMITH.

An act of a state legislature which discharges a debtor from all liability for debts contracted previous to his discharge, on his surrendering his property for the benefit of his creditors, is a law impairing the obligation of contracts within the meaning of the constitution of the United States, so far as it attempts to discharge the contract; and it makes no difference in such a case, that the suit was brought in a state court of the state, of which both the parties were citizens, where the contract was made, and the discharge obtained, and where they continued to reside until the suit was brought.

**E**RROR to the Supreme Court of the state of Pennsylvania.

This was an action of *assumpsit* brought by the plaintiffs in error, in the Supreme Court of the commonwealth of Pennsylvania, against the defendant in error, as indorser of a promissory note, made at Philadelphia by one Edward Shoemaker, on the 6th of June, 1811, for \$2,500, payable in six months after date, and indorsed by the defendant to the plaintiffs at the same place, on the same day. The declara-

1.—The latter cited *Brown v. Van Braam*, 3 Dall. 344; *Renner v. Marshall*, 1 Wheat. Rep. 215, to show that where the action is brought for a sum certain, or which may be made certain by computation, judgment for the damages may be entered up by the court without a writ of inquiry.

NOTE.—See note to *Sturges v. Crowninshield*, 4 Wheat. 122, and see *McMillan v. McNeill*, 4 Wheat. 209.

tion was in the usual form; and the defendant pleaded, that on the 8th day of September, 1812, he was a citizen of the said commonwealth, residing in the city and county of Philadelphia, and having resided there for more than two years before that time; and that being such citizen and resident, he, the defendant, in conformity to the act of the \*legislature of the said commonwealth, [**\*132** passed on the 13th of March, 1812, entitled, "An act for the relief of insolvent debtors residing in the city and county of Philadelphia," did, on the said 8th day of September, 1812, at the city of Philadelphia aforesaid, present his petition to Charles Jared Ingersoll, &c., the commissioners appointed under and by virtue of said act, &c.: in which petition, he, the said petitioner, did state his belief, that he was insolvent, and did pray that he might be permitted to assign all his estate and property for the benefit of his creditors, and be discharged by virtue of said act. Whereupon the said commissioners did appoint Mathew Randall, &c., to be curators, to whom the defendant did thereupon forthwith assign all his estate, real and personal, in conformity with the provisions of the said act. And the said commissioners did then and there appoint the second day of October, 1812, aforesaid, for the hearing the defendant and his creditors, of which due notice was given according to the provisions of the act aforesaid. Upon which day, &c., the said petitioner did exhibit a true account and list of all his creditors, and moneys due, and to become due, and owing to them respectively by him; and, also, an inventory and account of his estate, real and personal, and of all interest of him, the said petitioner, either present or contingent, in anything of value, and of all books, vouchers, and securities relating to the same. And thereupon the said Charles Jared Ingersoll, one of the said commissioners, did administer to him, the said petitioner, the oath required by the said law, which was duly \*taken by him, the [**\*133** said petitioner, according to the requisition of the said law. And, afterwards, &c., the said commissioners did assign to Chandler Price, &c., who were duly nominated and appointed assignees, all the estate, real and personal, of him the said petitioner, or which was of him the said petitioner, at the time of the provisional assignment so as aforesaid made to the curators aforesaid. And the said commissioners did appoint the 15th day of October, then next, for a second examination of him the said petitioner. Upon which second examination, it appearing to the satisfaction of the said commissioners, that the said petitioner had not concealed any part of his property, &c., and he, the said petitioner, having also, in all other things, conformed to the provisions of the said act, the said commissioners did, then and there, give to him, the said petitioner, a certificate, under their hands and seals, that he, the said petitioner, had, in all things, conformed to, and was discharged by, said act. The plea also averred, that the cause of action arose in the city and county of Philadelphia, from contracts made within the same, and that the plaintiffs and defendants were, at the time the said contracts were made, and at the time the causes of action accrued, and at the time the

said act passed, citizens of the state of Pennsylvania, and still continued to be citizens thereof. To this plea there was a demurrer; and judgment being rendered thereon for the defendant, the cause was brought by writ of error to this court.

**134\*]** \*This cause was argued by *Mr. Hopkinson* for the plaintiffs, and by *Mr. Sergeant* for the defendant.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court, that this case was not distinguishable from its former decisions on the same subject,<sup>1</sup> except by the circumstances, that the defendant in the present case, was a citizen of the same state with the plaintiffs, at the time the contract was made in that state, and remained such at the time the suit was commenced in its courts. But that these facts made no difference in the cases. The constitution of the United States was made for the whole people of the Union, and is equally binding upon all the courts and all the citizens.

*Judgment reversed.*

**JUDGMENT.**—This cause came on to be heard on the transcript of the record of the Supreme Court for the Eastern District of the commonwealth of Pennsylvania, and was argued by counsel. On consideration whereof, the court is of opinion, that the said Supreme Court for the Eastern District of the commonwealth of Pennsylvania, erred in giving judgment for the defendant, on the demurrer of the plaintiffs to the plea of the said defendant. It is, therefore, adjudged and ordered, that the judgment of the said Supreme Court for the Eastern District of the commonwealth of Pennsylvania be, and **135\*]** \*the same is hereby reversed and annulled. And it is further ordered, that the said cause be remanded to the said Supreme Court for the Eastern District of the commonwealth of Pennsylvania, with directions to enter judgment for the plaintiffs in the said court.

Rev'g—3 Serg. & R. 63.

Cited—12 Wheat 333; 5 How. 308, 316; 6 How. 330; Bald. 298, 301; 1 Wood. & M. 128, 130; McAll. 265; 11 Bank. Reg. 570.

#### [COMMON LAW. CONSTRUCTION OF STATUTE.]

#### UNITED STATES v. WILKINS.

Where, in a contract with the Secretary of War, for supplying the troops of the United States with provisions, specific prices are stipulated for rations issued at certain places mentioned in the contract; and it is further provided, that "should any rations be required at any places not specified in this contract, the price of the same shall be hereafter agreed on betwixt the public and the contractor:" if the parties cannot agree upon the price for the rations thus required, a reasonable compensation is to be allowed, and is to be proved by competent evidence, and settled by a jury; and the contractor, upon the trial, is at liberty to show, that the sum allowed by the Secretary of War is not a reasonable compensation.

Under the 3d and 4th sections of the act of the 3d of March, 1797, ch. 74, the defendant is entitled, at the trial, to the full benefit of any credit in his favor, whether arising out of the particular transac-

tion for which he was sued, or out of distinct and independent transactions, which would constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States.

**THIS** was an action of debt brought in the District Court of Kentucky against the defendant, a former contractor for supplying the troops of the United States with provisions. The defendant pleaded *nil debet*. The attorney of the United States, to support the issue on the part of the United States, produced a certain account marked A. The counsel for the defendant, to support the issue on his part, produced the contract marked B; also, a paper marked C, and an account for contingent claims, marked D. By the contract entered into between the defendant and the Secretary of War, on the 3d of July, 1801, it was, among other things, agreed, that the contractor should receive "for every complete ration issued at the Chickasaw Bluffs, at Nashville, at Bear Creek, on the Tennessee, or at any other place on the road between Nashville and Bear Creek, fourteen cents;" and "for every complete ration issued at any place in the Chickasaw or Choctaw country, on the road between Bear Creek and Natchez, eighteen cents and one-half cent;" and that, "should any rations be required at any places, or within any other districts not specified in this contract, the price of the same shall be hereafter agreed on betwixt the public and the contractor."

It appeared from the evidence, that at the time the contract was entered into, the road from Nashville to Natchez crossed the Tennessee River at the mouth of Bear Creek, which empties into the Tennessee River on the south-west side. That after the date of the contract, a new road from Nashville to Natchez, passing through the Chickasaw and Choctaw country, was cut out by the United States troops, which crossed the Tennessee River about twelve or fourteen miles above the mouth of Bear Creek, and \*about ten miles further [**137** from Nashville. That during the continuance of the contract, a cantonment was established on the south-west side of the Tennessee River, at the crossing point of the new road, and in the Chickasaw country. That the rations on which the two first deductions were made in the paper marked C, were issued at this cantonment, and on the new road as far as Bear Creek. That supplying rations at the cantonment, and on the road as aforesaid, was more expensive to the contractor than it would have been at the mouth of Bear Creek. That Fort Deposit is situated on the road from Natchez to Nashville, on the north-east side of the Bayou Piere, about half a mile above the Grindstone Ford. That when the contract was entered into, the Bayou Piere was considered the Choctaw boundary; but at the treaty afterwards held at Fort Adams, it was discovered, that an old boundary line existed between the Choctaw Indians and the French, twenty miles in advance from the Grindstone Ford, and this line was adopted in the treaty. That at this post the rations were deposited, on which the third deduction was made in the paper marked C.

On the trial of this cause, the following questions occurred:

1. Whether, under the contract marked B,

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1.—*Sturges v. Crowninshield*, 4 Wheat. Rep. 122; *M'Millan v. M'Neill*, Id. 209.

Wheat. 6. U. S., Book 5.



the defendant was entitled to the sums, or either of them, disallowed in the papers C and D, which had been presented to the proper officers, and by them disallowed.

2. If the defendant be not entitled to the **138\*** amount \*claimed in the first, second and third items, or either of them, in the paper marked C, on the ground, that the place at which the rations were delivered is not specially provided for in the contract, has he a right to show that the sum allowed by the Secretary of War for those rations is not a reasonable compensation?

3. Upon such proof, is the defendant entitled to a reasonable compensation for those rations to be ascertained by the jury?

4. If the defendant be entitled to any of the above sums, can he be permitted to claim a credit for them in this suit?

The opinions of the judges of the Circuit Court being opposed upon these questions, they were ordered to be certified to this court, according to the act of Congress.

This cause was argued by the *Attorney-General*<sup>1</sup> for the United States, and by *Mr. Jones* and *Mr. B. Hardin* for the defendant.

*Mr. Justice STORY* delivered the opinion of **139\*** the \*court: This case comes up from the Circuit Court of Kentucky, upon a division of opinion of the judges upon certain questions stated in the record.

It appears from the record, that the defendant, on the 3d of July, 1801, entered into certain articles of agreement with the Secretary at War, for supplying the troops of the United States with provisions, at certain places enumerated in the contract. Among other things, the articles provided, that the contractor should receive, "for every complete ration issued at the Chickasaw Bluffs, at Nashville, at Bear Creek, on the Tennessee, or at any place on the road between Nashville and Bear Creek, fourteen cents;" and, "for every complete ration issued at any place in the Chickasaw or Choctaw country, on the road between Bear Creek and Natchez, eighteen cents and one-half cent;" and that, "should any rations be required at any places or within any other districts not specified in this contract, the price of the same shall be hereafter agreed on betwixt the public and the contractor."

At the time the contract was entered into, the road from Nashville to Natchez crossed the Tennessee river at the mouth of Bear Creek, which empties into Tennessee River on the south-west side. After the date of the contract, a new road from Nashville to Natchez, passing through the Chickasaw and Choctaw country, was cut by the United States troops, which crossed the Tennessee River about twelve or fourteen miles above the mouth of Bear Creek, and about ten miles further from Nashville. During the continuance of the contract, a can-

tonment \*was established on the south- [\***140** west side of the river Tennessee, at the crossing point of the new road, and in the Chickasaw country. At this cantonment certain rations were issued by the defendant, for which he claimed the contract price of eighteen and a half cents a ration, as rations issued in the Chickasaw country. This claim was disallowed by the treasury department, and constitutes the first and second items of an account presented to the treasury, and referred to in the first question as the paper marked C. The remaining item of the same account, which was disallowed by the treasury, was for certain rations deposited at Fort Deposit, for which the defendant claimed, also, the contract price of eighteen and a half cents a ration, as rations issued in the Choctaw country. At the time the contract was made, Fort Deposit was considered within the Choctaw boundary; but at the treaty afterwards held at Fort Adams, it was discovered, that an old boundary line existed between the French and the Choctaws, which was the line adopted by that treaty, and excluded Fort Deposit from the Choctaw country. There is another account annexed to the record marked D, consisting of certain claims of the defendant against the United States, which were presented to and disallowed by the treasury department. Upon these claims it is unnecessary to say more than that this court entirely concurs in the opinion of the treasury department.

The first question, then, is, whether the defendant is entitled to any or all the items disallowed by \*the treasury department in [\***141** the account C. It is contended on behalf of the United States, that the two first items for rations issued and deposited at the cantonment on the new road on Bear Creek, were within that part of the contract providing for rations issued "at any place on the road between Nashville and Bear Creek," for which the defendant was entitled to the contract price of fourteen cents only; and that this sum had been allowed therefor at the treasury. On the other hand, the defendant's counsel pretends, as has been already stated, that this cantonment was within the Chickasaw country, and that the phrase, "Bear Creek on the Tennessee," in the contract, means the mouth of Bear Creek, on the Tennessee; so that the defendant is entitled to the contract price of eighteen and a half cents.

We are, however, of opinion, on this point, that the contract must necessarily be presumed to refer to the actual state of things at the time of its inception, inasmuch as there is nothing in it which shows that the parties had in contemplation any prospective changes. The phrase, "Bear Creek, on the Tennessee," seems to be an unusual description of the junction of a creek with a river; but in its connection with the context, we are unable to give it any other rational interpretation. And if this were even doubtful, we are of opinion, that the road between Nashville and Bear Creek, spoken of in the contract, is the road then in existence and use between those places, and cannot, in the absence of all evidence of intention, be construed to mean a new road not then laid out or made, nor shown to be in \*the contemplation of the parties. [\***142** The rations, then, issued and deposited at the can-

1.—He cited the case of *The Commonwealth v. Matlack*, 4 Dall. 303, in which it was held by the Supreme Court of Pennsylvania, under the statute of that state, that a debtor to the commonwealth, who was sued by it, could not indirectly recover from the state a substantive, independent claim, by way of set-off, any more than he could directly recover a debt due from the state by bringing a suit against it. He also cited *The United States v. Giles*, 9 Cranch, 212, 228, to the same effect.



tonment on the new road, were not provided for in the contract at a specific price; not at the price of fourteen cents, for they were not issued at any place on the old road between Nashville and Bear Creek, described in the contract; and not the price of eighteen and a half cents, for it was not sufficient that the cantonment should be in the Chickasaw and Choctaw country, but it must also be on the road between Bear Creek and Natchez existing at the time of the contract. The case, then, falls precisely within that clause of the articles of agreement, that provides, that the price of rations delivered at any other places not specified, shall be thereafter agreed on betwixt the public and the contractor; and this is the construction originally adopted by the government itself.

The same reasons which lead us to this conclusion, constrain us to adopt the construction, that the parties, in their contract, in referring to the Chickasaw and Choctaw country, intended not a disputed, imaginary, or rightful boundary afterwards to be settled, but the actual reputed boundary of that country. If, then, Fort Deposit was within the reputed boundary at the time of the contract, the line as afterwards settled by the treaty at Fort Adams, though the true line, has nothing to do with the case; and the rations deposited at Fort Deposit are to be paid for at the contract price of eighteen and a half cents a ration.

The second and third questions propounded by the Circuit Court, may be shortly answered. **143\***] If \*there be no specific price agreed upon in the contract for rations issued at any place, the contract leaves the price to be adjusted by the government and the contractor. It is to be the joint act of both parties, and not the exclusive act of either. If they cannot agree, then a reasonable compensation is to be allowed; and that reasonable compensation is to be proved by competent evidence, and settled by a jury, as in common cases; and the defendant upon such a trial, is at liberty to show that the sum allowed him by the Secretary of War is not a reasonable compensation.

The fourth question is, whether the defendant can be permitted to claim a credit for the sums due him, under the contract, in this suit. The answer may materially depend upon the true construction of the act of Congress of the 3d day of March, 1797, c. 74, providing for the more effectual settlement of accounts between the United States and public receivers. The third section of that act provides, that upon suits instituted against any person indebted to the United States, judgment shall be rendered at the return term, unless the defendant shall, in open court, make oath or affirmation, that he is equitably entitled to credits which had been previous to the commencement of the suit submitted to the consideration of the accounting officers of the treasury, and rejected, &c. The fourth section then provides, that in suits between the United States and individuals, no claim for a credit shall be admitted upon trial, but such as shall appear to have been presented to the accounting officers of the treasury for **144\***] their \*examination, and by them disallowed in whole or in part, unless it shall be proved to the satisfaction of the court, that the defendant is at the time of the trial in possession of vouchers not before in his power to

Wheat. 6.

procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States, or some unavoidable accident. The terms of these sections are very broad and comprehensive. The third section manifestly supposes, that not merely legal but equitable credits ought to be allowed to debtors of the United States by the proper officers of the treasury; and the fourth section prohibits no claims for any credits, which have been disallowed at the treasury, from being given in evidence by the defendant at the trial. There being no limitation as to the nature and origin of the claim for a credit which may be set up in the suit, we think it a reasonable construction of the act, that it intended to allow the defendant the full benefit at the trial of any credit, whether arising out of the particular transaction for which he was sued, or out of any distinct and independent transaction, which would constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States. The object of the act seems to be to liquidate and adjust all accounts between the parties, and to require a judgment for such sum only, as the defendant in equity and justice should be proved to owe to the United States. If this be the true construction of the act, which we do not doubt, the defendant might well claim a credit in this suit for the sums due him, even if they had grown out of distinct and independent trans- **\*145** actions, for he is legally, as well as equitably, entitled to them. But even if this construction of the act were doubtful, upon the facts of this particular case, as far as we can gather them, we should have probably come to the same result.

This suit seems to have been brought by the United States for the money price of certain provisions received by the defendant under the articles of agreement. The real object of the suit is, therefore, to procure an account and settlement of that claim. It forms an item in the general account between the parties, like every other advance made by the government to the defendant; and, independent of any statute provision, the defendant would have a right to show that he had accounted for the value of such advance by delivering the equivalent provisions for which it was originally made. In this view, also, the fourth question might be answered in the affirmative.

The opinion of the court will be certified accordingly to the Circuit Court of Kentucky:

1. That under the contract marked B, the defendant is not entitled to the sums disallowed in the paper D, nor to the sums specifically charged in the first and second items of the paper C, which were disallowed by the treasury officers; but is entitled to the sum charged in the third item of the paper C, which was disallowed by the same officers, if Fort Deposit was within the reputed boundary of the Choctaw country.

\*2. That the defendant is not entitled **\*146** to the first and second items in the paper C, on the ground that the place at which the rations were delivered is not specially provided for in the contract; but that he has a right to show that the sum allowed by the Secretary of War for those rations is not a reasonable compensation.



3. That upon such proof the defendant is entitled to a reasonable compensation for those rations, to be ascertained by the jury.

4. That the defendant ought to be permitted to claim a credit for the above sums due him in this suit.

*Certificate accordingly.*

Cited—7 Pet. 25, 48; 10 Pet. 133; 15 Pet. 370; 4 How. 112; 8 How. 105; 23 How. 420; 9 Wall. 765; 20 Wall. 28; 1 Wood, & M. 194; 1 Curt. 21; 3 Blatchf. 350; 2 Story, 208; 2 Dill. 427; 2 Broek. 12; Crabbe, 577.

[PRACTICE.]

YOUNG v. BRYAN ET AL.

The Circuit Court has jurisdiction of a suit brought by the indorsee of a promissory note, who is a citizen of one state, against the indorser, who is a citizen of a different state, whether a suit could be brought in that court by the indorsee, against the maker, or not.

No protest of a promissory note, or inland bill of exchange, is necessary.

ERROR to the Circuit Court of Tennessee.

This was an action of *assumpsit*, brought in the court below, by the defendants in error, citizens of Pennsylvania, against the plaintiff [147\*] in error, a citizen \*of Tennessee, as the indorser of a promissory note drawn by another citizen of Tennessee, and indorsed to the plaintiffs. The only questions in the cause were,

(1) Whether the court below had jurisdiction; and, (2) whether notice of protest was necessary to charge the indorser in this case. Judgment having been rendered against the defendant below, the cause was brought by writ of error to this court.

*Mr. Eaton*, for the plaintiff in error, (1) argued that under the 11th section of the judiciary act of 1789, c. 20, the court below had not jurisdiction. The decision of this court, in the cases of *Montalet v. Murray*,<sup>1</sup> and *Turner v. The Bank of North America*,<sup>2</sup> shows, that where jurisdiction does not attach between the drawer and drawee, assignment cannot give jurisdiction. The indorser can only transfer by the assignment, the rights and interest he possesses; as he had no right (he and the drawer being citizens of the same state) to sue in the federal court, he could not consequently create any such right by the assignment. It would amount to a creation of jurisdiction by consent, which the law does not warrant. The case of *Slacum*

*v. Pomery*,<sup>3</sup> went off on the ground of the want of notice. At any rate, that was a foreign bill, and perhaps within the operation of the 11th section of the judiciary act; it is, then, not authority in this case. In the language of the 11th section of the judiciary act, \*his [\*148] is a "suit to recover the contents of a promissory note in favor of an assignee," &c. The declaration contains but a single count, founded upon the assignment, non-payment, and consequent liability of the plaintiff in error. There is no count for money had and received; there is but a single count, and that is to recover the contents of the note, a chose in action, which is against the express provision of the act. There is no distinct, substantive contract, between the indorser and holder of the note; and, if there were any, it is not declared on. (2) No notice of protest was given. This was necessary to charge the indorser;<sup>4</sup> and the declaration should contain an averment of notice of protest.<sup>5</sup>

*Mr. Sergeant*, contra, (1) admitted, that where by the judiciary act, jurisdiction does not attach between the drawer and the payee of a note, assignment cannot give jurisdiction. Such, and no more, is the amount of the decisions referred to. If the payee of the note could not maintain a suit in the federal courts against the drawer, neither can the indorsee maintain a suit in the federal courts against the drawer. But the jurisdiction of the federal courts extends to the case of a suit brought by the indorsee against the indorser, being citizens of different states, whether a suit could have been there brought against the drawers or not. By the words of the act, a general jurisdiction is given, in terms, \*embracing all cases where citizens of [\*149] different states are parties. Being in conformity with the provisions of the constitution, and intended to secure to the suitor an impartial tribunal, it ought to be liberally construed. Out of this general grant, there is a particular exception, which ought not to be extended beyond its natural construction, but rather to be strictly taken, being against constitutional right; and if there be doubt, that interpretation should be given which is most favorable to the jurisdiction. The words are, "Nor shall any district, or circuit court, have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in case of foreign bills of exchange." These words necessarily import a recovery by an assignee, claiming through the medium of an assignment, of the

3.—6 Cranch, 221.

4.—*French's Ex'r's v. The Bank of Columbia*, 4 Cranch, 141; *Donaldson v. Meaus*, 4 Dall. 109.

5.—*Slacum v. Pomery*, 6 Cranch, 221.

1.—4 Cranch, 46.

2.—4 Dall. 11.

NOTE.—See note to *Emory v. Greenough*, 3 Dall. 370, as to jurisdiction of circuit court.

No protest of a promissory note, or inland bill of exchange is necessary. Protest is only necessary in case of foreign bills. *Orr v. Maginnis*, 7 East, 359; *Gale v. Walsh*, 5 T. R. 239; *Borough v. Perkins*, 1 Salk. 131; *Chitty on bills*, 13th Am. Ed. [\*332], 372; *Byles* (Sharswood's Ed.) [\*249], 394; *Burke v. McKay*, 2 How. 66; *Union Bk. v. Hyde*, *post*, 572; *Bailey v. Dozier*, 6 How. 23; *Bk. of U. S. v. Leathers*, 10 B. Mon. 64; *Hubbard v. Troy*, 2 Fred. 134; *McMarchey v. Robinson*, 10 Ohio St. 496; *Smith v. Curlee*,

59 Ill. 221; 2 Daniels, Neg. Instr. 1; *Nichols v. Webb*, 8 Wheat. 326; *Wanzer v. Tupper*, 8 How. 234; *Sullivan v. Deadman*, 19 Ark. 484; *Bond v. Bragg*, 17 Ill. 69; *Sumner v. Bowen*, 2 Wisc. 524; *Solarte v. Palmer*, 7 Bing. 530; *Merritt v. Benton*, 10 Wend. 116; *Bank of Utica v. Smith*, 18 John. 230; *City Bk. v. Cutter*, 3 Pick. 414; *Rahm v. Phila. Bk.*, 1 Rawle, 335; *Whiting v. Walker*, 2 B. Mon. 262.

Though by statute in most of the states inland bills and promissory notes may be protested in like manner as foreign bills. 2 Daniels Neg. Instr. 1; *Story Prom. Notes*, 340.

same contents which might have been recovered by the assignor, if he had not assigned. They apply only to a derivative claim. If the payee should make a special indorsement to a citizen of the same state, and such indorsee should indorse the note to a citizen of a different state, the latter, perhaps, could not sue the first indorsee in the federal court, because he would be obliged to claim under the assignment, and in right to the assignor. But if the payee indorse the note to a citizen of a different state, there is a new contract entered into between the indorser and the indorsee, by the indorsement, and the indorsee would claim upon the footing **150\***] of \*that contract, without regard to the original engagement, except for the fact (upon which the liability of the indorsee arises), that the note has been dishonored. The contract is so entirely independent that the indorsee would be liable though the note were forged, or the drawer fictitious. The assignment, it is true, is the evidence of the contract, and in a certain sense, the foundation of his claim; but he does not claim through it nor under it, nor does he claim at all as assignee. In the case of a note payable to bearer, and transferable by delivery, it is believed there could be no doubt of the jurisdiction, in favor of a *bona fide* holder, being a citizen of a different state from the drawer, through whatever hands it might have passed in its course to him. He would claim in his own right, and not by assignment. In the case of a general indorsement, also transferable by delivery, and conferring upon the *bona fide* holder an original right of suit against the indorser, the court would have jurisdiction of a suit against the indorser, for the same reason. And in case of a special indorsement to a citizen of a different state, the argument, if possible, is still stronger. Neither of these is within the words of the act. The plain intention of the provision is effectuated by the construction contended for on the part of the defendants in error. The design of the exception was either to prevent colorable transfers for the purpose of giving jurisdiction, or to enable the party to a negotiable contract, to secure to himself the jurisdiction of the state courts. The interpretation contended for, does not interfere **151\***] with these views. \*It is in the power of the indorser to fix the jurisdiction, by making a special indorsement, as it is in the power of the drawer to escape the federal jurisdiction by making the note payable to a citizen of the same state. But as it must be admitted, that where the note is payable to a citizen of a different state, or being payable to bearer, comes into the hands of a citizen of a different state, the drawer may become subject to federal jurisdiction, it would seem to follow, conclusively, that the indorser (omitting to guard himself, and thereby voluntarily waiving the right) would also be liable. It may be remarked, in the particular case under consideration, that the note appears, from the evidence, to have been drawn, and, probably, indorsed for the very purpose of being delivered to the plaintiffs below, who were, and were known to be, citizens of Pennsylvania. (2) It appears fully in evidence, that notice of non-payment by the drawer, was in due time given to the indorser. This is all that was necessary to be done, no protest being required of a note or inland bill of exchange. Wheat. 6.

*Slacum v. Pomery*,<sup>1</sup> was the case of a foreign bill.

Mr. Chief Justice MARSHALL delivered the opinion of the court, that a suit may be brought in the Circuit Court by the indorsee against the indorser, whether a suit could be there brought against the drawer or not. In such a case, the indorser does not claim through an assignment. It is a new contract \*enter- **[\*152]** ed into by the indorser and indorsee, upon which the suit is brought; and if the indorsee is a citizen of a different state, he may bring an action against the indorser in the Circuit Court. As to the other objection insisted upon by the plaintiff in error, all that was incumbent upon the holder, was to give due notice to the indorser. No protest of a promissory note or inland bill of exchange is necessary.

*Judgment affirmed.*

Cited—11 Pet. 83; 16 Pet. 95; 2 How. 71; 5 How. 291; 13 How. 187; 1 Abb. U. S. 307; 1 Wood. & M. 119, 120; 1 Biss. 277; 4 Biss. 348; Hemph. 535; 2 Wall., Jr., 337; 1 Woods 495.

[PRIZE.]

## THE BELLO CORRUNES.

THE SPANISH CONSUL, Claimant.

A foreign consul has a right to claim, or institute a proceeding, *in rem*, where the rights of property of his fellow-citizens are in question, without a special procurator from those for whose benefit he acts.

But a consul cannot receive actual restitution of the *res* in controversy, without a special authority from the particular individuals who are entitled.

A capture made by citizens of the United States of property belonging to subjects of a country in amity with the United States unlawful, wheresoever the capturing vessel may have been equipped, or by whomsoever commissioned; and the property thus captured, if brought within the neutral limits of this country, will be restored to the original owners.

Whatever difficulty there may be, under our municipal institutions, in punishing as pirates, citizens of the United States who take from a state at war with Spain, a commission to cruise against that power, contrary \*to the 14th article of the Spanish **[\*153]** treaty, yet there is no doubt that such acts are to be considered as piratical acts for all civil purposes, and the offending parties cannot appear, and claim in our courts the property thus taken.

It seems, that the terms, "a state with which the said king shall be at war," in the 14th article of the treaty, include the South American provinces which have revolted against Spain.

But, however this may be, the neutrality act of June, 1797, c. I., extends the same prohibition, with all its consequences, to a colony revolting, and making war against its parent country.

In the case of such an illegal capture, the property of the lawful owners cannot be forfeited, for a violation of the revenue laws of this country, by the captors, or by persons who have rescued the property from their possession.

The rights of salvage may be forfeited by spoliation, smuggling, or other gross misconduct of the salvors.

**A**PPPEAL from the Circuit Court of Rhode Island.

This was the case of a Spanish vessel and cargo, stranded on Block Island, and there seized by the officers of the customs. An in-



formation on behalf of the United States, was filed in the District Court, against the property, as forfeited, for an alleged breach of the revenue laws. His Catholic Majesty's Vice Consul for the District of Rhode Island, interposed a claim on behalf of "certain subjects of the King of Spain," the original owners of the ship and cargo, which was bound on a voyage from the port of Tarragona, in Spain, to La Vera Cruz, and was taken off Cape St. Antonio, on the west end of the island of Cuba, on the 21st of March, 1818, by an armed vessel called the Puyerrdon, commanded by one James Barnes, sailing under Buenos Ayres colors, and asserting a right to make captures under the authority of the government of that place. Restitution to the original Spanish owners was claimed **154** \*upon the ground that the capturing vessel had been equipped in the ports of this country, in violation of our neutrality. An allegation was also filed by Barnes, demanding restitution of the property to the captors, as having been taken, *jure belli*, on the high seas. Another claim was also filed by certain persons, part of the original crew of the Bello Corrunes, left on board after the capture, who asserted a claim for salvage, in case the property should be restored to the original Spanish owners, under the following circumstances. The master of the captured vessel, and all her crew except four, were taken out, and a prize-master and crew put on board from the Puyerrdon. Thus equipped, the Bello Corrunes cruised in company with the Puyerrdon nearly two months, during which period another Spaniard, of the original crew of the Bello Corrunes, was returned to that vessel. The two vessels afterwards separated, and on the 8th of May, in lat. 32° 30' north, and longitude 74° W. from London, the prize crew, assisted by the persons originally on board the Bello Corrunes, rose on the prize-master and other officers, and rescued the vessel from their possession. They then steered their course for the United States, and the vessel was by some means stranded upon Block Island, where the vessel and cargo were seized by the revenue officers.

A decree was entered in the District Court, *pro forma*, and by consent of parties, restoring

the property to the original Spanish owners as claimed, and dismissing the other allegations and claims. This decree was affirmed, *pro forma*, and by consent, in \*the [**155** Circuit Court, and the cause was brought by appeal to this court.

It appeared by the evidence in the courts below, and by the further proof taken under a commission from this court, that the capturing vessel was formerly owned by citizens of the United States, and called the Mangoree, and was originally armed, equipped, and manned at Baltimore; and sailed from that port in March, 1817, under the command of Barnes, a citizen of the United States, domiciled in that city, under Buenos Ayres colors, on a cruise; and after capturing several Spanish vessels, proceeded to Buenos Ayres, where the vessel arrived in August, 1817.<sup>1</sup> The vessel was then altered from a schooner into a brig, and her name changed to The Puyerrdon, an addition of one gun was made to her armament, some of the original crew were re-shipped, and other seamen recruited.\* An alleged sale of the vessel took place to one Higginbotham, a citizen of the United States, domiciled at Buenos Ayres; and a commission was issued by the Supreme Director of the United Provinces of South America, dated the 20th of November, 1817, authorizing Barnes to capture Spanish property; with which the vessel sailed from Buenos Ayres on the cruise, during which the present capture was made.

The *Attorney-General*, for the United States, argued, that the officers of the government being in \*possession of this property, [**156** would hold it as a *droit* until some person appeared duly authorized to claim it. The Consul of Spain has no authority to claim, in his own name, and in his official character, the property of persons to him unknown, and by whom he cannot therefore have been invested with a special procuration. He is not invested with a general authority for that purpose, *virtute officii*, nor is there evidence in this particular case that the consul is the agent, consignee, or correspondent of the owners, who are sometimes permitted to claim for their principal, when the latter is absent from the country.<sup>2</sup>

1.—This was the same vessel which captured the *Divina Pastora*, in 1816. *Vide ante*, Vol. IV., p. 52.

2.—The *Anne*, 3 Wheat. Rep. 435; De Steck, des Consuls, 64; Warden on Consuls, 116, and opinion of M. Portalis there cited. This opinion of M. Portalis, in the case of the claim of the Danish Consul before the French council of prizes, will be found in the appendix to the present volume of Reports, Note No. V.

The passage cited from De Steck, is as follows:

"§ 27. Selon la règle par la plupart des traités de commerce et par l'usage presque généralement reçu les consuls sont les juges des gens de mer et des négocians et marchands de leur nation. (a)

§ 28. Il leur est ordinairement attribuée la juridiction tant en matière civile que criminelle.

§ 29. Cette juridiction attribuée aux consuls n'émane point de la puissance et de l'autorité du souverain, qui les établit, que n'a point de pouvoir sur ses sujets expatriés, demeurans, commerçans, établis en des pays étrangers. Elle depend et derive plutôt de la concession, de l'attribution du souverain de l'état où les consuls résident. Elle sup-

pose donc toujours des traités par lesquels elle est stipulée, accordée, attribuée.

§ 30. Lorsque la juridiction est attribuée aux consuls par les traités de commerce, ils ont le pouvoir dans leur district, dans l'endroit de leur établissement et dans leur résidence, de juger les différens, contestations et procès qui surviennent entre les gens de mer, les négocians, les commerçans de leur nation, qui s'élèvent entre les capitaines, patrons, l'équipage, et les passagers des vaisseaux et des batimens nationaux.

§ 31. Leur juridiction ne se borne pas alors aux affaires contentieuses des nationaux. Ils ont aussi la juridiction volontaire, c'est à dire la faculté de recevoir les déclarations des capitaines des vaisseaux, et tous les actes que leur nationaux veulent passer dans leur chancellerie, de les légaliser, de recevoir leur testaments, de régler leurs successions et leur tutelles, de faire l'inventaire de leur biens délaissés et naufragés, etc.

§ 32. Dans les procès que surviennent entre les nationaux et les habitans et sujets de l'état où les consuls sont établis, ou entre les commerçans d'autres nations, ils assistent, protègent, défendent leurs nationaux. Dans les échelles du Levant les juges du lieu n'osent dans ce cas procéder sans la participation et l'intervention du consul, sans la présence des on interprète." De Steck des Consuls, p. 64.

a.—Valin, Com. Sur l'Ordonn. de la Marine, l. 1, tit. 9, art. 12, p. 251.

Great public inconveniences and mischief might  
**157\***] \*follow from allowing foreign consuls, not specially authorized by their own government, or by this, nor by the parties, to receive restitution of property, for which they may interpose a claim as belonging to their fellow-subjects. Supposing the property here to be devested out of the original owners by the capture, and vested in the captors, *jure belli*, it must be forfeited to the United States for violating the revenue laws, which was the original intention of the parties, and was partially accomplished at Block Island. Or supposing the recapture by the prize crew to be valid, they **158\***] must be \*considered as the agents of the original proprietors, and their misconduct must be visited upon the original proprietors.

Mr. Winder, for the appellants and captors, insisted, that the present capture being made on the high seas, *jure belli*, under a commission regularly issued by a government acknowledged to be entitled to exercise the rights of war against its enemy, could not be inquired into by the courts of this country; but that the captors being entitled to the possession, having only been dispossessed by the criminal misconduct of the prize crew which they had put on board to secure the prize, were entitled to restitution, in order to enable them to proceed against it as prize in the competent court. Whatever military means are directed, from within the territory of one of the belligerent states against its enemy, are not subject to the review or control of any neutral or other foreign tribunal or authority, except in the single case of a direct violation of the neutral territory itself. This principle grows out of the perfect independence and equality of nations, existing as it were in a state of nature in respect to each other. Their conduct in authorizing acts of war is no more reviewable by other nations, than any other of their acts of sovereignty.<sup>1</sup> It is this perfect independence and equality of sovereign states which is the sole foundation of the exclusive jurisdiction of the prize courts of the captor's country over everything done under **159\***] a prize \*commission.<sup>2</sup> In the celebrated case of *The Exchange*,<sup>3</sup> this court held, that the commission of a sovereign protected that vessel from all inquiry, notwithstanding the flagrantly unjust conduct of the French emperor in appropriating the property of an American citizen to his own use, without the form of a trial, and incorporating it into his military marine. It must be shown, that the act of the government of Buenos Ayres in granting this commission is unlawful, before it can be shown that any of the effects of that act are invalid. Suppose the *Exchange*, on her voyage, had made a capture, could this court have restored it to the former owners? Or could it inquire into the validity of such a capture consistently with the principles laid down in that case? The enlistment of men in neutral countries to serve the belligerent powers is lawful, unless there be some express prohibition of the neutral state. Such a municipal prohibition would certainly make it unlawful, in

respect to the neutral state whose laws are violated; but it does not, therefore, follow, that all the acts of such persons in war would be unlawful, or that they are not entitled to the rights of lawful war.<sup>4</sup> The carrying of contraband is prohibited by the law of nations under the penalty of confiscation, and the exportation of contraband articles may be prohibited by the municipal code under other penalties; but such prohibition would not invalidate a \*capt-[\***160** ure made with the munitions of war thus exported. The government of this country naturalizes all foreigners indiscriminately, in peace and in war, and employs them in its land and naval service; and it is not for us to question the right of a citizen of the United States to enter into the military service of a foreign state. It is insisted, that not only the court has no authority by the law of nations to restore to the original owners a prize thus captured, but that the law of nations gives the congress no power to authorize the court to restore. The legislature may prohibit our citizens from enlisting in the service of the belligerents, or from fitting out ships to be employed in cruising, under ever so severe penalties; but those penalties cannot extend to a forfeiture of the rights of prize acquired under the commission of an independent sovereign state. Nor are Spain and the United States competent to regulate by their mutual treaty stipulations the sovereign rights of the South American provinces, though they may stipulate to inflict penalties *in personam*, for what they deem the criminal conduct of their subjects or citizens. As to the claim of the United States for a forfeiture on account of the alleged violation of the revenue laws, it is already settled by this court, that the property of foreigners cannot be forfeited for the misconduct of those who are tortiously in possession, as was the case here with the rescuers.<sup>5</sup>

\*Mr. Webster and Mr. Wheaton, for [\***161** the respondent and claimant, the Spanish Consul, (1) contended, that the consul, from the necessity of the case, had a right to interpose a claim for the property of his fellow-subjects, brought into our ports in this manner. He does not claim as attorney in fact, but his character is more like an attorney at law. There is no necessity of a special procuration from those for whom he claims, because it does not follow that the property will be actually delivered into his hands until the respective rights of the owners are determined, and a special authority produced from them to receive distribution. There is the more necessity for permitting the consul, as the official protector of the commercial rights and interests of his fellow-subjects in a foreign country, to interpose a claim in a case of this nature, because the usual term of a year and a day allowed in prize causes, where there is no claim, would not be allowed here, since the property is demanded by the captors under their pretended commission, and if the subjects of Spain, residing at a distance, and ignorant even of the fact of the capture, were not allowed to be represented by their consul, the property would be taken away by

1.—Vattel, *Droit des Gens*. Prelim. s. 15-23. l. 2, c. 4, s. 54, 55.

2.—L'Invincible, 1 Wheat. Rep. 238, 254.

3.—7 Cranch, 116.

Wheat. 6.

4.—Vattel, l. 3, c. 2, s. 13-15; Bynk. Q. J. Pub., pp. 175, 177 of Du Ponceau's translation.

5.—The *Josefa Segunda*, 5 Wheat. Rep. 338.



the captors, and irrevocably lost to the original owners. It will also frequently be impossible for the consul to specify the owners for whom he claims, and he ought, therefore, to be allowed to file allegations claiming it for Spanish subjects generally. The opinion of M. Portalis in the case of *The Danish Consul*,<sup>1</sup> proceeds on-  
**162\*** tively upon the peculiar \*regulation of France, which makes the procureur-general, the official attorney of all persons who are not represented before the tribunals by any special procurator; which would, of course, render unnecessary the interposition of foreign consuls in cases where the rights of their countrymen were involved.

2. They argued, that the vessel by which the present capture was made, having been fitted out in the ports of the United States, and the capture having been made by our citizens, in violation of the law of nations, the acts of Congress, and the treaty with Spain, the property must be restored to the original owners, according to the uniform decisions of this court.<sup>2</sup> Under our municipal constitution, the treaty is the supreme law of the land; and it would be so by the law of nations without that constitutional provision. "Every treaty," says Sir W. Scott, "is a part of the private law of the country which has entered into that treaty, and is as binding on the subjects as any part of their municipal laws."<sup>3</sup> The 9th article of the Spanish treaty declares, that goods taken from pirates shall be restored to the lawful owners; and the 14th article declares the captors, in the present case, to be pirates, as it provides, that they shall be punished as such for taking a commission to cruise against Spain. And yet we are inquiring whether they are entitled to  
**163\*** restitution \*of the very property which they have thus piratically taken. It may be admitted, that in some cases citizens of one country may lawfully engage in the wars of another; we may take the doctrine cited from Bynkershoek, that they may enlist where there is no prohibition. It may also safely be admitted, that as far as the other belligerents are concerned in their hostile relations with each other, it is lawful war. Spain cannot justly complain of the South American provinces for employing foreigners in their service. And if the capturing ship were a national vessel, like the *Exchange*,<sup>4</sup> no doubt her commission would estop all judicial inquiry into her conduct. But this is a private claim. The original Spanish owners claim nothing against the government of Buenos Ayres. That government claims nothing of the Spanish owners. Our own citizens assert a claim to this property acquired in war, which can only be maintained upon the supposition that they may be at war whilst their country is at peace; that they are not bound by the laws and treaties of their own country; that they may expatriate themselves, *flagrante bello*, for the purpose of committing hostilities against nations in amity with the

United States. If the doctrine contended for on the part of the captors, that the commission is conclusive, be correct, then the court can never look behind it, and the belligerents may dispense with our laws, and the allegiance of our citizens, at their pleasure. The case of *Talbot v. Janson*,<sup>5</sup> whatever may be thought  
 \*of it in other respects, has never been [\***164** overruled as to the principle, that the neutral tribunals have a right to inquire into the validity of a captor's commission, to see whether it was obtained and used in violation of the laws of the neutral country. That case has been made the basis of a series of decisions, which have become the settled law of this court, and which it is now too late to question. The court has uniformly treated it as a necessary consequence of the personal illegality of the act of taking the commission that the property captured under it should be restored to the lawful owner. It is, therefore, immaterial where, or by whom, the capturing vessel was equipped. It is sufficient, that the capturing persons are citizens of the United States, and cannot assert a right of property founded on their own illegal conduct.

3. But even admitting that the original capture was legal, the prize cannot now be reclaimed by the captors. An interest acquired in war by possession, is lost with the possession. The rights of capture are completely divested by recapture, escape, or rescue.<sup>6</sup> Here the property has been divested out of the possession of the captors by the rescuers, for the benefit of the original owners, and the rescuers hold it in trust for their benefit.

*Mr. Wheaton*, for the salvors, stated, that the original \*owners being thus shown [\***165** to be entitled to restitution, the next question would be, whether the salvors were entitled to any, and what salvage. Unless the property were thus restored to the Spanish owners, the rescuers could not claim any salvage; for certainly the captors would not admit that any meritorious service had been rendered them by the rescue. But, as against the former owners, the rescuers have a just claim, having saved the property from the grasp of their enemy; and it would be idle to send the salvors to the courts of Spain, to prosecute their claim, since the possession of the property enables this court to do complete justice between all the parties.<sup>7</sup> And this court has already determined, that in a case of derelict by one belligerent, a neutral is entitled to salvage, and the courts of the neutral country into which the property is brought, have authority to award it.<sup>8</sup> As to the *quantum* of salvage: one-third was allowed in that case; and it was doubted whether more ought not to have been allowed, if the salvors had appealed. The case of *The Adventure*,<sup>9</sup> which was a donation at sea by the belligerent captor to a neutral, who brought the property into a port of his own country, was held to be a lawful salvage, and a moiety was allowed. In the

1.—*Vide* Appendix, Note No. V.

2.—*The Alerta*, 9 Cranch, 359; *Talbot v. Jansen*, 3 Dall. 133; *L'Invincible*, 1 Wheat. Rep. 238; *The Divina Pastora*, 4 Wheat. Rep. 52; note to that case, p. 62; Sir L. Jenkins's works, there cited; *The Estrella*, 4 Wheat. Rep. 298.

3.—*The Eenroom*, 2 Rob. 6.

4.—7 Cranch, 116.

5.—3 Dall. 133.

6.—*The Astrea*, 1 Wheat. Rep. 125; *The Invincible*, 2 Gallis. 35; *Hudson v. Guestier*, 4 Cranch, 293; S. C. 6 Cranch, 281; *The Diligentia*, 1 Dodson, 404.

7.—*The Two Friends*, 1 Rob. 281.

8.—*The Mary Ford*, 3 Dall. 198.

9.—8 Cranch, 221.

case of *Rowe et al. v. The Brig* —, which was a Spanish vessel captured by a South American cruiser, one of the learned judges of **166\***] this \*court allowed a moiety of the net value.<sup>1</sup> And in general, it may be affirmed that there is no inflexible rule, either in cases of derelict, or of rescue; a reasonable salvage, proportioned to the meritorious exertions of the salvors, is to be decreed; but never less than a third, unless the property is very valuable, or the services rendered very inconsiderable.<sup>2</sup>

*Mr. Webster*, contra, upon the claim for salvage, insisted, that it appeared by the evidence that there had been a partial embezzlement of the property by the alleged salvors, and that it was a fixed rule that such misconduct, or any circumstance of fraud, forfeited the rights of salvage.<sup>3</sup>

*Mr. Justice JOHNSON* delivered the opinion of the court:

This vessel was stranded on Block Island, in an alleged effort to reach a port of the United States. The vessel and cargo have been seized by the collector of Newport, for supposed violations of the trade laws of this country, and an information was accordingly filed, to subject the whole to condemnation, in the District Court for Rhode Island District.

This claim of the United States has been opposed by three classes of competitors. The **167\***] vessel and \*cargo, it appears, are Spanish property, and were captured on the southwestern coast of Cuba, by the Puyerrdon, a private armed brig, bearing the flag of the Buenos Ayrean republic, and commanded by Captain James Barnes. Being armed, and well calculated for a privateer, she was manned with a complement of the privateer's men, about thirty in number, and her original commander, and all except four of the Spanish crew, removed. Thus equipped, it appears, that she cruised, as a tender to the Puyerrdon, for about two months, during which time another Spaniard was added to her crew, and on the 8th May, when in lat. 32, 30, N. and long. 74, from London, the crew rose upon the officers, subdued them, put them on board the first vessel they met with, and steered their course for this continent.

Thus circumstanced, Capt. Barnes has libeled in behalf of the captors, the Spanish Vice-Consul in behalf of the original Spanish owners, and the crew of the Bello Corrunes have libeled for a compensation by way of salvage, to which they supposed themselves entitled, in the event of restitution being decreed to the original owners.

To these several claims it is objected on behalf of the United States, that restitution cannot be decreed to the Spanish Vice-Consul because he is not in that capacity a competent party in court to assert the rights of individual subjects; nor, in favor of the captors, because the privateer was originally fitted out in the United States, and is still owned by American

citizens; nor, in favor of the salvors, because \*they have forfeited their claim to sal- [**168** vage by spoliation, and an attempt to smuggle.

As these suggestions open the whole case, it shall be disposed of by considering them severally in their order, only remarking, *en passant*, that though they are all sustained, it would avail the United States nothing: since, without evidence sufficient to sustain the criminal charge, it would only follow that the proceeds of the property libeled must lie in the registry of the court until a proper claimant shall make his appearance.

On the first point made by the *Attorney-General*, this court feels no difficulty in deciding, that a vice-consul duly recognized by our government, is a competent party to assert or defend the rights of property of the individuals of his nation, in any court having jurisdiction of causes affected by the application of international law. To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which consuls are deputed by their sovereigns; and in a country where laws govern, and justice is sought for in courts only, it would be a mockery to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the courts of the United States, has sanctioned the exercise of this right, and it is impossible that any evil or inconvenience can flow from it. Whether the powers of the vice-consul shall in any instance extend to the right to receive, in his national character, \*the [**169** proceeds of property libeled and transferred into the registry of a court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognized. Much, in this respect, must ever depend upon the laws of the country from which, and to which, he is deputed. And this view of the subject will be found to reconcile the difficulties supposed to have been presented by the authorities quoted on this point. Considering, then, the original Spanish interest as legally represented, the questions are, whether that interest is not forfeited to the United States, or superseded by the superior claims of the capturing vessel.

This is not the ordinary case of a capture made under the taint of an illegal outfit. The decision of this court must rest upon a very different principle. In those cases, the national character of the claimant is immaterial. He has violated the neutrality of this country, and cannot shelter himself under his commission, or his allegiance, however unquestionable his right, individual or national, would have been otherwise. But can a citizen of this country, who has violated its laws, ever be recognized in our courts as a legal claimant of the fruits of his own wrong? We are of opinion he cannot; and it therefore becomes material to determine what is the national character of the claimants, under the capture made by the Puyerrdon.

At the time of this vessel's first sailing from Baltimore, she was unquestionably American owned and commanded. During the time of her cruising \*under the name of the [**170** Mangoree, it is not pretended that she changed

1.—1 Mason's Rep. 372.

2.—Abbott on Shipp. 451; Story's Ed. Note (1); The Favourite, 4 Cranch, 347; The Jonge Bastian, 5 Rob. 322; The Lord Nelson, Edw. 79; L'Esperance, 1 Dodson, 49; The Blendenhall, 1 Dodson, 421; Barrels of Flour v. Prior, 1 Gallis. 133.

3.—The Blaureau, 2 Cranch, 240.



owners. The legality of her conduct at that period has been defended altogether on the ground of her taking the flag of Buenos Ayres, being commissioned in a foreign state, and her commander, Barnes, assuming the character of a citizen of the power that had commissioned him. It is not until her arrival at Buenos Ayres, in 1817, that any change of property in the vessel has been set up in proof. At that time, it is contended, she was set up at auction, and changed owners, passing into the hands of a Mr. Higginbotham, a citizen of the United States, married and domiciled at Buenos Ayres.

If this fact had been satisfactorily made out in evidence, it would have drawn this court into the consideration of some questions of great nicety, which have never yet received a solemn adjudication in this court. But the evidence to support this pretended change of property is so wholly unsatisfactory, that the court rejects it; for, the ordinary solemnities of such transfers are too well known to admit the belief that in this instance the change of property, had it been real, would not have been effected or commemorated by written documents.

This court, then, proceeds upon the assumption that the *Puyerrdon* is still, in reality, American owned, and they are also of opinion, that she must be held to be American commanded; since even if the doctrine could be admitted, that a man's allegiance may be put off with his coat, it is very clear that Mr. Barnes' citizenship is altogether in fraud of the laws of his own country. His family has never been **171\*** removed from Baltimore, and his home has been always either there or upon the ocean.

The question then is, whether thus circumstanced, the claim in behalf of the owners and mariners of the *Puyerrdon* can be sustained.

We are decidedly of opinion it cannot.

By the 2d section of the 14th article of the treaty with Spain, "Citizens, subjects or inhabitants" of the United States, are strictly prohibited from taking "any commission or letter of marque, for arming any ship or vessel, to act as privateers against the subjects of His Catholic Majesty, or the property of any of them, from any prince or state with which the said king shall be at war." And it is further provided, "that if any person of either nation shall take such commissions or letters of marque, he shall be punished as a pirate."

Whatever difficulties there may exist under the free institutions of this country, in giving full efficacy to the provisions of this treaty, by punishing such aggressions as acts of piracy, it is not to be questioned that they are prohibited acts, and intended to be stamped with the character of piracy; and to permit the persons engaged in the open prosecution of such a course of conduct, to appear, and claim of this court the prizes they have seized, would be to countenance a palpable infraction of a rule of conduct, declared to be the supreme law of the land.

Some doubts have been suggested on the use of the words "state at war" with Spain. This court would not readily lean to favor a **172\*** stricted construction of language, as applied to the provisions of a treaty, which always combines the characteristics of a con-

tract, as well as a law; but it is not necessary to examine the grounds of these doubts, as applied to the present case; because this treaty has been enforced by the provisions of the act of Congress of the 14th June, 1797, so as to leave no doubt of its extension to the case of cruising against Spain, under a commission from the new states formed in her colonies.

Citizens of the United States, therefore, present themselves to this court to demand restitution of a prize which they had made in violation of the most solemn stipulations of a treaty, and provisions of a law of their own country, and of which they have been dispossessed by their own associates in guilt. Under such circumstances, this court cannot hesitate to reject the claim, and adjudge the property to the original proprietors.

This view of the subject obviates the necessity of examining the reality and effect of the alleged rescue on behalf of the original owners, with a view to the question of restitution; but it still becomes necessary, with a view to the question of forfeiture, and the merit of the alleged salvors. With regard to the former, it is very clear, that supposing the rescue to have been real and complete, the Spanish consul ought not to be precluded from his election, whether to put his claim upon the ground, that the interest of those whom he represents was never legally divested, or that it was afterwards legally recovered. In the one case, there is no ground for affecting it with the **[\*173]** forfeiture, because of the conduct of the crew; and in the other, some question may be made, how far the property was affected by the illegal acts of those who, at that time, held in the right of the owners. But even in this latter view of the state of the property, we are of opinion, that the forfeiture was not incurred; since, although it be supposed that the property was in custody of those who held for the Spanish owners, it was not held by those to whom the Spanish owners had entrusted the vessel and cargo. And this is the only ground upon which the acts of the ship's company are made to produce forfeitures of the interest of shippers or ship-owners. For, besides the considerations drawn from the great predominance of the force detached from the privateer, in the effort to recapture, the few men of her own crew were gratuitous actors. Their contract with the owners had ceased, and they assumed the character of voluntary agents, whose conduct the owners might or might not adopt, according to their own views or interests.

As to the claims of the salvors, it may be remarked, that maritime courts always approach them with great benignity and favor. Yet, in proportion to the inclination to favor where there is merit, is the indignation with which they view every indication of a disposition to take advantage of the unfortunate. Spoliation, and even gross neglect, may forfeit all the pretensions of salvors to compensation.

In the case before us, it is not too much to pronounce the claim of those of the crew of the *Puyerrdon* who libel for salvage, to **[\*174]** be not only groundless but impudent; for, besides spoliation, smuggling, and the grossest irregularities, it is perfectly clear, from the pilot's evidence, that they run the vessel on shore purposely. So that whatever may have been the



reality of their benevolent designs towards the Spanish owners originally, their subsequent conduct not only casts a doubt over their candor, but divests them of all pretensions to compensation.

Nor do the five Spaniards who composed a part of the crew of the *Bello Corrunes*, at the time she was stranded, and who were not of the capturing crew, escape being involved in the suspicions which fasten on their associates.

It is a melancholy truth, too well known to this court, that the instruments used in the predatory voyages carried on under the colors of the South American states, are among the most abandoned and profligate of men. Under the influence of strong interests or fears, the mind of man too often yields, even where the moral sense still exerts its influence; but hold out to one of these practiced adventurers in a course of plunder, the hope of gain on the one hand, and the fear of imprisonment for piracy on the other, and what are the chances for truth?

That these men were selected from the Spanish crew to associate with those of the capturing vessel, is a circumstance not very favorable to their characters and conduct, and it would require some strong evidence of their innocence to remove from them the suspicion of a voluntary association with the enemies of their king. Joining in, or even setting on foot **175\*** or promoting the recapture (facts which rest wholly on their own veracity), can prove very little in their favor, since such mutinies are become every-day occurrences whenever such a crew find themselves in possession of a valuable cargo. Nor will the inference in their favor be very strong from their resorting to the consul of their country, since it was the only course which held out a chance of gain, or of escape from the imputation both of piracy and smuggling. There is no evidence to separate their conduct from a complete identification with the rest of the crew, except what is obtained from their own testimony. Yet it is suggested, that they may still make their innocence and merits to appear; and as the parties have signified their consent that the case may be opened in the court below as to this class of salvors, the case will be remanded to the Circuit Court, for further proceedings, so far as the claim for salvage is concerned.

*Decree accordingly.*

**DECREE.**—This cause came on to be heard on the transcript of the record of the Circuit Court for the District of Rhode Island, and was argued by counsel. On consideration whereof, it is ordered and decreed, that the decree of the said Circuit Court in this case be, and the same is hereby affirmed, with costs, against Barnes and others, except so far as relates to the libel for salvage of Emanuel Rodriguez, Emanuel Josef, Emanuel Barbarus, Antonio Josef, and **176\*** Josef Isnages, who formed no part of the crew of the private armed brig *Puyerrredon*; and as to so much of the said decree as relates to the said libelants, Emanuel Rodriguez and others, it is further decreed and ordered, by consent of parties, by their counsel, that the decree of the said Circuit Court be, and the same is hereby reversed and annulled. And it is further ordered, that the said cause be re-

manded to the said Circuit Court for farther inquiry; and that the proceeds of the said *Bello Corrunes* and cargo lie in the registry of the said Circuit Court, to be paid over, under the order of that court, to the Spanish owners, as interest shall be made to appear.

Cited—1 Curt. 89; Blatchf. & H. 120.

[INSURANCE.]

SMITH ET AL.

v.

UNIVERSAL INSURANCE COMPANY.

Where, in a policy of insurance, a technical total loss is asserted as the ground of recovery, the loss must be occasioned by the immediate operation of some of the perils insured against, and it is not sufficient that the voyage be abandoned for fear of the operation of the peril.

The insurers do not undertake, that the voyage shall be performed without delay, or that the perils insured against shall not occur; they undertake only for losses sustained by those perils; and if any peril does begin to act upon the subject, yet if it be removed before any loss takes place, and the voyage is not thereby broken up, but is, or may be, resumed, the insured cannot abandon for a total loss.

Insurance on munitions of war, laden on board a neutral vessel, on a voyage from New **[\*177]** York, to and at a port or ports, place or places, in the Gulf of Mexico, from the Balize to Campeachy, both inclusive, and from either back to New York, &c., with a memorandum, that the insurers should be free from any loss arising from illicit or prohibited trade. The goods insured were prohibited from being imported into the ports of New Spain, in possession of the Royalists, by the laws of Old Spain, but were permitted to be introduced into such ports as were in possession of the Insurgents. The vessel and cargo arrived off a place in possession of the patriot General Mina, and the master made an agreement to sell the cargo to him, deliverable from time to time, as he should want it, at St. Ander. But before the cargo could be delivered, the vessel was chased off by Spanish armed ships, and after making several attempts to return, was compelled to proceed to the Balize for repairs; after which she again approached the coast, but found it still in possession of the Royalists, General Mina having retired into the interior. The objects of the voyage being thus defeated, the vessel returned to New York with the original cargo on board; and the insured then abandoned to the underwriters, not having before had information of the breaking up of the voyage. Held, that the insured were not entitled to recover as for a total loss of the voyage.

**E**RROR to the Circuit Court of Maryland.

This was an action of covenant on a policy of insurance, underwritten by the defendants for the plaintiffs, on the 4th of February, 1817, on a voyage at and from New York, to and at a port or ports, place or places, in the Gulf of Mexico, from the Balize to Campeachy, both inclusive, and from either back to New York, or a port of discharge in the United States, upon all kinds of lawful goods and merchandises laden, or to be laden, on board the schooner *Ellen Tooker*. In another part of the policy, it is stated to be "on cargo, consisting chiefly of munitions of war." There **[\*178]** is a memorandum also in the policy, whereby the underwriters are warranted by the assured free from any charge, damage, or loss, which may arise in consequence of a seizure or detention of the property for or on account of any illicit or prohibited trade. The declaration



alleges, that the vessel, with the cargo, proceeded on the voyage, and asserts as a loss within the contract, that while on the voyage, the schooner, with her cargo, was restrained and detained by certain persons acting under the authority of the King of Spain, whereby the goods and merchandises became wholly lost.

The material facts, as they appeared on the trial, are these. The *Ellen Tooker*, having on board property of the plaintiff of a greater value than the sum insured, sailed from New York, on the voyage insured, on the 31st of January, 1817. On the 25th of February she arrived at the Balize, where the master left the vessel and went to New Orleans, and having obtained information, that Nantla and Talacuta were in possession of the Independents, to which places American vessels might proceed, on his return to the Balize, the schooner proceeded for Nantla, and arrived off that place on the 23d of March, and found it in possession of the Royalists. The schooner then proceeded to Talacuta, and having arrived off that place, a boat was sent ashore for information, the crew of which were made prisoners. Concluding from this occurrence, that the place was in possession of the Royalists, the schooner put to sea, and on the 5th of April fell in with **179\***] a fleet \*of six sail under the command of General Mina, with troops on board, bound for the bar of St. Ander. The master having had communication with General Mina, and received encouragement from him that he would purchase the cargo, the schooner kept company with the fleet, and arrived off the bar of St. Ander on the 28th of April, where the schooner came to anchor in the open sea, the entrance being too shoal to permit her to cross the bar. On the 11th of May, the master left the schooner and went up the river to Porto La Marina (where General Mina had his headquarters), for the purpose of selling the cargo, which he accordingly did, deliverable to General Mina, as he should want it, from time to time, at St. Ander, the whole delivery to be completed by the first of July. On the 18th of May, while the master was on shore, a Spanish frigate and two armed schooners of the Royalists hove in sight, and the schooner was immediately gotten under way for the purpose of escaping them, and after four hours' chase effected her escape. The schooner made several attempts to return, but was prevented by Spanish ships hovering about the place; on the 26th of May, finding the coast clear, she returned to St. Ander, which was still in possession of the Independents, and the master was taken on board. The foremast of the schooner being found to be loose in the step and injured, and the crew being short of water, the schooner proceeded to the mouth of the Rio Grande for water and to examine the foremast; and there the heel of the foremast being found to be gone, the schooner proceeded to the Balize **180\***] \*for repairs, and arrived there on the sixth of June. The foremast was there repaired, and the schooner sailed again for St. Ander for the purpose of delivering the cargo to General Mina according to contract, and on her arrival there, on the 22d of June, the place was found to be in possession of the Royalists, who occupied it with a military force. In consequence of this, the schooner did not ap-

proach the shore, but proceeded along the coast northward to a place called Pass Cavellos, about 270 miles from St. Ander, where information was received that St. Ander, and the coast, were completely in possession of the Royalists. The objects of the voyage being in this manner defeated, the schooner returned to New York with her original cargo on board, and arrived there on the 22d of July, 1817. The plaintiffs had no intelligence of the breaking up of the voyage until the return of the schooner to New York, and then abandoned to the underwriters in due time, assigning as a cause, that the *Ellen Tooker* was "compelled, by an armed force, to leave St. Ander in the Gulf of Mexico, where she had arrived and was about to deliver her cargo, and was prevented thereafter by a like force from re-entering that place." This abandonment was not accepted. It was also in evidence, that the cargo of the *Ellen Tooker* was shipped, and intended to be sold to the Independent party of Mexico, which was waging war with the King of Spain, and that the same was prohibited from importation into Mexico by the laws of Spain, and would have been seized and confiscated if it had been carried into any of the ports in \*possession of the Royalists, but would [**\*181** have been freely admitted into any ports in possession of the Independent party.

Upon these facts a verdict was given, and judgment rendered for the defendants, and the cause was brought to this court by writ of error.

*Mr. Winder* and *Mr. Raymond*, for the plaintiffs, stated, that this was an action of covenant on a policy of insurance, and that the breach assigned in the declaration was a loss occasioned by the restraint and detention of certain persons acting under the authority of the King of Spain. The voyage was broken up and destroyed by the constraint imposed upon the vessel to leave St. Ander, in order to avoid capture by the Spanish armed ships. The insurers were apprised of the nature of the risk. The port of St. Ander became the destination, and the vessel was prevented from entering it, by the risks insured against. This is a restraint within the meaning of the policy. Every restraint or control exerted by a people, prince or state, over the subject-matter insured, so as to defeat the voyage, is a loss within the policy. Such are the restraints of a blockade;<sup>1</sup> an embargo, limited in point of time, or indefinite;<sup>2</sup> and the municipal law of a \*country which [**\*182** subjects the vessel and cargo to confiscation, if it is morally certain that it applies to the vessel, and would be enforced.<sup>3</sup> So, if the port of destination be shut, by being in possession of an enemy, or by interdiction of trade, it is a just cause for breaking up the voyage.<sup>4</sup> There is a great apparent discrepancy in the English authorities as to "restraint of princes." But this court has settled the import and meaning

1.—*Schmidt v. Unit. Ins. Co.*, 1 Johns. Rep. 249; *Craig v. Unit. Ins. Co.*, 6 Johns. Rep. 226; *Ycaton v. Fry*, 6 Cranch, 335; *Olivera v. Union Ins. Co.*, 3 Wheat. Rep. 183.

2.—*M'Bride v. Mar. Ins. Co.*, 5 Johns. Rep. 299; *Walden v. Phoenix Ins. Co.*, 5 Johns. Rep. 310; *Ogden v. Firemen Ins. Co.*, 10 Johns. Rep. 177; *Rhineland v. Ins. Co. of Pennsylv.*, 4 Cranch, 29.

3.—*Craig v. Unit. Ins. Co.*, 6 Johns. Rep. 226.

4.—1 Johns. Rep. 268, per Kent, *Ch. J.*, who cites 1 Emerig. Des. Assur. 242.



of the term in the case of *Olivera v. The Union Insurance Company*.<sup>1</sup> But it may be said that there is no proof that the blockade existed at the time of the abandonment. To which it is answered, that this principle does not apply to a technical total loss produced by blockade. In the case of an embargo or capture, the voyage is not necessarily broken up; it is merely suspended; but in that of a blockade, it is entirely defeated, and the object of the voyage cannot be accomplished. Though the restraint now under consideration is not that of a blockade, yet it is equivalent; since the master was prevented by the restraint from entering the port which he had selected, within the limits prescribed by the policy. A reasonable fear of loss by capture, seizure, &c., is a justifiable cause of deviation, and consequently protects against all losses arising from deviation. In 183\*] the case of *Schmidt v. United Insurance Company*, it is said to be "sufficient to justify the master's conduct in cases of this kind, if he have good reason to apprehend that a capture will be the consequence of going on."<sup>2</sup>

*Mr. Pinkney* and *Mr. D. B. Ogden*, contra, argued, that in order to establish a technical total loss in this case, the insured must show a restraint within the policy and declaration; and that it actually produced the breaking up of the voyage. The *onus probandi* is on the plaintiffs, and they must trace the supposed consequences of the peril home to its efficient cause. The insurance was on munitions, contraband of war; but the memorandum that the underwriters were not to be liable for a loss by illicit trade, secured them against any loss by mere municipal regulations. They have nothing to do with an internal conflict, by which the port may change masters. The declaration alleges a loss by restraint of princes. But this restraint must be the direct and immediate agent in breaking up the voyage; as in an embargo, or blockade, which being removed, the peril instantly ceases. Here the restraint was not only not the efficient cause of the loss, but it arose out of illicit traffic. This part of the coast of Mexico did not cease to be subject to the colonial code of Spain, by the temporary possession of the insurgents. The vessel attempted 184\*] to escape, not merely from the \*ordinary peril of capture in war, but from that combined with the local prohibition. It was a loss from a fear, which, had it been realized, would not have made the underwriters liable. All the *quia timet* cases, are cases where they would be so liable. The attempt is to make the underwriters find a lawful market; whereas the insured stipulates to take that upon himself by his warranty. Even if the market were lawful for a time, its ceasing to be so is not at the risk of the underwriters. So that the insured have broken up the voyage for a technical total loss, arising from perils not insured against.

*Mr. Justice Story* delivered the opinion of the court, and, after stating the facts, proceeded as follows:

1.—3 Wheat. Rep. 183.

2.—Per *Livingston, J.*, 1 Johns. Rep. 262, and *Targa. Ponderaz, c. 59, 291*; *Casaregis, Disc. 83, No. 84*, cited by him. See also 1 *Emerig. des Assur.* 509. Wheat. 6.

Upon these facts, the Circuit Court directed the jury that the plaintiffs were not entitled to recover; and the propriety of this direction is the question before us upon this writ of error.

Two points have been argued at the bar: 1. That there was no actual restraint of persons acting under the authority of Spain, whereby the voyage was defeated. 2. That if a technical total loss took place by the loss of the voyage, it was a loss occasioned by engaging in an illicit and prohibited trade, for which, by the memorandum in the policy, the underwriters are not liable.

The declaration and the abandonment, both tie up the case to a total loss of the voyage, by the restraint of Spanish authorities. If this case be not made out in proof, there is an end of the controversy.

\*In cases of this sort, where a technical total loss is asserted as a ground of recovery, it is not sufficient that the voyage has been entirely frustrated and lost; but the loss must be occasioned by some peril actually insured against. The peril must act directly, and not circuitously, upon the subject of the insurance. It must be an immediate peril, and the loss the proper consequence of it; and it is not sufficient that the voyage be abandoned, for fear of the operation of the peril.

The plaintiffs rely upon the fact of the *Ellen Tooker's* being chased away from *St. Ander*, and being prevented for several days from returning to that place by the presence of Spanish armed ships as decisive proof of actual restraint. But the voyage was delayed only, and not broken up by this occurrence, for the vessel afterwards returned in safety to *St. Ander*. The insurers do not undertake that the voyage shall be performed without delay, or that the perils insured against shall not occur; they undertake only for losses sustained by those perils; and if any peril does act upon the subject, yet if it be removed before any loss takes place, and the voyage be not thereby broken up, but is, or may be resumed, the insured cannot abandon for a total loss. If a vessel be captured during a voyage, and afterwards be recaptured, and performs, or may perform it, there can be no abandonment after the recapture, for a technical total loss. In the present case, the vessel actually did resume her voyage after the restraint ceased; and there is no evidence to show that any object of the voyage was defeated by this temporary \*restraint and de- [\*186 lay to avoid capture. Then, what was the real cause of the final destruction of the voyage? It was, that *St. Ander*, which but for a short time was in the possession of the troops of General *Mina*, was, *in transitu*, again occupied by the Royalists, and the colonial government resumed its functions. A trade was inhibited with that place, by the ordinary colonial laws of Spain; and the voyage itself, in which the *Ellen Tooker* was engaged, placed her, and her cargo also, in the character of an enemy. It was clear, therefore, that a proceeding into *St. Ander*, would have subjected the *Ellen Tooker* to confiscation for a double cause; for breach of the ordinary laws of trade, and for a violation of neutral duties. The voyage, then, was broken up from fear of loss, by reason of the seizure and confiscation of the property. It was abandoned by the master *quia timebat*, and not because there



was any actual direct restraint, which prevented the vessel from proceeding to the port of destination. The case, therefore, falls directly within the authority of the cases of *Hadkinson v. Robinson* (3 Bos. & Pull., 388), and *Lubbock v. Rousecroft* (5 Esp. R., 50), which have never been shaken. In the former case, Lord Alvanley said, "any loss which necessarily arises from capture or detention of princes, is a loss within the policy; but here the captain, learning that if he entered the port of destination, the vessel would be liable to confiscation, avoided that port, whereby the object of the voyage is defeated. This does not operate to the total destruction of the thing insured." There are **187** precisely the same circumstances \*in the case now at bar. The underwriter does not warrant that the vessel shall have a right, to trade at the port of destination; but only that notwithstanding the perils insured against, the vessel shall proceed to such port. If the plaintiffs, in the events which have occurred, were entitled to abandon and recover, as for a technical total loss, they would have been entitled to abandon for the same cause at the time of the vessel's sailing from New York on the voyage; for St. Ander was at that time just as much shut against the vessel, and she was just as liable to confiscation for illegal traffic with that place, as she was at the time the voyage was broken up.

It is the unanimous opinion of the court, that the judgment of the Circuit Court be affirmed, with costs.

Cited—12 Pet. 402; 5 How. 276; 3 Mason, 21.

[INSTANCE COURT.]

THE ROBERT EDWARDS.

SAVAGE, *Claimant*.

A question of fact, under the 46th section of the collection law of the 2d March, 1799, c. 128, exempting from duty the wearing apparel, and other personal baggage, of persons arriving in the United States.

Where the *res gesta*, in a revenue cause, are incapable of explanation consistently with the innocence of the party, condemnation follows, although there be no positive testimony of the offense having been committed. Circumstances are sometimes more convincing than the most positive evidence. **188** \*Although a mere intention to evade the payment of duties be not, *per se*, a cause of forfeiture, yet when a question arises whether an act has been committed which draws after it that consequence, such intention will justify the court in not putting on the conduct of the party, in respect to the act in question, an interpretation as favorable as under other circumstances it would be disposed to do.

**A** PPEAL from the Circuit Court of South Carolina.

This cause was argued by *Mr. Winder* and *Mr. Raymond* for the appellant and claimant, and by the *Attorney-General* for the United States.

*Mr. Justice* LIVINGSTON delivered the opinion of the court:

This is a libel for an alleged forfeiture under the 46th section of the collection law, passed the 2d of March, 1799.

This section exempts from duty the wearing apparel, and other personal baggage, of those persons who arrive in the United States; and to ascertain what articles are to be exempted, it is directed that due entry thereof, as of other goods, but separate and distinct therefrom, shall be made with the collector, by the owner or his agent, verified by oath, stating, among other things, that the packages, mentioned in such entry, contain no goods whatever, except the wearing apparel and other personal baggage of the person to whom they belong. And it is provided, that whenever any article subject to duty, shall be found among such baggage, which shall not be mentioned to the collector at the time such entry is made they shall be forfeited, and the person in \*whose bag- [**189** gage they shall be found, shall, moreover, forfeit and pay treble the value of such articles.

These proceedings commenced in the District Court of the District of South Carolina, and after sentences of condemnation in that court, and in the Circuit Court of the United States for that district, the claimant has appealed to this court.

The only question we have to decide, is, whether the goods libeled, and which are admitted to be subject to duty, were entered as baggage or not. If they were, they must be condemned; if not, the claimant is entitled to restitution.

The claimant insists that the trunks seized were not included in her baggage entry, and that no act of hers, prior or subsequent to the entry, shows that it was her intention to cover them by it. Her baggage entry comprised "seven trunks wearing apparel, sundry band-boxes and bedding, for Mrs. Savage and family, passengers in the ship Robert Edwards." Under this entry, and a permit given in conformity with it, the claimant took away several trunks and band-boxes, the contents of some of which do not appear, but she alleges that they contained only baggage, and no dutiable article, and that she never demanded the trunks in question as part of those mentioned in the entry of her baggage. Some reliance is also placed on the fact, that before any seizure, these trunks were regularly entered by the master, and the duties on them secured, or paid. Whether they were thus entered or not, can have no influence on the present question, which is confined to the single inquiry, whether they had, previous \*to such act on the [**190** part of the master, been entered by the owner as part of her baggage. For, no act of the master, subsequent to such entry, could relieve them from the forfeiture which in that case had previously attached.

It will be sufficient to advert to a few of the prominent facts, to ascertain the real character of this transaction. The court has been reminded that it ought not, without the most satisfactory and positive proof, in a case so highly penal, to decide that a violation of law has been committed. Although such proof may generally be desirable, we are not to shut our eyes on circumstances which sometimes carry with them a conviction which the most positive testimony will sometimes fail to produce. And if such circumstances cannot well consist with the innocence of the party, and arise out of her own conduct, and remain un-

Wheat. 6.

explained, she cannot complain if she be the victim of them. No extraordinary prudence or circumspection on the part of the claimant was necessary to have avoided the unpleasant predicament in which she is placed. If she had brought these goods on board in London, as cargo; if she had paid freight for them as such; if she had desired them to be placed on the manifest of the cargo, which she was most probably apprised was necessary; if, when she entered her other merchandise imported in the same vessel, she had also entered these; if, after making her baggage entry, she had distinguished or informed the inspector which of the trunks contained her baggage, and which were **191\***] filled with merchandise, the whole \*of the present difficulty would have been avoided. The claimant neglecting to take any one of these precautions, which could not have been the effect of ignorance, as it appears she is occasionally engaged in the importation of goods in the line of her business, leads, irresistibly, to the conclusion, that she intended to land those trunks without the payment of duties, and that this end was to be effected under the disguise of entering them as baggage and wearing apparel. Although a mere intention to evade such payment be no cause of forfeiture, yet when a question arises, whether an act has been committed which draws after it this consequence, such intention will assist in dispelling some of the doubts in which the act itself might otherwise be involved, and will justify a court in not putting on the conduct of the party, in relation to the act in question, an interpretation as favorable as under other circumstances it would feel disposed to do. Thus, in the case before us, the claimant wishes us to believe, that the seven trunks of wearing apparel, and the band-boxes, which were included in her baggage entry, were all of them actually landed under her permit; and that, therefore, the five trunks which remained on board, and were seized as composing part of her baggage entry, were not comprised in it. But is this made out with any reasonable certainty? On the contrary, is there any evidence whatever on which we can come to a satisfactory conclusion, that seven trunks, which was the number entered by her as baggage, were actually landed before the seizure. What the **192\***] \*claimant herself considered as band-boxes, and actually represented as such to the inspector, she now desires may be converted into trunks. Unless this can be done, which would be to disbelieve the whole evidence in the cause, there is no pretense for saying that all the trunks entered by her as baggage had been landed. The marks on the trunks do not furnish even a presumption in her favor, for on those landed, and on those seized, we find the same inscription, that is, "Mrs. Savage's baggage, apparel, and haberdashery." In this uncertainty and confusion, which is the result of her own irregular conduct, and which it was her business, and not that of the court, to remove, she has exposed her case to very unfavorable inferences. One of the trunks landed was empty, or contained only a few books and loose papers, and yet it appears, by a cocket produced before the Circuit Court, that this very trunk, when taken aboard, was valued in London at 115 pounds sterling. What be-

Wheat. 6.

came of the goods which it then contained, is left without explanation. This forms a part of the *res gesta*, and is a circumstance, if not a strong suspicion, at any rate but little calculated to evince the integrity of the transaction.

Without, therefore, entering into a more minute detail of the circumstances in this case, the court is well satisfied, from the whole of the evidence, notwithstanding some little obscurity in which it is involved, that the trunks in question formed a part of the baggage entry of the claimant, and therefore, affirm the sentence of the Circuit Court, with cost.

[\*PRIZE.]

[\*193]

## THE NUEVA ANNA AND LIEBRE.

THE SPANISH CONSUL, *Claimant*.

This court does not recognize the existence of any lawful court of prize at Galveztown, nor of any Mexican republic or state, with power to authorize captures in war.

## APPEAL from the District Court of Louisiana.

These were the cases of the cargoes of two Spanish ships, captured and condemned by a pretended court of admiralty at Galveztown, constituted by Commodore Aury, under the alleged authority of the Mexican republic. The goods were, after this condemnation, brought into the port of New Orleans, and there libeled by the original Spanish owners in the District Court. That court decreed restitution to the original owners, and the captors appealed to this court.

This cause was argued by *Mr. Hopkinson* for the respondents and libelants, no counsel appearing for the appellant and captors.

The court stated, that it did not recognize the existence of any court of admiralty sitting at Galveztown, with authority to adjudicate on captures, nor had the government of the United States hitherto acknowledged the existence of any Mexican republic or state at war with Spain; so that the court could not consider as legal, any acts done under the \*flag and **\*194** commission of such republic or state. But, as the record, in this case, stated the capture to have been made under the flag of Buenos Ayres, it became necessary to send back the case, in order to ascertain under what authority it was in fact made.

*Sentence reversed, and cause remanded for further proceedings.*

Cited—5 Pet. 46.

[INSTANCE COURT.]

THE COLLECTOR. WILMOT, *Claimant*.

In all proceedings *in rem*, on an appeal, the property follows the cause into the Circuit Court, and is subject to the disposition of that court. But it does not follow the cause into the Supreme Court, on an appeal to that court.

After an appeal from the District to the Circuit



Court, the former court can make no order respecting the property, whether it has been sold, and the proceeds paid into court, or whether it remains specifically, or its proceeds remain in the hands of the marshal.

It is a great irregularity for the marshal to keep the property or the proceeds thereof in his own hands, or to distribute the same among the parties entitled, without a special order from the court; but such an irregularity may be cured by the assent and ratification of all the parties interested, if there be no *mala fides*.

## **A** PPEAL from the Circuit Court of Maryland.

The facts of this case were as follows:

In the year 1807, the schooner Collector and cargo were libeled in the District Court of the district of Maryland, as forfeited under the act **195\*** of Congress, \*prohibiting commercial intercourse with certain ports of St. Domingo.

John Wilmot, the present petitioner and libellant, and the house of Tagart & Caldwell, claimed the whole property.

Pending the proceedings in the District Court, the vessel and cargo were sold under an order to "bring in the proceeds, subject to the future disposition thereof." The money, notwithstanding this order, was never paid to the clerk, nor was it ever deposited by him in any court, and the court never afterwards made any order respecting it.

The property was condemned in the district and circuit courts, which latter decree was reversed by the Supreme Court, in the term of February, 1809, and the property libeled ordered to be restored. The mandate of the Supreme Court was filed below, the 11th of May following. The present libel and petition was filed in the District Court, the 8th of June, 1816, when a decree passed dismissing the same, which was afterwards affirmed by the Circuit Court, from whose sentence this appeal was taken.

The object of the present appeal was to obtain the benefit of the decree of the Supreme Court, that is, restitution of the property, according to the rights of the respective claimants; the appellant insisting on one-half of the proceeds of vessel and cargo, as joint owner, and also upon a lien on the other half as ship's husband, for advances made beyond his proportion of the outfits of the voyage, as well as for expenses in defending the vessel and cargo against the information which had been filed **196\*** against them, \*and for this purpose prayed that the marshal might be ordered to bring in the proceeds, according to the interlocutory decree, and that the same might be restored, pursuant to the decree of the Supreme Court, preserving to the parties their respective rights, liens, &c., concluding with a general prayer for relief.

From the petition of the appellant, the answer of the marshal, and the proofs in the cause, it appeared, that the marshal, although he sold the schooner and her cargo, did not, in fact, bring the money into court. That for the moiety of the proceeds belonging to Tagart & Caldwell, an order was given by them in favor of Van Wyck & Dorsey, as early as March, 1807, in consequence of which order Van Wyck and Dorsey, who sold the property at auction, under the marshal's directions, were permitted to retain the part belonging to Tagart & Caldwell, upon an understanding to keep it,

if the vessel and cargo were acquitted, but to return it in case of a different issue. That the other moiety of the proceeds was paid on the 6th of April, 1809, which was previous to the filing of the mandate in the court below, by the marshal, to the present appellant, as appears by his receipt of that date, and which expresses the sum therein mentioned, to be for his one half of the net proceeds of the sale of the schooner Collector and cargo. The marshal died, pending the proceedings, and they were revived against his executors.

*Mr. Mitchell*, for the appellant and claimant, **\*197** stated, that this was not a motion **[\*197** in the court below, for a rule against the marshal, to lay the foundation for an attachment, but a proceeding in the nature of an original libel, to give effect to the sentence of this court, as another court of admiralty, in the former cause. That the District Court has jurisdiction to sustain such a libel or petition, founded upon the sentences of foreign courts, and *a fortiori* of our own, appears by numerous authorities.<sup>1</sup> The mandate from this court was properly filed in the District Court, because if the proceeds were to be considered as in court at all, they were in that court. They remained in that court, notwithstanding the appeal, and it was, therefore, the proper tribunal to execute the decree of restitution. According to the English practice in proceedings *in rem*, the thing in controversy does not follow the suit into the Court of Appeals, but remains in that where the proceeding was originally commenced.<sup>2</sup> This is also the law of our own country.<sup>3</sup> The ground of complaint here is, that the proceeds have not been brought into the registry, in pursuance of the interlocutory decree of the District Court, which is the only tribunal competent to vindicate its own decrees. The Circuit Court has no original jurisdiction in *\*ad- [\*198* miralty and maritime cases, and cannot redress a violation of the orders of the District Court. The object of the present application, is not merely to compel the payment of the proceeds into court, but to obtain payment of money out of court, which requires the solemnity of a petition analogous to the proceedings in chancery in a similar case. Lord Eldon would never suffer money to be paid out of court on motion, but put the party to his petition, stating his rights, which would thus appear on the records of the court at any distance of time; and this practice was approved and adopted by Lord Erskine.<sup>4</sup> (2) The claimant insists upon his lien as part owner and ship's husband, on the voyage in which she was seized, for advances made by him, besides his absolute right in one moiety.<sup>5</sup> It is an incontrovertible principle, that where property is taken out of the hands of a party, *in invitum*, and by legal process, the law will retain all his liens, and return it to him, still subject to them, as before.<sup>6</sup> It is

1.—Penhallow v. Doane, 3 Dall. 54, 97, 118; Jennings v. Carson, 2 Cranch, 21; Livingston v. McKenzie, 3 Term Rep. 323, note; Smart v. Wolff, 3 Term Rep. 329; 2 Bro. Civ. and Adm. Law, 120; 7 Vez., Jun., 593; Camden v. Home, 4 Term Rep. 385, 395.

2.—2 Bro. Civ. and Adm. Law, 405.

3.—Jennings v. Carson, 2 Cranch, 21.

4.—3 Vez., Jun., 393.

5.—Abbott on Shipp. 114, Story's ed.

6.—Wilson v. Kymer, 1 Maul. & Selw. 157, 163.

true, that a person holding a dormant title, who stands by and witnesses a sale to another, is guilty of fraud; but if this lien be an equity raised by law, and not by the act of the parties, it requires no notice. The receipt of part out of the registry of a court of admiralty, is no bar or prejudice to the residue of the claim, but the party may afterwards file his libel, and have a monition for the further sum due.<sup>1</sup> **199\***] The \*marshal has not done his duty under the interlocutory decree, directing him to bring the money into court. We do not insist on an actual delivery to the register, *in facie curiæ*, but that the specific proceeds should be separated from all other property, so that the decree of the court shall act upon it, without the necessity of the concurring will of the officer. The property is not to be confounded with the private funds of the officer, so that it cannot be distinguished and recovered, if he absconds; or if he dies, will be subject to a distribution of assets in the hands of his personal representative.<sup>2</sup> In this case, the executor is liable, not as for a *tort*, but to restore funds which are not assets in his hands.

Mr. Pinkney and Mr. Wheaton, contra, (1) insisted, that the cases cited on the other side, of *Jennings v. Carson*,<sup>3</sup> and *Penhallow v. Doane*,<sup>4</sup> were proceedings to enforce the decrees of the Continental Court of Appeals, which had ceased to exist; similar in their nature to those cases in England where the prize commissions to certain vice-admiralty courts had expired, and application was made to the High Court of Admiralty to carry into effect their decrees.<sup>5</sup> In the cases cited, the District Court had jurisdiction, because it is a court of prize of the first resort, with all the powers of **200\***] the English High \*Court of Admiralty inherent in it; and the proceeding could be commenced nowhere else, because it is the only court of original prize jurisdiction. But the present case is a proceeding under the judiciary act, where the Supreme Court does not execute its own decrees, but sends its mandate to the Circuit, and not to the District Court; and the Circuit Court must, therefore, execute the mandate, and distribute the proceeds of the property. The property follows the cause into the Circuit, but not into the Supreme Court. (2) Here the distribution, though irregularly made by the marshal, without the special direction of the court, is precisely what the court would have made upon an application. It is a rule of the Court of Admiralty to restore, or to condemn, the gross tangible property, without regard to any liens which parties other than the general owners may have upon it. So that if the court had now to pronounce the distribution of the property, it would not enter into these minute inquiries respecting the claims of the part owners against each other, but leave them to their remedy at common law or in equity. Thus, in the case of *The Jefferson*,<sup>6</sup> Sir W. Scott refused to sever the share of

a bankrupt partner in favor of his assignees, but restored the property *in solidum*, leaving the assignees to their remedy in the proper forum. (3) But supposing the court would interfere to protect the pretended lien, there is no proof of its existence; or if it ever existed, it has been waived, and the distribution made \*with the assent of all the parties inter- **\*201** ested. The appellant has received his moiety of the gross property. And even if it were not so, the personal representative of the deceased marshal is not liable in this form. The regular course would be to proceed against the marshal himself, by motion, and a rule directing him to bring the money into court. But this proceeding could not be continued against his executors. The provisions of the judiciary act relative to the revival of suits, do not apply to this proceeding, because it cannot, upon general principles of admiralty law and practice, be continued against the personal representatives of the officer. If it could be revived against them, the relation of their testator with the court, as an officer, would cease, and it would become a common debt, subject to the ordinary course of administration.

Mr. Justice LIVINGSTON delivered the opinion of the court, and after stating the facts, proceeded as follows: This is, to say the least, a very novel and extraordinary proceeding. The marshal, probably without any improper views, or an intention of making use of the proceeds of the vessel and cargo, disobeys the order of the judge, and instead of depositing them in the registry of the court, keeps them under his own control, and finally distributes them among the parties without any direction of the court on the subject. This was a great irregularity, but the owners of the schooner Collector and cargo have no right at this day to complain of it. They were early apprised of the situation of their \*property. **\*202** Two of them gave an order on the marshal for their proportion of the proceeds before any sale had taken place; and the other, who is the present appellant, received of the marshal his share before the sentence of reversal, which was pronounced here, had been made known to the court below. After this ratification, or sanction, on their part, of the irregular conduct of the marshal, neither of them ought now to be permitted to seek any other redress from him. Before any distribution of the proceeds by the marshal, they might have applied to the court to enforce obedience to its order, as it regarded the bringing of them into court, and then have had their respective pretensions adjudicated by the court itself. Not having proceeded in this manner, the District Court, if it have jurisdiction of the case, could not now, without great danger of doing injustice, interfere in this business. Whatever notice it might have taken of the lien, which is now set up by the appellant, on a part of these proceeds beyond his moiety, if the proceeds were still in that court, it is by no means clear, that the marshal ought now to be rendered liable to the appellant for them, there being nothing like satisfactory proof that he had notice of such a claim when the appellant took from him his moiety, nor until long after he had parted with the whole of the prop-

1.—Bymer v. Atkyns, 1 H. Bl. 167.

2.—The Princessa and La Reine Elizabeth, 2 Rob. 31.

3.—2 Cranch, 21.

4.—3 Dall. 54.

5.—The Picimento, 4 Rob. 360.

6.—1 Rob. 325.

Wheat. 6. U. S., Book 5.



erty. Under this view of the case, the court is of opinion, that the appellant, under the particular circumstances of this case, is not entitled, on the merits, to any relief against the marshal. But the court is further of opinion, **203\***] \*that the proceeding on the present petition, and that in the District Court, was *coram non judice*.

By an appeal from the sentence of a district court to a circuit court, the latter becomes possessed of the cause, and executes its own judgment without any intervention of the former. It is fit, therefore, that the proceeds of the property, if it have been converted into money, should follow the appeal into the Circuit Court, and be deposited in such bank, or other place as it may direct, there to remain, subject to the disposition and direction of the Circuit Court. And if the property at the time of the appeal remain in specie in the marshal's custody, and any order or direction shall become necessary for its sale or preservation after an appeal, such order must emanate from the Circuit Court. But if a further appeal be had to the Supreme Court, the property, or its proceeds, will still continue in the Circuit Court, because the Supreme Court, in such cases, does not execute its own judgments, but sends a special mandate to the Circuit Court to award execution thereon.

The proceeds, therefore, of the Collector and cargo, at the time of filing the present petition and libel, even if the order of the District Court in relation to them had been complied with, could not, after the appeal, be regarded as in, or under, the control of the District Court, which was, therefore, incompetent, when this petition was filed, to make any order respecting them.

*Sentence affirmed with costs.*

Cited—5 Wall. 412; 20 Wall. 225; 5 Otto, 617; 2 Wood. & M. 540; 1 Ware. 361; Gilp. 40; Blatchf. Pr. 622.

**204\***] [\*CONSTITUTIONAL LAW.]

ANDERSON v. DUNN.

To an action of trespass against the sergeant at arms of the House of Representatives of the United States, for an assault and battery and false imprisonment, it is a legal justification and bar, to plead, that a Congress was held and sitting, during the period of the trespasses complained of, and that the House of Representatives had resolved that the plaintiff had been guilty of a breach of the privileges of the House, and of a high contempt of the dignity and authority of the same; and had ordered that the speaker should issue his warrant to the sergeant at arms, commanding him to take the plaintiff into custody, wherever to be found, and to have him before the said House, to answer to the said charge; and that the speaker did accordingly issue such a warrant, reciting the said resolution and order, and commanding the sergeant at arms to take the plaintiff into custody, &c., and delivered the said warrant to the defendant. By virtue of which warrant the defendant arrested the plaintiff, and conveyed him to the bar of the House, where he was heard in his defense, touching the matter of the said charge, and the examination being adjourned from day to day, and the House having ordered the plaintiff to be detained in custody, he was accordingly detained by the defendant, until he was finally adjudged to be guilty, and con-

victed of the charge aforesaid, and ordered to be forthwith brought to the bar, and reprimanded by the speaker, and then discharged from custody; and after being thus reprimanded, was actually discharged from the arrest and custody aforesaid.

**E**RROR to the Circuit Court of the District of Columbia.

This was an action of trespass, brought in the court below, by the plaintiff in error, against the defendant in error, for an assault and battery, and false imprisonment; to which the defendant pleaded the general issue, and a special plea of justification. The \*plaintiff [\***205** demurred generally to the special plea, which was adjudged good, and the demurrer overruled; and judgment upon such demurrer was entered for the defendant, and a writ of error brought by the plaintiff. The question arising upon the demurrer will be best explained by giving the defendant's plea at large, as pleaded and adjudged good upon general demurrer, in the Circuit Court, viz.:

And the said Thomas, by the leave of the court here first had, further defends the force and injury, when, &c. And as to the coming with force and arms, or whatsoever is against the peace; and also as to the assaulting, beating, bruising, battering, and ill-treating of the said John, in manner and form as the said John, in his said declaration, hath above supposed to be done, the said Thomas saith that he is not guilty thereof; and of this he, as before, puts himself upon the country. And as to the imprisonment of the said John, and the keeping and detaining him in confinement, at the time in the said declaration mentioned, to wit, on the said eighth day of January, in the year one thousand eight hundred and eighteen, and for the space of two months in the said declaration mentioned, the said Thomas saith, that the said John ought not to have or maintain his action aforesaid against him, because he saith that long before and at the said time when, &c., in the introduction of this plea mentioned, and during all the time in the said declaration mentioned, a Congress of the United States was holden at the city of Washington, in the county of Washington, and District of Columbia aforesaid, and was then and there, \*and [\***206** during all the time aforesaid, assembled and sitting; and that long before and at the time when, &c., in the introduction of this plea mentioned, and during all the time in the said declaration mentioned, he the said Thomas was, and yet is, sergeant at arms of the House of Representatives (then and there being one of the Houses whereof the said Congress of the United States consisted), and by virtue of his said office, and by the tenor and effect of the standing rules and orders ordained and established by the said House for the determining of the rules of its proceedings, and by the force and effect of the laws and customs of the said House, and of the said Congress, was then and there, and during all the time aforesaid, and yet is duly authorized and required, amongst other things, to execute the commands of the said House, from time to time, together with all such process issued by authority thereof, as shall be directed to him by the speaker of the said House; and that long before, and at the time when, &c., in the introduction of this plea mentioned, and during all the time in the dec-

Wheat. 6.

laration mentioned, one Henry Clay was, and yet is, the speaker of the said House of Representatives, and by virtue of his said office, and by the tenor and effect of such standing rules and orders as aforesaid, and by the force and effect of such laws and customs as aforesaid, then and there, and during all the time aforesaid, was and yet is, amongst other things, duly authorized and required to subscribe with his proper hand, and to seal with his seal, all writs, warrants, and subpoenas issued by order of the said House; and that long before and **207\*** at the time when, &c., in the introduction of this plea mentioned, and during all the time in the said declaration mentioned, one Thomas Dougherty was, and yet is, the clerk of the said House of Representatives; and by virtue of his said office, and by the tenor and effect of such standing rules and orders as aforesaid, and by the force and effect of such laws and customs as aforesaid, then and there, and during all the time aforesaid, was and yet is, amongst other things, duly authorized and required to attest and subscribe with his proper hand, all such writs, warrants, and subpoenas issued by order of the said House; and that long before, and at the time when, &c., in the introduction of this plea mentioned, and during all the time in the said declaration mentioned, and ever since, it was and yet is, amongst other things, ordained, established, and practiced, by and under such standing rules and orders as aforesaid, and such laws and customs as aforesaid, that all writs, warrants, subpoenas, and other process issued by order of the said House, shall be under the hand and seal of the said speaker of the said House, and attested by the said clerk of the said House; and so being under the hand and seal of the said speaker, and attested by the said clerk as aforesaid, shall be executed, pursuant to the tenor and effect of the same, by the said sergeant at arms. And the said Thomas, the defendant, further saith, that the said Henry Clay, so being such speaker of the said House of Representatives as aforesaid, and the said Thomas Dougherty, so being such clerk of the same House as aforesaid, and he **208\*** the said defendant, \*so being such sergeant at arms of the same House as aforesaid, and the said Congress, so being assembled and sitting as aforesaid, heretofore and before the said time when, &c., in the introduction of this plea mentioned, to wit, on the seventh day of January, in the year aforesaid, at Washington aforesaid, in the county and district aforesaid, it was, in and by the said House, for good and sufficient cause to the same appearing, resolved and ordered, pursuant to the tenor and effect of such standing rules and orders so ordained and established as aforesaid, and according to the force and effect of such laws and customs as aforesaid, that the said John had been guilty of a breach of the privileges of the said House, and of a high contempt of the dignity and authority of the same; wherefore, it was then and there, in and by the said House, further resolved and ordered, in the like pursuance of such standing rules and orders as aforesaid, and of such laws and customs as aforesaid, that the said speaker should forthwith issue his warrant, directed to the sergeant at arms, commanding him to take into

custody the body of the said John, wherever to be found, and the same forthwith to have before the said House, at the bar thereof, then and there to answer to the said charge, &c., as by the journal, record, and proceedings of the said resolutions and order in the said House remaining, reference being thereto had, will more fully appear. Whereupon, the said Henry Clay, so being such speaker as aforesaid, in pursuance of such standing rules and orders as aforesaid, and according to such laws and customs as aforesaid, did, for \*the execution [**\*209** of the resolutions and order aforesaid, afterwards and before the time when, &c., in the introduction of this plea mentioned, to wit, on the said seventh day of January, in the year aforesaid, at Washington aforesaid, in the county aforesaid, as such speaker as aforesaid, duly make and issue his certain warrant, under his hand and seal, duly directed to the said Thomas, the defendant, as such sergeant at arms as aforesaid (to whom, so being such sergeant at arms as aforesaid, the execution of such warrant then and there belonged), and by the said Thomas Dougherty, so being such clerk as aforesaid; in and by said warrant, reciting that the said House of Representatives had, that day, resolved and adjudged, that the said John Anderson had been guilty of a breach of the privileges of the said House, and of a high contempt of its dignity and authority; and that the said House had thereupon ordered the said speaker to issue his warrant, directed to the said sergeant at arms, commanding him, the said sergeant, to take into custody the body of the said John Anderson, wherever to be found, and the same forthwith to have before the said House, at the bar thereof, then and there to answer to the said charge; therefore, it was required that the said Thomas, the defendant, as such sergeant as aforesaid, should take into his custody the body of the said John Anderson, and then forthwith to bring him before the said House, at the bar thereof, then and there to answer to the charge aforesaid, and to be dealt with by the said House, according to the constitution and laws of the United States; and said \*Henry Clay, so being such speaker [**\*210** as aforesaid, then and there, and before the said time, when, &c., in the introduction of this plea mentioned, delivered the said warrant to the said Thomas, so being such sergeant as aforesaid, to be executed in due form of law. By virtue, and in execution of which said warrant, the said Thomas, as such sergeant as aforesaid, afterwards, to wit, at the said time when &c., in the introduction of this plea mentioned, at Washington aforesaid, in order to arrest the said John, and convey him in custody to the bar of the said House, to answer to the charge aforesaid, and to be dealt with by the said House, according to the constitution and laws of the United States, in obedience to the resolutions and order aforesaid, and to the tenor and effect of the said warrant, so issued as aforesaid, went to the said John, and then and there gently laid his hands on the said John to arrest him, and did then and there arrest him by his body, and take him into custody, and did then forthwith convey him to the bar of the said House, as it was lawful for the said Thomas to do for the cause aforesaid; and thereupon such proceedings were had, in and



by the said House, that the said John was then and there forthwith duly examined, and heard in his defense, before the said House, at the bar thereof, touching the matter of the said charge; and that such examination was, in and by the said House, and by the resolutions and orders of the same, duly adjourned and continued from day to day, from the said time when, &c., in the introduction of this plea mentioned, until the sixteenth day of January, in **211\*** the \*year aforesaid; which said examinations were then so adjourned and continued, as aforesaid, from necessity, in order to go through and conclude the examination and defense of the said John, touching the matter of the said charge, before the said House; neither the said examination, nor the said defense, having been finished or concluded before the day last aforesaid; during all which time, to wit, from the said time when, &c., in the introduction of this plea mentioned, until the day last aforesaid, it was, in and by the said House, duly resolved and ordered, from day to day, as the said examination was adjourned and continued as aforesaid, that the said John should be remanded, kept, and detained in the custody of the said Thomas, as such sergeant as aforesaid, by virtue and in execution of the said warrant, in order to have such his examinations and defense finished and concluded, in due form; and the said Thomas, as such sergeant as aforesaid, afterwards, to wit, at and from the said time when, &c., in the introduction of this plea mentioned, until the said sixteenth day of January, in the year aforesaid, did, in pursuance of the last-mentioned resolutions and orders of said House, and by virtue, and in execution of the said warrant, keep and detain the said John in custody as aforesaid, and him did bring and have, from day to day, during the said time, before the said House, at the bar thereof, in order to undergo such examinations as aforesaid, and to be heard in his defense aforesaid, touching the matter of the said charge, to wit, at Washington aforesaid, in the county aforesaid, it was also lawful for him. **212\*** the \*said Thomas, to do for the cause aforesaid; and thereupon afterwards, to wit, on the said last-mentioned sixteenth day of January, in the year aforesaid, such further proceedings were had in and by the said House, that it was then and there finally resolved and adjudged, in and by the said House, that the said John was guilty, and convict of the charge aforesaid in the form aforesaid; and that he be forthwith brought to the bar of the said House, and there reprimanded by the said speaker, for the outrage by the said John committed, and then that he be forthwith discharged from the custody of the said sergeant at arms. And thereupon the said John was then and there, in pursuance of the last-mentioned resolutions, order, and judgment, forthwith reprimanded by the said speaker, and then forthwith discharged from the arrest and custody aforesaid; as by the journals, record, and proceedings of the said resolutions, orders, and judgment in the said House remaining, reference being thereto had, will more fully appear; which are the same several supposed trespasses in the introduction of this plea mentioned, and whereof the said John hath, above, in his said declaration, complained against the said

Thomas, and not other or different. With this, that the said Thomas doth aver that the said John, the now plaintiff, and the said John Anderson, in the said resolutions, orders, warrant, and judgment respectively mentioned, was, and is, one and the same person; and that at the said several times in this plea mentioned, and during all the time therein mentioned, the said Congress of the United States was \*assembled [**\*213** and sitting, to wit, at Washington aforesaid, in the county aforesaid; and this the said Thomas is ready to verify. Wherefore he prays judgment, if the said John ought to have or maintain his aforesaid action thereof against him, &c.

*Mr. Hall*, for the plaintiff in error, made three points:

1. That the House of Representatives had no authority to issue the warrant.
2. That the warrant is illegal on the face of it.
3. That in either case, it is no justification to the officer who executed it.

1. If the House had authority, it must be either in virtue of the constitution of the United States, of usage and precedent, or as inherent in, and incidental to, legislative bodies. In the constitution there are but two clauses which can be made to serve the purpose. The first article, section eight, enables Congress to make all laws which may be necessary and proper to effectuate the powers expressly given. But it is obvious, that this merely authorizes the legislature collectively, not one House separately, to pass certain laws, not mere occasional sentences. And the powers delegated to the United States, being in derogation of the rights of sovereign states, must be construed strictly.<sup>1</sup> For the same reasons, the authority to determine the rules of its proceedings (art. 1, sec. 5) cannot be construed to operate beyond the walls of the House, except on its own \*members; [**\*214** and its officers. It is observable, also, that this authority is coupled with an authority to punish its members for misbehaviour, and to expel a member. It is a rule of construction, that the text should be considered in connection with the context; but the context, viz., the power to punish and to expel, relates solely to the internal polity and economy of the House. The authority is to determine the rules of its proceedings, not the proceedings themselves, for these are determined by the constitution itself in the first article. The fifth section of the first article, authorizes the House to punish its members; *et enumeratio unius est exclusio alterius*. The power of issuing warrants is manifestly judicial. This may be assumed as an axiom. The constitution ordains, that the judicial power (which is equivalent to all the judicial power) shall be vested in one supreme court, and other inferior courts (art. 3, sec. 1). Thus, the right of the courts to exercise such a power, is exclusive, and an assumption of it by any other department, is an usurpation. Nor can the authority be inferred from usage and precedent. These must be, either of the two Houses of Congress, the state legislatures, or the British Parliament. On the journals of the House of Representatives, are found the cases of Randal and Whitney, and two others. On those of the

1.—2 Mass. Rep. 146.

Senate, is the case of the editor of the Aurora, &c. Shall we be told that these proceedings were acquiesced in? The want of spirit in the individual to resist oppression, cannot fairly be construed into acquiescence on the part of the **215** public; since that resistance \*could be made only by the person immediately affected. As to the usage of the state legislatures, it is either under color of their unlimited powers, of express provisions in their constitution, or of the common law and the usage of Parliament. In this case, unlimited powers and express provision are not pretended; the penal code of the common law is no part of the federal system. Is, then, the authority incident to legislative bodies? An incident is defined, "a thing necessarily depending upon, or appertaining to, another that is more worthy, or principal." So the constitution of the United States (art. 1, sec. 8), when regulating the incidental powers of Congress, authorizes it to make such law only as may be "necessary" to effectuate the express powers. Necessity, then, is the criterion of incident. But is a power to punish the offer of a bribe beyond the verge of the House necessary to enable Congress to perform its duties? The impunity of the offense being the only possible reason of the necessity, if the offender may be adequately punished by the courts of justice in the ordinary mode of proceeding, the supposed necessity ceases. Bribery of a member of Congress is punishable in the state courts, and in the Circuit Court of the District of Columbia, according to the course of the common law. Redress may also be had before the same tribunals, in case of the battery or libel of a member; and if the existing remedies be insufficient, an act of Congress may be made to supply the deficiency. And though the ordinary remedies should not reach every possible case, it is a rule, that "if the **216** words of a statute do not extend to a mischief which rarely occurs, they shall not, by an equitable construction, be extended to that mischief; but it is a *casus omissus*; and the objects of statutes, are mischiefs, *quæ frequentius accidunt*." It is evident, that the framers of the constitution deemed it more prudent to leave such mere possible mischiefs unprovided for, than to incur a certain evil by vesting an extraordinary and dangerous prerogative for their suppression.

2. The warrant is illegal on the face of it. By the fourth article of the amendments to the constitution, it is provided, that "no warrant shall issue but on probable cause, supported by oath or affirmation." Thus are prohibited all warrants which do not rest on oath, and on probable cause. But it is no less necessary that the warrant should recite the cause in special and the oath. The constitution is not satisfied with "a cause" so vague and indefinite, as "high contempt and breach of privilege." When it adopts a term from the common law, it adopts, also, the law regulating its incidents and properties, unless repugnant to that instrument. Now, what are the incidents and properties of a warrant at common law? It is said by Dalton, that "the warrant ought to contain the special cause and matter whereupon it is granted."<sup>2</sup>

3. If there be either a defect of authority in the House, or illegality in the warrant, it is no justification. That it is none in the former case, has long \*since been settled in this [**217** court.<sup>3</sup> As to the latter alternative of the proposition, the constitution, by prohibiting an act, renders it void, if done; otherwise, the prohibition were nugatory.<sup>4</sup> Thus, the warrant is a nullity. The rights of Congress on the subject of contempts, have been considered similar, and equal to those of the federal courts. But here we must recur again to the maxim, that when the constitution adopts a term from the common law, it adopts, also, its incidents. At common law, the power to punish contempt is incident to courts. But "Congress," and the "House of Representatives," being terms unknown to the common law, can derive no claims through it. Courts enforce the laws; they must, therefore, be clothed with authority to compel obedience to them; whereas, the legislature is merely deliberative. But, it is asked, are the members to be insulted with impunity, in a manner which will not authorize the interference of a court? If the insolence be merely by words or gestures, not amounting to slander or assault, the genius of our institutions does not admit of its punishment. Privilege of Congress is reduced by the sixth section, art. 1, of the constitution, to exemption from arrest, and freedom of speech. From the nature of the enumerated privileges, it is evident that the sole object of giving them was to prevent interruption of the business of the Houses, not to render the person and feelings of members more sacred than those of other citizens. An attempt to \*bribe a member may be [**218** made in Maine or Missouri. The Speaker's warrant may be issued on a mere allegation without oath, commanding the sergeant at arms to arrest the accused "wherever found," and bring him to the bar of the House. So that he may be dragged from the extreme of the Union, to be tried by a legislative body. Yet the constitution (art. 3, sec. 2) provides, that "the trial of all crimes shall be by jury; and that such trial shall be held in the state and district where the offense was committed;" and, also, (art. 5, amendments,) that "no person shall be held to answer for an infamous crime, except on the presentment or indictment of a grand jury; nor shall be deprived of liberty without due process of law." And further, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district." It is only necessary to compare the conduct of the House of Representatives, in the case at bar, with these provisions, in order to perceive its gross injustice and illegality.

The *Attorney-General* and *Mr. Jones*, contra, stated, that the only question before the court was, whether the House of Representatives could exercise the power in question, either as incidental to its legislative, or its judicial capacity.

1. The House being one branch of the legislature, no legislative act can be performed without its concurrence, and therefore an attack upon it, is an attack upon the whole Congress. The necessity of self-

1.—Vaugh. 373.

2.—Dalton's Sheriff, 169.  
Wheat. 6.

3.—Little v. Barreme, 2 Cranch, 179.

4.—4 Bl. Comm. 491.



defense is as incidental to legislative, as to **219** judicial \*authority. This power is not a substantive provision of the common law adopted by us; it is rather a principle of universal law growing out of the natural right of self-defense belonging to all persons. It is unnecessary to resort to the doctrine of constructive contempts, in order to vindicate the conduct of the defendant as a ministerial officer. He merely executed the judgment of the House, pronouncing the plaintiff guilty of a breach of privilege, and a high contempt. It was confessedly within the competency of the House to render such a judgment in some cases: such as that of a direct interruption of its proceedings by open violence within the walls. But from the plea, *non constat*, what was the nature of the offense committed by the plaintiff. Nor was it necessary that the plea should set out the facts constituting the contempt. It is sufficient for the protection of the officer, that the House has jurisdiction to punish contempts, and that it had adjudged the plaintiff guilty of a contempt. The power of punishing contempts is incidental to all courts of justice, and even to the most inferior magistrates, when in the exercise of their public functions, and arises out of the absolute necessity of the case, which renders it indispensable that they should have such a power.

2. Each branch of the legislature has certain powers of judicature under the constitution, and the House of Representatives has the exclusive power of impeachment; which necessarily involves the authority of compelling the attendance of witnesses, and punishing them for contempt. Even Lord Holt, who was an **220** enemy of the extravagant privileges \*of Parliament, admits that the power of impeachment residing in the House of Commons, necessarily involved the authority of committing the accused, and of punishing contempts.<sup>1</sup> The

powers of judging of elections, and of punishing members for disorderly conduct, necessarily involves all the incidents of judicature. Nothing appears upon the face of the record to show that it was not in the exercise of these very powers, or in defense of the admitted privileges of the House, that the warrant issued. It need not appear on the face of the warrant that the cause out of which the contempt grew, was within the judicial powers of the House. The mere question between the ministerial officer and the offender, is, whether the warrant was issued by a court of competent jurisdiction, and whether he has pursued the precept in the manner of executing it. In other words, the only question is, whether the House has, in any case, the power of punishing contempts. If it has jurisdiction, it is a peculiar exclusive jurisdiction, and its exercise cannot be questioned or re-examined elsewhere. The doctrine is settled and established in this court, that the grant of the powers expressly given to Congress in the constitution, involves all the incidental powers necessary and proper to carry them into effect.<sup>2</sup> And the general grant of judicial powers to the courts of the United States, does not exclude the other branches of the government from the exercise of certain portions \*of judicial authority. The [**221** different departments of the government could not be divided in this exact, artificial manner. They all run into each other. Even the President, though his functions are principally executive, has a portion of legislative power; and the Congress is invested with certain portions of judicial power. The whole of this subject has been thoroughly investigated, in two recent cases in England, and the authorities cited on the argument of those cases, renders it unnecessary to repeat a reference to them on the present occasion.<sup>3</sup>

\*It is sufficient to say, that they fully [**222**

1.—Regina v. Paty, 2 Lord Raym. 1105.

2.—M'Culloch v. Maryland, 4 Wheat. Rep. 316.

3.—Burdett v. Abbott, 14 East's Rep. 1; Burdett v. Colman, 1h. 163.

In these cases, the pleas by the Speaker and Sergeant at Arms of the House of Commons justified the supposed trespasses under a warrant reciting a resolution of the House that "a letter signed 'Sir Francis Burdett,' and a further part of a paper entitled, 'Argument,' in Cobbet's Weekly Register, of March 24, 1814, was a libelous and scandalous paper, reflecting on the just rights and privileges of that House; and that Sir Francis Burdett, who had admitted the letter and argument to have been printed by his authority, has been thereby guilty of a breach of the privileges of that House," and that it was thereupon ordered by the House, that the plaintiff, for his said offense, should be committed to the Tower; and that the Speaker should issue his warrants accordingly. The cases were carried from the Court of King's Bench to the Exchequer Chamber, where the judgments in favor of the defendants were affirmed upon the same grounds stated by the judges of the K. B. in East's Rep. The plaintiff, Sir Francis Burdett, having brought a writ of error to the House of Lords, the cause was argued for him by Mr. Brougham and Mr. Courtnay, in the session of 1816-1817. After the counsel for the plaintiff in error had been heard, Lord Eldon (Ch.) proposed to their Lordships that the counsel for the defendants should not be heard, until the House should have received the opinion of the judges on the following question, viz.: 'Whether, if the Court of Common Pleas, having adjudged an act to be a contempt of court, had committed for the contempt under a warrant, stating such adjudication generally, without the particular cir-

cumstances, and the matter were brought before the Court of King's Bench, by return to a writ of *habeas corpus*, the return setting forth the warrant, stating such adjudication of contempt generally; whether, in that case, the Court of King's Bench would discharge the prisoner, because the particular facts and circumstances out of which the contempt arose, were not set forth in the warrant.'

The question being handed to the judges, and they having consulted among themselves for a few minutes, Lord Chief Baron Richards delivered their unanimous opinion that in such a case the Court of King's Bench would not liberate.

Lord ELDON (Ch.): "That this is a case of very great importance none will dispute; but, at the same time, I do not think it a case of difficulty. If I did, I should be anxious to hear the counsel for the defendants, before proceeding to judgment. But in my view of the case, considering it as clear in law, that the House of Commons have the power of committing for contempt; that this was a commitment for contempt; that the general nature of the contempt, if that was necessary, was sufficiently set forth in the warrant; and being of opinion that the objections, in point of form, have not been sustained, unless any other noble Lord should express a wish to hear the counsel for the defendants, I shall now move that the judgments in the court below be affirmed."

Lord ERSKINE. "When this matter was first agitated, I understood that the House of Commons intended to pursue a very different course. I was therefore alarmed. I expressed myself, because I felt, with warmth. I have changed none of the opinions I then entertained; I then said that the House of Commons ought to be jealous of such privileges as were necessary for its protection. My opinion is, that these privileges are part of the law of

Wheat. 6.



establish the doctrine that a legislative body has, from the necessity of the case, a right to **223\***] commit persons for contempt, \*in breach of their privileges; that they are the exclusive judges whether those privileges have been violated in the particular instance; and **224\***] that \*their decisions upon the subject cannot be questioned in any other court or place.

3. As to the form of the warrant, it is unnecessary to describe the offense particularly in the warrant, except for the purpose of letting the party see whether it is bailable or not.<sup>1</sup> But this was only a warrant to arrest the plaintiff, and bring him before the House; a preliminary proceeding absolutely necessary to exercise any sort of jurisdiction over the matter.

*Mr. Justice JOHNSON* delivered the opinion of the court: Notwithstanding the range which has been taken by the plaintiff's counsel, in the discussion of this cause, the merits of it really lie in a very limited compass. The pleadings have narrowed them down to the simple inquiry, whether the House of Representatives can take cognizance of contempts committed **225\***] \*against themselves, under any circumstances? The duress complained of was sustained under a warrant issued to compel the party's appearance, not for the actual infliction of punishment for an offense committed. Yet it cannot be denied that the power to institute a prosecution must be dependent upon the power to punish. If the House of Representatives possessed no authority to punish for contempt, the initiating process issued in the assertion of that authority must have been illegal; there was a want of jurisdiction to justify it.

It is certainly true, that there is no power given by the constitution to either House to punish for contempts, except when committed by their own members. Nor does the judicial or criminal power given to the United States, in any part, expressly extend to the infliction of punishment for contempt of either House, or any one co-ordinate branch of the government. Shall we, therefore, decide, that no such power exists?

1.—Chitty's Crim. Law, and the authorities there cited.

the land, and upon this record there is nothing more than the ordinary proceeding; the Speaker of the House of Commons, like any other subject, putting himself on the country as to the fact, and pleading a justification in law; for this was not a plea to the jurisdiction, but a plea in bar. This course of proceeding gave rise to the most heartfelt satisfaction; for if the judgment had been adverse to the defendants, the House would no doubt have submitted. It would be a libel on the House of Commons to suppose that it would not. Therefore, by this judgment, it appears that it is the law which protects the just privileges of the House of Commons, as well as the rights of the subject.

The case has been argued with great propriety; but it was contended that it was not alleged in the warrant that the libel was published by the plaintiff. But it is alleged that the paper was printed by his authority. And if I send a manuscript to the printer of a periodical publication, and do not restrain the printing and publishing of it, and he does print and publish it in that publication, then I am the publisher. The word 'reflecting,' standing by itself, would not be sufficiently distinct. But the warrant recites that the letter had been adjudged to be a libelous and scandalous paper, reflecting on

Wheat. 6.

It is true, that such a power, if it exists, must be derived from implication, and the genius and spirit of our institutions are hostile to the exercise of implied powers. Had the faculties of man been competent to the framing of a system of government which would have left nothing to implication, it cannot be doubted that the effort would have been made by the framers of the constitution. But what is the fact? There is not in the whole of that admirable instrument a grant of powers which does not draw after it others, not expressed, but vital to \*their exercise; not substantive and in- [**\*226** dependent, indeed, but auxiliary and subordinate.

The idea is utopian, that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility, and stated appeals to public approbation. Where all power is derived from the people, and public functionaries, at short intervals, deposit it at the feet of the people, to be resumed again only at their will, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger.

No one is so visionary as to dispute the assertion that the sole end and aim of all our institutions is the safety and happiness of the citizen. But the relation between the action and the end, is not always so direct and palpable as to strike the eye of every observer. The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment.

But if there is one maxim which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests and dignity of those who created them, require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is a casual conflict with the rights \*of particular individuals any reason to [**\*227** be urged against the exercise of such powers. The wretch beneath the gallows may repine at the fate which awaits him, and yet it is no less

the just rights and privileges of the House of Commons; and the meaning there must be, arrainging the just rights and privileges of the House.

I, myself, while I presided in the Court of Chancery, committed for contempt, in a case in which a pamphlet was sent to me, the object of which was, by partial representation, and by flattering the judge, to procure a different species of judgment from that which would be administered in the ordinary course of justice. I might be wrong, but I do not think I was. The House of Commons, whether a court or not, must, like every other tribunal, have the power to protect itself from obstruction and insult, and to maintain its dignity and character. If the dignity of the law is not sustained, its sun is set, never to be lighted up again. So much I thought it necessary to say, feeling strongly for the dignity of the law; and have only to add, that I fully concur in the opinion delivered by the judges."

The counsel were called in, and informed that the House did not think it necessary to hear counsel for the defendants. And then, without further proceeding, the judgments of the court below were affirmed. 5 Dow's Parl. Rep. 165, 199.



certain, that the laws under which he suffers were made for his security. The unreasonable murmurs of individuals against the restraints of society, have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbor's rights.

That "the safety of the people is the supreme law," not only comports with, but is indispensable to, the exercise of those powers in their public functionaries, without which that safety cannot be guarded. On this principle it is, that courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.

It is true, that the courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not, in cases, if such should occur, to which such statute provision may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration **228**], that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment.

But it is contended, that if this power in the House of Representatives is to be asserted on the plea of necessity, the ground is too broad, and the result too indefinite; that the executive, and every co-ordinate, and even subordinate, branch of the government, may resort to the same justification, and the whole assume to themselves, in the exercise of this power, the most tyrannical licentiousness.

This is unquestionably an evil to be guarded against, and if the doctrine may be pushed to that extent, it must be a bad doctrine, and is justly denounced.

But what is the alternative? The argument obviously leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberate assembly, clothed with the majesty of the people, and charged with the care of all that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation; whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity **229**], which unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested. And, accordingly, to avoid the pressure of these considerations, it has been argued, that the right of the respective Houses to exclude from their presence, and

their absolute control within their own walls, carry with them the right to punish contempts committed in their presence; while the absolute legislative power given to Congress within this district, enables them to provide by law against all other insults against which there is any necessity for providing.

It is to be observed, that so far as the issue of this cause is implicated, this argument yields all right of the plaintiff in error to a decision in his favor; for, *non constat*, from the pleadings, but that this warrant issued for an offense committed in the immediate presence of the House.

Nor is it immaterial to notice what difficulties the negation of this right in the House of Representatives draws after it, when it is considered, that the concession of the power, if exercised within their walls, relinquishes the great grounds of the argument, to wit, the want of an express grant, and the unrestricted and undefined nature of the power here set up. For why should the House be at liberty to exercise an ungranted, an unlimited, and undefined power within their walls, any more than without them? If the analogy with individual right and power be resorted to, it will reach no farther than to exclusion, and it requires no exuberance of imagination to exhibit **230** the ridiculous consequences which might result from such a restriction, imposed upon the conduct of a deliberative assembly.

Nor would their situation be materially relieved by resorting to their legislative power within the district. That power may, indeed, be applied to many purposes, and was intended by the constitution to extend to many purposes indispensable to the security and dignity of the general government; but they are purposes of a more grave and general character than the offenses which may be denominated contempts, and which, from their very nature, admit of no precise definition. Judicial gravity will not admit of the illustrations which this remark would admit of. Its correctness is easily tested by pursuing, in imagination, a legislative attempt at defining the cases to which the epithet *contempt* might be reasonably applied.

But although the offense be held undefinable, it is justly contended, that the punishment need not be indefinite. Nor is it so.

\* We are not now considering the extent to which the punishing power of Congress, by a legislative act, may be carried. On that subject, the bounds of their power are to be found in the provisions of the constitution.

The present question is, what is the extent of the punishing power which the deliberative assemblies of the Union may assume and exercise on the principle of self-preservation?

Analogy, and the nature of the case, furnish the answer—"the least possible power **231** adequate to the end proposed;" which is the power of imprisonment. It may, at first view, and from the history of the practice of our legislative bodies, be thought to extend to other inflictions. But every other will be found to be mere commutation for confinement; since commitment alone is the alternative where the individual proves contumacious. And even to the duration of imprisonment a period is imposed by the nature of things, since the existence of the power that imprisons is indispensable to its continuance; and although the legislative

power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment.

This view of the subject necessarily sets bounds to the exercise of a caprice which has sometimes disgraced deliberative assemblies, when under the influence of strong passions or wicked leaders, but the instances of which have long since remained on record only as historical facts, not as precedents for imitation. In the present fixed and settled state of English institutions, there is no more danger of their being revived, probably, than in our own.

But the American legislative bodies have never possessed, or pretended to the omnipotence which constitutes the leading feature in the legislative assembly of Great Britain, and which may have led occasionally to the exercise of caprice, under the specious appearance of merited resentment.

**232\*]** \*If it be inquired, what security is there, that with an officer avowing himself devoted to their will, the House of Representatives will confine its punishing power to the limits of imprisonment, and not push it to the infliction of corporal punishment, or even death, and exercise it in cases affecting the liberty of speech and of the press? the reply is to be found in the consideration, that the constitution was formed in and for an advanced state of society, and rests at every point on received opinions and fixed ideas. It is not a new creation, but a combination of existing materials, whose properties and attributes were familiarly understood, and had been determined by reiterated experiments. It is not, therefore, reasoning upon things as they are, to suppose that any deliberative assembly, constituted under it, would ever assert any other rights and powers than those which had been established by long practice, and conceded by public opinion. Melancholy, also, would be that state of distrust which rests not a hope upon a moral influence. The most absolute tyranny could not subsist where men could not be trusted with power because they might abuse it, much less a government which has no other basis than the sound morals, moderation, and good sense of those who compose it. Unreasonable jealousies not only blight the pleasures, but dissolve the very texture of society.

But it is argued, that the inference, if any, arising under the constitution, is against the exercise of the powers here asserted by the House of Representatives; that the express **233\*]** grant of power to punish their \*members respectively, and to expel them, by the application of a familiar maxim, raises an implication against the power to punish any other than their own members.

This argument proves too much; for its direct application would lead to the annihilation of almost every power of Congress. To enforce its laws upon any subject without the sanction of punishment is obviously impossible. Yet there is an express grant of power to punish in one class of cases, and one only; and all the punishing power exercised by Congress in any cases, except those which relate to piracy and offenses against the laws of nations, is derived from implication. Nor did the idea ever

occur to anyone, that the express grant in one class of cases repelled the assumption of the punishing power in any other.

The truth is, that the exercise of the powers given over their own members, was of such a delicate nature, that a constitutional provision became necessary to assert or communicate it. Constituted, as that body is, of the delegates of confederated states, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honor or interests of the state which sent him.

In reply to the suggestion that, on this same foundation of necessity, might be raised a superstructure of implied powers in the executive, and every other department, and even ministerial officer of the government, it would be sufficient to observe, that neither analogy nor precedent would support the assertion \*of such powers in any other than a **[\*234]** legislative or judicial body. Even corruption anywhere else would not contaminate the source of political life. In the retirement of the cabinet, it is not expected that the executive can be approached by indignity or insult; nor can it ever be necessary to the executive, or any other department, to hold a public deliberative assembly. These are not arguments; they are visions which mar the enjoyment of actual blessings, with the attack or feint of the harpies of imagination.

As to the minor points made in this case, it is only necessary to observe, that there is nothing on the face of this record from which it can appear on what evidence this warrant was issued. And we are not to presume that the House of Representatives would have issued it without duly establishing the fact charged on the individual. And, as to the distance to which the process might reach, it is very clear that there exists no reason for confining its operation to the limits of the District of Columbia; after passing those limits, we know no bounds that can be prescribed to its range but those of the United States. And why should it be restricted to other boundaries? Such are the limits of the legislating powers of that body; and the inhabitant of Louisiana or Maine may as probably charge them with bribery and corruption, or attempt, by letter, to induce the commission of either, as the inhabitant of any other section of the Union. If the inconvenience be urged, the reply is obvious; there is no difficulty in observing \*that respectful deportment which will **[\*235]** render all apprehension chimerical.

*Judgment affirmed.*

Cited—2 Cranch C. C. 391; 1 Wood. & M. 440.

[PRIZE.]

LA CONCEPTION.

THE SPANISH CONSUL, *Claimant.*

Where a capture is made of the property of the subjects of a nation in amity with the United States, by a vessel built, armed, equipped, and owned in the United States, such capture is illegal, and the property, if brought within our territorial limits, will be restored to the original owners.



Where a transfer of the capturing vessel in the ports of the belligerent state, under whose flag and commission she sails on a cruise, is set up in order to legalize the capture, the *bona fides* of the sale must be proved by the usual documentary evidence, in a satisfactory manner.

# APPEAL from the Circuit Court of South Carolina.

This was an allegation filed in the District Court of South Carolina by the Vice-Consul of His Catholic Majesty, claiming restitution of the ship *La Conception* and cargo, as the property of Spanish subjects to him unknown, which had been illegally captured by the armed ship *La Union*, sailing under the flag of Buenos Ayres, and pretending to have a commission or letter of marque from that government, but actually built, equipped, armed, and manned in the United States. A claim was interposed **236\***] by one Brown, claiming the property as having been taken by him, as commander of *La Union*, on the high seas, under a commission from the government of Buenos Ayres, authorizing him to capture the property of the subjects of Spain. The District and Circuit Courts decreed restitution of the property to the captors, no sufficient evidence being produced of the capturing vessel having been equipped, or having augmented her force in the ports of the United States. On appeal to this court, farther proof was taken, showing conclusively, that the capturing vessel was originally built, owned, and equipped in this country, and after proceeding to Buenos Ayres, and sailing from that port on a cruise, had touched at the port of New Orleans, and there illegally augmented her force, since which, the capture in question was made. This evidence was attempted to be repelled on the part of the captors, by testimony tending to show a transfer of the capturing vessel at Buenos Ayres to domiciled subjects of that country, and that the subsequent augmentation of her force at New Orleans, if any, was very trifling, and only amounted to a replacement of her former equipment.

The *Attorney-General* and *Mr. Hopkinson*, for the appellant and claimant, the Spanish consul, argued, that the original owners were entitled to restitution, according to the uniform series of decisions in this court, upon the ground that the capturing ship was built and equipped in the United States, with the intention of cruising against the subjects of Spain, in violation of our neutrality, and actually belonged to citizens **237\***] of the United States, when the present capture was made; or had illegally augmented her force in our ports, previous to the capture.<sup>1</sup> That the pretended transfer at Buenos Ayres was evidently colorable, and was not proved by the production of the bill of sale, or any of the other documentary evidence usually expected by maritime courts, to establish a change of this species of property. That the enlistment of additional seamen to the crew at New Orleans, being proved, the *onus* was, thrown back upon the captors, to show that the persons so enlisted were subjects of Buenos Ayres, transiently within the United States.<sup>2</sup>

*Mr. Winder*, contra, insisted, that it must be a clear case of the violation of our neutral rights, or the court would not interfere to restore a capture made under a commission from a sovereign state, and that the *onus probandi* for this purpose was on the Spanish claimant.<sup>3</sup> We have an unquestionable right to build ships for sale, and to export any kind of contraband subject to the risk of capture. And even if a ship be expressly built for war, it may be sold to a belligerent, and afterwards equipped in his own ports to cruise against his enemy.<sup>4</sup> Here the purchaser \*was actually domiciled [**238** at Buenos Ayres, and there is nothing to impeach the *bona fides* of the transaction. He then sailed again from Buenos Ayres on a cruise, and the alleged augmentation of the crew at New Orleans was, in effect, nothing but a replacement of the original force, the vessel having lost by desertion nearly the same number of men which she acquired by enlistment. Such a replacement, this court has already determined not to afford a ground for restitution.<sup>5</sup> It is true, that the case cited was under the French treaty of 1778. But the 19th article of that treaty provides nothing more than a right of asylum and hospitality, the same as is enjoyed by the South American cruisers in our ports, under the President's instructions.

The counsel on both sides also argued on the same grounds which are stated in a case of the *Bello Corrunes*, ante, p. 155, and which it is not thought necessary to repeat.

*Mr. Justice Story* delivered the opinion of the court:

In this case, if the cause had stood solely upon the evidence before the Circuit Court, we should have no difficulty in affirming its decision. But upon the new proofs which have been since taken, and are now produced to this court, it is apparent that the capturing vessel was originally built, equipped, manned, and armed in the United States for a cruise, being owned by citizens of this country, and \*sailed with the intent of cruising [**239** against Spain. It is true that she went to Buenos Ayres, and sailed under the colors of that government on a second cruise, during which this capture was made; but, there is no satisfactory evidence that the American ownership ever ceased, or that there was a real, *bona fide* sale at Buenos Ayres. If such a sale had really taken place, it was perfectly in the power of the captors to have proved it, in the clearest manner. A bill of sale is the customary and universal document by which the ownership of vessels is evidenced; and the want of any document of this nature, or of any direct and positive evidence of an actual sale, leaves no doubt in the mind of the court, that no such sale ever was made. The consequence is, that the capturing vessel must still be considered as owned in the United States; and, according to the decisions which have already been made, the capture was illegal, and the property must be restored to the original Spanish owners.

*Sentence reversed.*

Cited—2 Wood. & M. 540, 541.

3.—*La Amistad de Rues*, 5 Wheat. Rep. 385.

4.—*The Alfred*, 3 Dall. 387.

5.—*Moodle v. The Phoebe Ann*, 3 Dall 319.

1.—*The Alerta*, 9 Craneh. 359; *The Divina Pastora*, 4 Wheat. Rep. 298; *The Estrella*, 4 Wheat. Rep. 298; *La Amistad de Rues*, 5 Wheat. Rep. 385; *The Bello Corrunes*, ante, p. 152.

2.—*The Estrella*, 4 Wheat. Rep. 298.

240\*]

[COMMON LAW.]

## WILLINKS v. HOLLINGSWORTH ET AL.

H. and others, merchants in Baltimore, consigned a vessel and cargo to W. and others, merchants in Amsterdam, with instructions to them respecting her ulterior destination, which showed, that on the failure of getting a freight to Batavia, or of selling the vessel at a price limited, she was to proceed to St. Petersburg, and there take in a return cargo of Russian goods for the United States, but with instructions to the master committing to him the management of the ulterior voyage. No freight to Batavia could be obtained, and the vessel could not be sold for the price limited at Amsterdam; and W. and others, purchased in Amsterdam, with the concurrence of the master, a return cargo of Russian goods, partly with the money of H. and others, and partly with money advanced by themselves. On the return of the vessel to Baltimore, H. and others, objected to the purchase of this cargo in Amsterdam, as being contrary to express orders, and gave notice to W. and others, of their determination to hold them responsible for all losses sustained in consequence of this breach of instructions; but received the goods and sold them. W. and others brought an *assumpsit* against H. and others, to recover from them the moneys advanced. The declaration contained the three usual money counts. Held, 1st. That the plaintiffs had a demand in law against the defendants, which could be maintained in this form of action. 2d. That whether the plaintiffs could, or could not, be made responsible in any form of action which might be devised for the possible loss resulting from the breaking up of the intended voyage to St. Petersburg, the defendants were not entitled to a deduction from the plaintiffs' demand, for the amount of such loss.

THIS was an action of *assumpsit* brought in the Circuit Court of Maryland, by the plaintiffs, who were merchants of Amsterdam, to recover from the defendants, merchants of Baltimore, a sum of money advanced by the **241\*** plaintiffs in Amsterdam, for the \*cargo of the Henry Clay, a vessel belonging to the defendants, which had been consigned by them to the plaintiffs, with an outward cargo, and with orders respecting her ulterior destination, which showed, that on the failure of getting a freight to Batavia, or of selling her at Amsterdam, she was to go to St. Petersburg, and there take in a return cargo of Russian goods for the United States. The plaintiffs purchased in Amsterdam, with the concurrence of the master, a return cargo for the Henry Clay, partly with the money of the defendants, and partly with money advanced by themselves. On her arrival at Baltimore, the defendants objected to the purchase of this cargo in Amsterdam, as being contrary to express orders, and immediately gave notice to the plaintiffs of their disapprobation of the transaction, and of their determination to hold them responsible for all losses sustained in consequence of this departure from instructions. They, however, received the cargo, and sold it.

The declaration contained three counts: The first, for money lent and advanced to the defendants; the second, for money laid out and expended for their use; and the third, for money received by them for the use of the plaintiffs.

On the trial of the cause in the Circuit Court, the defendants prayed the court to instruct the jury, that upon the whole evidence, which is spread on the record, "the plaintiffs have not any demand in law against the defendants which can be maintained in this action; but **242\*** that, if they have, the defendants \*are entitled to a deduction from the same, of the

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amount of the loss which the jury shall find the said defendants sustained, by reason of the alteration aforesaid, in the destination to St. Petersburg, of the said ship, and the loading her as aforesaid at Amsterdam." On this motion the judges were divided in opinion, and the division certified to this court.

The evidence principally consisted of two letters, dated the 29th of April, 1815, written by M'Kim, one of the defendants, addressed, the one to the plaintiffs, the other to the master of the Henry Clay.

That to the plaintiffs was as follows:

"*Gentlemen*—The owners of the ship Henry Clay having appointed me the ship's husband for this voyage, and from the introduction of our mutual friends, Robert Gilmore & Sons, I have been directed by the owners to consign the ship to your house, also that part of her cargo which I consider belongs to her owners jointly, agreeable to the invoice, amounting to \$1,363.40.

"You will find, that the owners of the ship have shipped tobacco on their separate accounts; the proceeds are to be placed to the credit of John M'Kim, Jun., to remain a fund for the purpose of loading the ship if she should proceed to St. Petersburg. The freight and primage, and also Captain Charles Gantt's bills, which are now inclosed, drawn on you for the sum of 6,550 guilders, are to constitute part of the funds for the loading of the ship.

"Our wish is, in the first place, if a good freight or charter can be had for the ship to Batavia, that \*she should proceed there [**\*243** in preference to any other place.

"And, second, if the ship can be sold for £8,000 sterling, you will dispose of her rather than send her to St. Petersburg."

The letter then proceeds to give such a description of the ship as might enhance her value in the estimation of a purchaser, and then adds, "if the Henry Clay proceeds to St. Petersburg, we must depend on your placing funds there to purchase a cargo of iron, hemp and other goods. If the funds we have placed in your hands should fall short of loading her, Messrs. Gilmore & Sons have written you to make us any advances that may be deficient. Agreeable to the estimate, what we have ordered from St. Petersburg, will not exceed \$45,000, and you may rest assured, that any sum advanced us will be remitted to you as soon as we know the amount."

The letter to the master was in these words:

"*Dear Sir*—The ship Henry Clay is given you in charge, that you proceed with all possible despatch for Amsterdam, and it is recommended that you sail north-about at this fine season of the year. The owners of the ship have the greatest confidence in your good management; that you will take care that your disbursements in every foreign port may be as moderate as possible; that you will purchase every article yourself on the lowest terms that may be required for the ship; that you will use the greatest economy in all your expenditures. After your arrival at Amsterdam, your first object is a \*good charter for Batavia, and [**\*244** if what you know to be a good charter is obtained, you will, of course, accept it in preference to anything else.



"And if a good freight cannot be had to Batavia, and the ship can be sold for £8,000 sterling, you have orders to sell her, and we confidently expect that she will bring more, as she costs upwards of £14,000 sterling, and never made one voyage. I hope that every exertion will be made to proceed to St. Petersburg immediately, if you do not go to Batavia, and the ship cannot be sold; as the season is far advanced, no time must be lost. The same industry must be used to get away from St. Petersburg, for fear that you might be detained there all the winter. The owners must also depend on your attention at St. Petersburg, that the hemp is good that you receive." The letter then gives instructions respecting pilots, protests, &c., and then adds, "Messrs. Willinks will of course endeavor to consign the ship to a friend of theirs at St. Petersburg, but we have great confidence in a house recommended by Mr. Cumberland D. Williams—Messrs. Meyer & Buxner—and we could wish you to consign the ship to them. If any freight should offer from St. Petersburg to Baltimore, of course you will accept of it, and if any goods for Philadelphia or New York should be there, you can inform the shippers how easy they may be sent," &c.

It was also proved, that no freight to Batavia could be obtained, and that the vessel could not be sold at the price limited.

**245\*]** *Mr. Harper and Mr. Winder*, for the plaintiffs, argued, (1) That the present action could be maintained by the plaintiffs for the moneys advanced by them at Amsterdam, for the purchase of the return cargo received by the defendants at Baltimore. Even supposing that the defendants might have refused to receive it, yet having actually sold it, and received the proceeds of the sale, this raises an *assumpsit* to pay the money thus received. In the case of *Manella v. Barry*,<sup>1</sup> foreign merchants, sent by their general agent, written orders to their factor in this country, to purchase goods here upon their account, but to ship the goods in the name of the factor, and by those orders the factor was referred to the verbal communications of the general agent, who undertook to order the goods to be shipped in the name of another person, and declared that he had authority from the foreign merchants thus to control and vary their orders; the factor was held to be justified in obeying the new orders of the general agent, though contrary to the first written orders. So, here the consignment of the ship to the plaintiffs was limited to her transactions at Amsterdam, and the control of her ulterior movements was left to the master. The learned counsel here entered into a minute examination of the correspondence, to show that this was its import.

2. The defendants cannot claim a deduction from the plaintiffs' demand of the amount of the supposed loss sustained by the alteration of **246\*]** the intended destination \*of the vessel to St. Petersburg, and the loading her at Amsterdam. This question depends not on the English statute of set-off, but on the act of Assembly of Maryland, of November, 1785, c. 46, s. 7. This act provides, "That in case any suit shall hereafter be brought on any judg-

ment, or on any bond, or other writing sealed by the party, and the defendants shall have any demand or claim against the plaintiff, upon judgment, bond, or other instrument under seal, or upon note, agreement, *assumpsit*, or account proved, as by this act is allowed the defendant, or otherwise according to law, shall be at liberty to file his account in bar, or plead discount to the plaintiff's claim, and judgment shall be given for the plaintiff for the sum only which remains due after just discount made; provided the sum which shall remain due after such discount be sufficient to support a judgment in the court where the cause may be tried, according to its established jurisdiction; and in all cases of suits upon simple contracts, the defendant may file an account in bar, or plead discount of any claim he may have against the plaintiff, proved as aforesaid, or otherwise proved according to law, which may be of an equal and superior nature to the plaintiff's claim, and judgment shall be given as aforesaid." Unliquidated damages cannot be admitted by way of discount, according to the very letter of the law, and the uniform decisions of the local courts of Maryland. But even the English statute has received the same construction.<sup>2</sup> Damages for a \*breach of the implied contract of an [**247** agent are, and necessarily must be, unliquidated. If, then, such damages cannot be set off under the statute, neither can they be admitted incidentally, by way of deduction, upon the equitable principles of an action for money had and received. It would be an evasion of the law to permit such an equitable deduction, which sounds rather in *tort* than contract. The policy of the law is to prevent two distinct issues, involving controverted questions, from being tried at the same time, thus confounding the simplicity of actions and of proceedings in a court of law.

*Mr. Pinkney and Mr. D. B. Ogden*, contra, (1) insisted, that the action could not be maintained by the plaintiffs, there having been a manifest breach of instructions on their part, not justified by the pretended approbation of the master. (2) The defendants have a right to a deduction for the loss sustained by them in breaking up the intended voyage to St. Petersburg. No part of the money, for which the action is brought, can be said to be received to the use of the plaintiffs, which, by the very nature of their claim, ought in conscience to be applied to the indemnity of the defendants against the breach of contract which originated the plaintiffs' demand. The claim of the plaintiffs arises from a breach of their duty to the defendants. This breach of duty forced the money in question into the hands of the \*defendants. If the plaintiffs should [**248** obtain a judgment for the whole of this money, it cannot be doubted that chancery would enjoin execution until the extent of the injury inflicted upon the defendants by the acts which produced the judgment could be ascertained by a jury. And surely in this action for money had and received, a court of law will proceed with the same view, if the existence of the defendants' right to complain is as-

1.—3 Cranch, 415.

2.—Montagu on Set-Off, 21, and the authorities there cited.

certainable (although the exact quantum of the injury is not) by the same evidence, and through the same circumstances, which properly belong to the case of the plaintiffs. The acknowledged nature of the action for money had and received, will otherwise cease, and it will differ in nothing from any other form of action. If we are not to inquire in this action, how, and under what circumstances money was received, in order that we may determine whether, *ex æquo et bono*, the defendants may retain the whole, or any part of it; and if nothing can prevent a recovery of the whole, but a plea of discount, or a notice of set-off, or such other defense as in ordinary action may be competent, the character given in the books of the action for money had and received, is a perfect delusion. The case of *Dale v. Sollet*<sup>1</sup> goes the whole length of this doctrine. The deduction there claimed might, perhaps, have been used as a discount or set-off under the statute; although as the claim was not a liquidated one, it probably could not; but at any rate it was not so used, and consequently, as a **249\*** discount or set-off, \*no advantage could be taken of it at the trial. Why, then, was it allowed in that case? Because of the equitable nature of the plaintiff's action, and of the intimate connection between the claim and the defense, out of which arose the conclusion that the defendant might retain, or stop so much of the money, although it was in fact the plaintiff's money which he received, and although there was no precise contract that it should be stopped out of the money received. The right in that case to stop a reasonable compensation (which the parties had not defined) out of the whole sum which had come to the defendant's possession, was exactly such a right as we now insist upon. It stood, as ours does, upon the qualities of that sort of suit which the plaintiff had instituted, and upon the union of the claim and the defense. The defense, indeed, was less complicated in that case than it is in the present one; but so, too, was the plaintiff's demand. And, besides, a defense is not the less a good defense, or an examinable defense, because it does not depend upon a single fact, or does depend on many facts. A jury can deal with it, nevertheless, and does deal with such defenses every day; and there would be a defect of justice if they did not. The defense in this case rests, incontestably, upon contract, as it did in that. The deduction claimed was in that, as in this, unliquidated in amount. The right to the deduction arose in that, out of the whole circumstances of the case. It does so equally in this. The amount was, in that case, as well as in this, part of the case itself, as respected the demand of the plaintiff. Evidence was necessary **250\*** on the \*part of the defendant, to ascertain there the *quantum* of the deduction, as much as it is here. What case could the plaintiffs in this cause have shown upon any of the counts in their declaration without exposing, or letting in an exposition, of the whole matter on which the defendants rely? Of necessity, the entire transaction was before the jury, and it is upon that, as in *Dale v. Sollet*, that we contend for the admissibility of a defense which the entire transaction brings under the

notice of the court and jury. And it should seem to be monstrous, that when the whole is regularly and necessarily presented, and the result is that the defendants ought, in conscience and equity, to be permitted to retain an ascertainable part of the money received by them for their own use, they should be turned round to a cross action against persons who appear in their writ to be foreigners, and are not therefore amenable to our judicatures, or that (being probably remediless at law, if they are compelled to part with the whole of the money in their hands) they should be driven into chancery for an injunction upon grounds of equity, equally available, as we are taught by the authorities, in an action for money had and received. The cross action, to which the other side refer us, must, in truth, try the present action over again; and a verdict for the present defendants, in such an action, could scarcely be reconciled with a verdict in this cause for the whole amount of the plaintiffs' claim. A cross action, which is to unravel the action now *sub judice*, and which upon the same circumstances is to establish that the present plaintiffs \*ought not [**\*251** to have what it is now contended they ought to have, seems to be supererogation at least. When a cross action is unavoidable, the necessity must be submitted to; and it is unavoidable where the matters of inquiry are not combined in their nature. But, where so combined, an action for money had and received, opens the entire investigations, and can do ample justice without other assistance. Indeed, it cannot do justice at all on such occasions without exhausting the whole investigation. And to affect to administer equity by shutting out one-half of the real case (upon which the equity of the other half depends), would be a mere mockery. Cross actions are always avoided when it is possible; and here it is not only possible, but absolutely required by the facts.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court, and after stating the facts, proceeded as follows:

On the first branch of the question certified from the Circuit Court, no doubt can be entertained. The defendants having received the cargo of the *Henry Clay*, and sold it, are accountable for the proceeds, although the cargo should be considered as the property of the plaintiffs. Whether the defendants are liable for the moneys actually advanced in Amsterdam, or for the net amount of sales in Baltimore, considering the goods as the property of the plaintiffs, still they are liable for something; and, of consequence, the action is sustainable.

\*In deciding on the second branch [**\*252** of the instructions which were required, it becomes material to examine the orders which were carried out by the *Henry Clay* on her voyage from Baltimore to Amsterdam, contained in the letters of the 25th of April, the one to the plaintiffs, the other to the master.

It is admitted, that no freight to Batavia could be obtained, and that the vessel could not be sold at the limited price; consequently, the only deviation from orders alleged by the defendants is, the purchase of the Russian goods for the return cargo at Amsterdam, in-



stead of sending the *Henry Clay* to St. Petersburg.

That the orders of the defendants to send their ship to St. Petersburg, in the event which had occurred, were positive; and that no authority was given to purchase her return cargo at Amsterdam, under any circumstances, are too apparent for controversy. That this purchase, thus made without authority, whether with, or without, the consent and concurrence of the master, must have been made at the risk of the plaintiffs, is also too clear for argument. But the liability of the plaintiffs for any loss which the defendants may have sustained by the breaking up of the voyage to St. Petersburg, depends on the question whether the control of that voyage was committed to them, or to the master. In considering this question, it is proper to take into view all the instructions which were given, and to compare the two letters written by the defendants with each other.

In the commencement of the letter written by **253\*** Mr. M'Kim, on the part of the defendants, he says: "I have been directed by the owners to consign the ship to your house, also that part of the cargo which I consider belongs to the owners jointly."

Whether this consignment was limited to the transactions in Amsterdam, or extended to any subsequent voyage in which the *Henry Clay* might be directed to engage, depends on other parts of the letter.

Mr. M'Kim then proceeds to direct, that certain parts of the outward cargo should "remain as a fund for the purpose of loading the ship, if she should proceed to St. Petersburg."

These orders are precise and explicit, with respect to the funds which are to remain in the hands of the plaintiffs for the purchase of the cargo in St. Petersburg, but are silent respecting any agency of the plaintiffs in making that purchase.

After communicating the desire of the defendants, that a freight should be obtained for Batavia, the letter proceeds to say: "And second, if the ship can be sold for £8,000 sterling, you will dispose of her rather than send her to St. Petersburg."

This part of the letter may indicate, that in some other part of it, might be found an express order to send the *Henry Clay* to St. Petersburg, if the primary objects of the defendants should be unattainable, but does not in itself amount to such express order. The writer does not say, "we request you, if the vessel cannot be sold, to send her to St. Petersburg;" but, "you will dispose of her, rather than send her to St. Petersburg;" as if there were some **254\*** authority not communicated by these words to which they have allusion. There is no such authority, unless it be implied in the general consignment of the vessel.

That consignment is completely satisfied by the agency which was to be exercised in Amsterdam. If it was designed to extend it to the eventual voyage to St. Petersburg, the Messrs. Willinks would naturally expect to find some instructions respecting that voyage; respecting the articles of which the cargo was to consist, and their conduct in the purchase of them. But

they could find no such instructions. In a subsequent part of the letter, Mr. M'Kim states the estimated value of the cargo he had ordered, and is explicit in his request, that they would advance the necessary funds for laying it in, should those placed in their hands be insufficient; but he is entirely silent with respect to their having any other agency in the voyage.

It was impossible for these gentlemen to read this letter without, at least, doubting their power to interfere further with respect to the voyage to St. Petersburg, than to advance the money which might be required for the cargo to be purchased at that place. The letter contains all the information, and all the power which was necessary for this purpose, but contains neither information nor power, for any other purpose.

It was natural for the Messrs. Willinks to require farther information on this subject, and to seek it from the master. He could have no motive for withholding his letter of instructions from them, and in that they would find, that the management of the \*voyage [**\*255** was committed to him, and that the utmost confidence was reposed in his intelligence and integrity. "I hope," says M'Kim, "that every exertion will be made to proceed to St. Petersburg immediately, if you do not go to Batavia, and the ship cannot be sold." These exertions were to be made by the master; he was to proceed immediately to St. Petersburg; and as no reference is here made to the Messrs. Willinks, the fair inference seems to be, that he was expected to proceed, not in consequence of any orders he should receive from them, but in consequence of the orders he had received from the owners. "The same industry," he is told, "must be used to get away from St. Petersburg." The letter then adds, "the owners must also depend on your attention at St. Petersburg, that the hemp is good that you receive."

But the part of the letter which seems to be conclusive on this point, is that which relates to the consignment of the ship. "The Messrs. Willinks," says the writer, "will of course endeavor to consign the ship to a friend of theirs at St. Petersburg, but we have great confidence in a house recommended by Mr. Cumberland D. Williams—Messrs. Meyer & Buxner—and we wish you to consign the ship to them."

The owners, then, did not suppose that they had empowered the plaintiffs to order the ship to St. Petersburg. They did not suppose that their original consignment of the *Henry Clay* to the Messrs. Willinks, implied a control over her after the transactions at Amsterdam should be terminated. Had \*such a control [**\*256** existed, those gentlemen would not have consigned her to one of their friends. But these words show conclusively, that the defendants themselves directed the consignment of the ship from Amsterdam to St. Petersburg, and in executing their orders, the master is not merely directed to proceed without consulting the Messrs. Willinks; he is directed to disregard their advice should it be offered.

The plaintiffs could not compare this letter with that addressed to themselves, without perceiving that, with respect to the voyage to St. Petersburg, every order was given directly to

the master without reference to them, further than to show that their interference, with respect to the consignment of the ship, was to be disregarded; and that their agency was confined to advancing the necessary funds for the purchase of the return cargo.

Both the master and the Messrs. Willinks appear to have acted on this construction of their respective powers. The correspondence between them contains no indication of an opinion in either, that the voyage to St. Petersburg depended on the orders of those gentlemen. The master does not require their orders, but asks their advice; they do not attempt to order, they only advise. This advice may have been dictated by their best judgment, or may have been dictated by a view to personal interest; still it is mere advice, and was both given and received as advice.

The conduct of the parties, then, is full proof of the opinion each entertained of the authority of each; and the first letters written after they 257\*] had met in \*Amsterdam, show that free communications had taken place between them. In a letter of the 19th of June, addressed to Captain Gantt, the Messrs. Willinks say: "We have not received yet the promised note of the Russian goods that would be wanted for the Henry Clay." And in the captain's letter from the Helder, of the 18th of June, he says: "Herewith, I annex you a copy of the order for Russian produce, which the owners of the Henry Clay wish to constitute her return cargo."

These letters strengthen the probability, that in the verbal communications which were made at Amsterdam, the captain had stated his orders relative to the voyage to St. Petersburg; at any rate, they show that the note for the cargo which had not been transmitted to the Messrs. Willinks, had been entrusted to him. There is an expression in the last letter of the plaintiffs to the defendants, which seems to have some bearing on the question, whether the captain had communicated to them his letter of instructions. They say: "You cannot expect, gentlemen, that we shall enter here into all the details of this business, which has been conducted by us, *bona fide*, with a view to your greatest benefit and advantage, faithfully relying on your promises, and considering the incomplete state of your instructions to us, that your captain was furnished with more particular orders."

There is a vagueness in these expressions, arising, probably, from the unskillfulness of the translation, if they were not written in our 258\*] language, which \*leaves it, in some measure, uncertain, whether the plaintiffs meant to assert, that the captain was furnished with more particular orders, or that they inferred this fact from the incomplete state of the instructions to themselves. If the case depended entirely on the question, it might, perhaps, be proper to refer to the original; but we do not think that the right of the defendants to the deduction they claim from the demand, depends entirely on the fact that their orders to their captain were shown to the plaintiffs. Their letter to the plaintiffs was at best equivocal; and any evidence showing that the construction which the plaintiffs put on that letter, conformed to the intention of the defendants, will

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justify the plaintiffs, although that evidence was not in their possession pending the transaction. The defendants cannot be permitted to say, "It is true, we did not intend to consign the Henry Clay to you, farther than was necessary to your agency in Amsterdam. We did not intend to give you any control over her voyage to St. Petersburg. We had committed that whole subject to our captain, and had given him precise orders respecting it. We had even gone so far as to direct him to disregard your consignment of the vessel, should you endeavor to make one. But you did not see these orders, and we will, therefore, make you responsible for not having understood our letter to you, as creating a duty which we did not intend it should create." This, certainly, cannot be permitted. As little can they be permitted to charge the Messrs. Willinks, in consequence of the \*advice they gave, with [\*259 the profits which might possibly have been made on the voyage to St. Petersburg. Although the orders were broken with their advice, still they were broken by the master, to whom their execution was confided, not by the Messrs. Willinks, to whom their execution had not been confided.

Were it even possible that the Messrs. Willinks could be made responsible in any form of action which could be devised, for the possible loss resulting from the breaking up of the voyage to St. Petersburg, they cannot, we think, be made responsible in this. Having loaded the Henry Clay at Amsterdam, clearly without authority, the cargo was shipped at their risk. The defendants might have refused it altogether. But they have sold it and received the money. This creates an *assumpsit* to pay the money received. This action, then, so far as respects the count for money received by the defendants to the plaintiffs' use, is founded on the transactions in Baltimore; and, were it even possible, which we are far from admitting, that the defendants could be allowed to make a deduction of this supposed loss, from the sum to be recovered on the count for money laid out and expended to their use, provided that count could be supported, yet they cannot be allowed to make that deduction from the sum to be recovered on the count for money had and received to the use of the plaintiffs, for goods sold as the goods of the plaintiffs.

\*CERTIFICATE.—This cause came on to [\*260 be heard on the transcript of the record of the Circuit Court, for the fourth Circuit and District of Maryland, and on the question on which the judges of said court were divided, and was argued by counsel. On consideration whereof, this court is of opinion, that the plaintiffs have a demand in law against the defendants, which can be maintained in the action now depending in the Circuit Court, and that the defendants are not entitled to a deduction from the same for the amount of any loss which may have been sustained by them by reason of the alteration in the destination of the ship Henry Clay to St. Petersburg, and the loading her at Amsterdam. Which opinion is directed to be certified to the Circuit Court.



## [PRACTICE.]

## GREEN v. WATKINS.

In real or personal actions, at common law, the death of parties, before judgment, abates the suit; and it requires the aid of some statutory provision, like that of the 31st section of the judiciary act of 1789, c. 20 to enable the suit to be prosecuted by, or against the personal representative or heir of the deceased, where the cause of action survives.

In writs of error upon judgments already rendered, in personal actions, if the plaintiff in error dies before assignment of errors, the writ abates at common law; but if, after assignment of errors, the defendant may join in error, and proceed to 261\*] get the judgment affirmed, \*if not erroneous, and may then revive it against the representatives of the plaintiff.

But a writ of error, in personal actions, does not abate by the death of the defendant in error, whether it happen before or after errors assigned; and the personal representatives may not only be admitted voluntarily to become parties, but a *scire facias* may issue to compel them.

By the rules of this court, if either party, in real or personal actions, die, pending the writ of error, his representatives in the personalty or realty, may voluntarily become parties, or may be compelled to become parties, in the manner prescribed by the rule.

*Mr. B. Hardin*, for the defendant in error, moved to dismiss the writ of error in this case, which was a real action, upon a suggestion of the death of the demandant and plaintiff in error, pending the proceedings in this court. He insisted that, at common law, the death of either party, any time before final judgment, would have abated the suit;<sup>1</sup> that the judiciary act of 1789, c. 20, s. 31, made no provision for this case, since it merely extended to the case of the death of parties, in personal actions, before judgment; and that the statute 17 Car. II., c. 8, and the act of Kentucky, showed the sense of Parliament and the local legislature, that

1.—Tidd's Prac. 1024; Bac. Abr. tit. Abatement.

real actions abated by the death of the parties, before judgment, upon writ of error on judgments already rendered.

*Mr. Justice STORY* delivered the opinion of the court:

The preliminary question which has been argued at the bar, is, whether the writ of error in this case, \*which is a writ of right, [\*262 has abated by the death of the demandant, who is the plaintiff in error, pending the proceedings in this court. There is a material distinction between the death of parties before judgment and after judgment, and while a writ of error is depending. In the former case, all personal actions by the common law abate; and it required the aid of some statute, like that of the thirty-first section of the judiciary act of 1789, ch. 20, to enable the action to be prosecuted by or against the personal representative of the deceased, when the cause of action survived. In real actions, the like principle prevails, for a still stronger reason, for, by the death of either party, the right descends to the heir, and a new cause of action springs up; and the plea is not, therefore, in the same condition as it was in the life-time of the party.

But, in cases of writs of error upon judgments already rendered, a different rule prevails. In personal actions, if the plaintiff in error dies before assignment of error, it is said that by the course of proceedings at common law, the writ abates; but if, after assignment of errors, it is otherwise. In this latter case, the defendant may join in error, and proceed to get the judgment affirmed, if not erroneous; and he may then revive it against the representatives of the plaintiff. But in no case does a writ of error in personal actions abate by the death of the defendant in error, whether it happen before or after errors assigned. If it

NOTE.—In real actions, the death of either party, before judgment, abates the suit. Sec. 31 of the judiciary act of 1789, which enables the action to be prosecuted by or against the representatives of the deceased, when the cause of action survives, is clearly confined to personal actions. *Mackie v. Thomas*, 7 Wheat. 530.

Upon the death of a complainant in equity only his legal representatives can revive the suit. An assignee cannot appear. *Mitford*, Eq. Pl. by Jeremy, 69; *Story* Eq. Pl., sec. 354, a; *Barribeau v. Brant*, 17 How. 43.

Upon the death of a party, the proceedings become abated or discontinued. *Story* Eq. Pl. s. 329.

The death of one of the parties to a suit does not, in all cases, necessarily produce such an abatement of it as to suspend all further proceedings; but only when the interest of such party, or that which he represents, survives. *Cave v. Cork*, 2 Younge & Coll. New R. 130, 133. If the interest of the party dying so determines that it can no longer affect the suit, and no person becomes entitled thereupon to the same interest (which happens in the case of a tenant for life, or a person having a temporary or contingent interest, or an interest defeasible upon a contingency), the suit does not so abate as to require any proceeding to warrant the prosecution of the suit against the remaining parties. *Mitf. Eq. Pl. by Jeremy*, 58, and cases there cited; *Coop. Eq. Pl.* 65.

But if the party so dying be the only plaintiff, or only defendant, there will necessarily be an end of the suit, if there be no subject of litigation remaining. *Story* Eq. Pl., sec. 356.

The death, or marriage, of one of the original parties to the suit, is the most common, if not the sole cause of the abatement of a suit in equity. As the interest of the plaintiff usually extends to the whole suit, therefore, in general, upon the death

of the plaintiff, or the marriage of a female plaintiff, all proceedings become abated. Upon the death of a defendant, all proceedings become abated as to that defendant. *Mitf. Eq. Pl. by Jeremy*, 57, 58; *Cooper* Eq. Pl. 63.

If a suit abates by the death of the defendant, the plaintiff may bring a new original suit, or a bill of review, at his election. *Wyatt*, Pr. Reg. 91; *Spencer v. Wray*, 1 Vern. 463; *Anon.*, 3 Atk. 485, 486; *Nicoll v. Roosevelt*, 3 John., ch. 60; *Hardy v. Hull*, 14 Simons, 21; *Foster v. Foster*, 16 Sim. 637; *McCoul v. Le Kamp*, 2 Wheat. 111.

But upon the marriage of a female defendant, the proceedings do not abate, though her husband should be named in the subsequent proceedings. *Story* Eq. Pl., sec. 354; *Jones v. Skipworth*, 9 Beav. 237.

If the defendant below marries after the judgment, and before the service of the writ of error, the service of the citation on the husband is sufficient. *Fairfax v. Fairfax*, 5 Cranch, 19.

When the representative of a deceased appellant did not appear after the lapse of two terms after the suggestion of his death, the suit was entered as abated. *Barribeau v. Brant*, 17 How. 43; so, when he did not appear in four years, the suit was abated and cause remanded. *Philips v. Preston*, 11 How. 294.

An appellee having died, on motion of his administrator, no counsel appearing for the appellant, the appeal was dismissed. *Hook v. Linton*, 10 Pet. 107. If one of two plaintiffs in error die, the action survives. *McKinney v. Carroll*, 12 Pet. 66. If one defendant in error die, before the term begins, and the cause of action survives, the death may be suggested and judgment taken against the survivor. *McNutt v. Bland*, 2 How. 9.

The death of one of the parties to the decree did not affect the right to have the decree executed. *Penhallow v. Doanc*, 3 Dall. 54.

happen before, and the plaintiff will not assign errors, the representatives of the defendant may have a *scire facias quare executio non*, in **263\***] order to compel \*him; if it happen after, they must proceed as if the defendants were living, till judgment be affirmed, and then revive by *scire facias*. And the plaintiff, in order to compel the representatives of the defendant in error to join in error, may sue out a *scire facias ad audiendum errores*, either generally, or naming them. Such is the doctrine of approved authorities.<sup>1</sup> It is clear, therefore, that at common law, in these cases, a writ of error does not necessarily abate: and that the personal representatives may not only be admitted voluntarily to become parties, but a *scire facias* may issue to require them to become parties. And such has been the practice hitherto adopted in this court in all personal actions, whether there has been an assignment of errors or not; for, a specific assignment of errors has never been insisted on here, as a preliminary to the argument, or decision of the cause.

In respect to real actions, this is the first time the question has presented itself upon a writ of error, where the death of either party has occurred *pendente lite*. There is no doubt that the heir or privy in estate, who is injured by an erroneous judgment, may prosecute a writ of error to reverse it. And there seems no good reason why, in case of the death of his ancestor, pending proceedings, he may not be admitted to become a party, or be cited to become a party, to pursue or defend the writ, in the same manner as in personal actions. The death of neither party produces any change in the **264\***] condition \*of the cause, or in the rights of the parties. It would seem reasonable, therefore, that the suit should proceed, and not be dismissed or abated. In the absence of all authority which binds the court to a different course, we are disposed to adopt this doctrine, and shall promulgate a general rule on the subject.

*Rule accordingly.*<sup>2</sup>

See S. C., 7 Wheat. 27.

Cited—7 Wheat. 531, 532; 1 Blatchf. 395; 1 Cliff. 129.

#### [CONSTITUTIONAL LAW.]

#### COHENS v. VIRGINIA.

This court has, constitutionally, appellate jurisdiction under the judiciary act of 1789, ch. 20, s. 25, from the final judgment or decree of the highest court of law or equity of a state, having jurisdiction of the subject-matter of the suit, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the consti-

tution, treaties, or laws of the United States, and the decision is in favor of such, their validity; or of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed, by either party, under such clause of the constitution, treaty, statute, or commission.

It is no objection to the exercise of this appellate jurisdiction, that one of the parties is a state, and the other a citizen of that state.

\*The act of Congress of the 4th of May, [**265** 1812, entitled, "an act further to amend the charter of the city of Washington," which provides (s. 6), that the corporation of the city shall be empowered, for certain purposes, and under certain restrictions, to authorize the drawing of lotteries, does not extend to authorize the corporation to force the sale of the tickets in such lottery, in states where such sale may be prohibited by the state laws.

**T**HIS was a writ of error to the Quarterly Session Court for the borough of Norfolk, in the state of Virginia, under the 25th section of the judiciary act of 1789, c. 20, it being the highest court of law or equity of that state having jurisdiction of the case.

*Pleas at the Court-House of Norfolk borough, before the Mayor, Recorder, and Aldermen of of the said borough, on Saturday, the second day of September, one thousand eight hundred and twenty, and in the forty-fifth year of the Commonwealth.*

Be it remembered, that heretofore, to wit, at a Quarterly Session Court, held the twenty-sixth day of June, one thousand eight hundred and twenty, the grand jury, duly summoned and impaneled for the said borough of Norfolk, and sworn and charged according to law, made a presentment in these words:

We present P. J. and M. J. Cohen, for vending and selling two halves and four quarter lottery tickets of the National Lottery, to be drawn at Washington, to William H. Jennings, at their office at the corner of Maxwell's wharf, contrary to the act thus made and provided in that case, since January, 1820. On the information of William H. Jennings.

\*Whereupon the regular process of [**266** law was awarded against the said defendants, to answer the said presentment, returnable to the next succeeding term, which was duly returned by the sergeant of the borough of Norfolk—"Executed."

And at another Quarterly Session Court, held for the said borough of Norfolk, the twenty-ninth day of August, one thousand eight hundred and twenty, came, as well the attorney prosecuting for the Commonwealth, in this court, as the defendants, by their attorney, and on the motion of the said attorney, leave is given by the court to file an information against the defendants on the presentment aforesaid, which was accordingly filed, and is in these words:

Norfolk borough, to wit: Be it remembered, that James Nimmo, attorney for the commonwealth of Virginia, in the court of the said borough of Norfolk, cometh into court, in his proper person, and with leave of the court, giveth the said court to understand and be informed, that by an act of the General Assembly of the said commonwealth of Virginia, entitled, "An act to reduce into one, the several acts, and parts of acts, to prevent unlawful gaming." It is, among other things, enacted

1.—2 Tidd's Pr. ch. 43, Error, p. 1096.

2.—*Vide* new order of court of the present term. *Ante*, Rule XXXII.

NOTE.—See note to *Martin v. Hunter's Lessee*, 1 Wheat. 304.

Wheat. 6.

U. S., Book 5.



and declared, that no person or persons shall buy, or sell, within the said commonwealth, any lottery, or part or share of a lottery ticket, except in such lottery or lotteries as may be authorized by the laws thereof; and the said James Nimmo, as attorney aforesaid, further giveth the court to understand and be informed that P. J. & M. J. Cohen, traders and partners, late of the parish of Elizabeth River, and **267\*** borough of Norfolk aforesaid, being evil-disposed persons, and totally regardless of the laws and statutes of the said commonwealth, since the first day of January, in the year of our Lord one thousand eight hundred and twenty, that is to say, on the first day of June, in that year, and within the said commonwealth of Virginia, to wit, at the parish of Elizabeth River, in the said borough of Norfolk, and within the jurisdiction of this court, did then and there unlawfully vend, sell, and deliver to a certain William H. Jennings, two half lottery tickets, and four quarter lottery tickets of the National Lottery, to be drawn in the city of Washington, that being a lottery not authorized by the laws of this commonwealth, to the evil example of all other persons in the like case offending, and against the form of the act of the General Assembly, in that case made and provided.

JAMES NIMMO, for the Commonwealth.

And at this same Quarterly Session Court, continued by adjournment, and held for the said borough of Norfolk, the second day of September, eighteen hundred and twenty, came, as well the attorney prosecuting for the commonwealth, in this court, as the defendants by their attorney, and the said defendants, for plea, say, that they are not guilty in manner and form, as in the information against them is alleged, and of this they put themselves upon the country, and the attorney for the commonwealth doth the same; whereupon a case **268\*** was agreed by them to be argued in lieu of a special verdict, and is in these words:

*Commonwealth against Cohens—case agreed.*

In this case, the following statement is admitted and agreed by the parties in lieu of a special verdict: That the defendants, on the first day of June, in the year of our Lord eighteen hundred and twenty, within the borough of Norfolk, in the commonwealth of Virginia, sold to William H. Jennings a lottery ticket, in the lottery called, and denominated the National Lottery, to be drawn in the city of Washington, within the District of Columbia.

That the General Assembly of the state of Virginia enacted a statute, or act of Assembly, which went into operation on the first day of January, in the year of our Lord 1820, and which is still unrepealed, in the words following:

No person, in order to raise money for himself or another, shall, publicly or privately, put up a lottery to be drawn or adventured for, or any prize or thing to be raffled or played for. And whosoever shall offend herein, shall forfeit the whole sum of money proposed to be raised by such lottery, raffling or playing, to be recovered by action of debt, in the name of anyone who shall sue for the same, or by indictment or information in the name of the commonwealth, in either case, for the use and

benefit of the literary fund. Nor shall any person or persons buy, or sell, within this commonwealth, any lottery ticket, or part or share of a lottery ticket, except in such lottery or lotteries as may be authorized by the laws thereof; and any person or persons [**\*269** offending herein, shall forfeit and pay, for every such offense, the sum of one hundred dollars, to be recovered and appropriated in manner last aforesaid.

That the Congress of the United States, enacted a statute on the 3d day of May, in the year of our Lord 1802, entitled, an act, &c., in the words and figures following:

*An Act to incorporate the inhabitants of the city of Washington, in the District of Columbia.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the inhabitants of the city of Washington be constituted a body politic and corporate, by the name of a Mayor and Council of the city of Washington, and by their corporate name may sue and be sued, implead and be impleaded, grant, receive, and do all other acts as natural persons, and may purchase and hold real, personal and mixed property, or dispose of the same for the benefit of the said city; and may have and use a city seal, which may be altered at pleasure. The city of Washington shall be divided into three divisions or wards, as now divided by the levy court for the county, for the purposes of assessment, but the number may be increased hereafter, as in the wisdom of the city council shall seem most conducive to the general interest and convenience.

SEC. 2. And be it further enacted, That the council of the city of Washington shall consist of twelve members, residents of the [**\*270** city, and upwards of twenty-five years of age, to be divided into two chambers; the first chamber to consist of seven members, and the second chamber of five members; the second chamber to be chosen from the whole number of councillors, elected by their joint ballot. The city council to be elected annually by ballot, in a general ticket, by the free white male inhabitants of full age, who have resided twelve months in the city, and paid taxes therein the year preceding the elections being held; the justices of the county of Washington, resident in the city, or any three of them, to preside as judges of election, with such associates as the council may from time to time appoint.

SEC. 3. And be it further enacted, That the first election of members of the city council, shall be held on the first Monday in June next, and in every year afterwards, at such place in each ward as the judges of the election may prescribe.

SEC. 4. And be it further enacted, That the polls shall be kept open from eight o'clock in the morning till seven o'clock in the evening, and no longer, for the reception of ballots. On the closing of the poll, the judges shall close and seal their ballot-boxes, and meet on the day following, in the presence of the marshal of the district, on the first election, and the council afterwards; when the seal shall be broken, and the votes counted; within three days after such election, they shall give notice to the persons having the greatest number of legal votes,

that they are duly elected, and shall make their return to the mayor of the city.

**271\***] \*SEC. 5. And be it further enacted, That the mayor of the city shall be appointed annually by the President of the United States; he must be a citizen of the United States, and a resident of the city prior to his appointment.

SEC. 6. And be it further enacted, That the city council shall hold their sessions in the city hall, or until such building is erected, in such place as the mayor may provide for that purpose, on the second Monday in June, in each year; but the mayor may convene them oftener, if the public good require their deliberations; three-fourths of the members of each council, may be a quorum to do business, but a smaller number may adjourn from day to day; they may compel the attendance of absent members in such manner, and under such penalties, as they may, by ordinance, provide; they shall appoint their respective presidents, who shall preside during their sessions, and shall vote on all questions where there is an equal division; they shall settle their rules of proceedings, appoint their own officers, regulate their respective fees, and remove them at pleasure; they shall judge of the elections, returns, and qualifications of their own members, and may, with the concurrence of three-fourths of the whole, expel any member for disorderly behavior, or malconduct in office, but not a second time for the same offense; they shall keep a journal of their proceedings, and enter the yeas and nays on any question, resolve or ordinance, at the request of any member, and their deliberations shall be public. The mayor shall appoint to all offices under the corporation. All ordi-  
**272\***] nances \*or acts passed by the city council, shall be sent to the mayor for his approbation, and when approved by him, shall then be obligatory as such. But, if the said mayor shall not approve of such ordinance or act, he shall return the same within five days, with his reasons in writing therefor; and if three-fourths of both branches of the city council, on reconsideration thereof, approve of the same, it shall be in force in like manner as if he had approved it, unless the city council, by their adjournment, prevent its return.

SEC. 7. And be it further enacted, That the corporation aforesaid shall have full power and authority to pass all by-laws and ordinances to prevent and remove nuisances; to prevent the introduction of contagious diseases within the city; to establish night watches or patrols, and erect lamps; to regulate the stationing, anchorage, and mooring of vessels; to provide for licensing and regulating auctions, retailers of liquors, hackney carriages, wagons, carts and drays, and pawn-brokers within the city; to restrain or prohibit gambling, and to provide for licensing, regulating, or restraining theatrical or other public amusements within the city; to regulate and establish markets; to erect and repair bridges; to keep in repair all necessary streets, avenues, drains and sewers, and to pass regulations necessary for the preservation of the same, agreeably to the plan of the said city; to provide for the safe keeping of the standard of weights and measures fixed by Congress, and for the regulation of all weights and measures used in the city; to provide  
**273\***] \*for the licensing and regulating the

sweeping of chimneys, and fixing the rates thereof; to establish and regulate fire wards and fire companies; to regulate and establish the size of bricks that are to be made and used in the city; to sink wells, and erect and repair pumps in the streets; to impose and appropriate fines, penalties and forfeitures for breach of their ordinances; to lay and collect taxes; to enact by-laws for the prevention and extinguishment of fires; and to pass all ordinances necessary to give effect and operation to all the powers vested in the corporation of the city of Washington; Provided, That the by-laws, or ordinances of the said corporation, shall be in no wise obligatory upon the persons of non-residents of the said city, unless in cases of intentional violation of the by-laws or ordinances previously promulgated. All the fines, penalties and forfeitures imposed by the corporation of the city of Washington, if not exceeding twenty dollars, shall be recovered before a single magistrate, as small debts are by law recoverable; and if such fines, penalties and forfeitures, exceed the sum of twenty dollars, the same shall be recovered by action of debt, in the District Court of Columbia, for the county of Washington, in the name of the corporation, and for the use of the city of Washington.

SEC. 8. And be it further enacted, That the person or persons appointed to collect any tax imposed in virtue of the powers granted by this act, shall have authority to collect the same, by distress and sale of the goods and chattels of the person chargeable therewith; no sale shall be made, unless ten days' \*previous [**274** notice thereof be given; no law shall be passed by the city council subjecting vacant or unimproved city lots, or parts of lots, to be sold for taxes.

SEC. 9. And be it further enacted, That the city council shall provide for the support of the poor, infirm and diseased of the city.

SEC. 10. Provided always, and be it further enacted, That no tax shall be imposed by the city council on real property in the said city, at any higher rate than three-quarters of one per centum, on the assessment valuation of such property.

SEC. 11. And be it further enacted, That this act shall be in force for two years from the passing thereof, and from thence to the end of the next session of Congress thereafter, and no longer.

And another act, on the 23d day of February, 1804, entitled, "An act supplementary to an act, entitled, an act to incorporate the inhabitants of the city of Washington, in the District of Columbia."

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the act, entitled, An act to incorporate the inhabitants of the city of Washington, in the District of Columbia, except so much of the same as is consistent with the provisions of this act, be, and the same is hereby continued in force, for and during the term of fifteen years from the end of the next session of Congress.

SEC. 12. And be it further enacted, That the council of the city of Washington, from and after the \*period for which the members [**275** of the present council have been elected, shall



consist of two chambers, each of which shall be composed of nine members, to be chosen by distinct ballots, according to the directions of the act to which this is a supplement; a majority of each chamber shall constitute a quorum to do business. In case vacancies shall occur in the council, the chamber in which the same may happen, shall supply the same by an election by ballot, from the three persons next highest on the list to those elected at the preceding election, and a majority of the whole number of the chamber in which such vacancy may happen, shall be necessary to make an election.

SEC. 13. And be it further enacted, That the council shall have power to establish and regulate the inspection of flour, tobacco, and salted provisions, the gauging of casks and liquors, the storage of gunpowder, and all naval and military stores, not the property of the United States, to regulate the weight and quality of bread, to tax and license hawkers and peddlers, to restrain or prohibit tippling houses, lotteries, and all kinds of gaming; to superintend the health of the city; to preserve the navigation of the Potomac and Anacostia rivers adjoining the city, to erect, repair, and regulate public wharves, and to deepen docks and basins; to provide for the establishment and superintendence of public schools; to license and regulate, exclusively, hackney coaches, ordinary keepers, retailers and ferries; to provide for the appointment of inspectors, constables, and such other officers as may be necessary to execute **276\*** the \*laws of the corporation, and to give such compensation to the mayor of the city as they may deem fit.

SEC. 14. And be it further enacted, That the Levy Court of the county of Washington shall not hereafter possess the power of imposing any tax on the inhabitants of the city of Washington."

That the Congress of the United States, on the 4th day of May, in the year of our Lord 1812, enacted another statute, entitled, "An act further to amend the charter of the city of Washington."

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That from and after the first Monday in June next, the corporation of the city of Washington shall be composed of a mayor, a board of aldermen, and a board of common council, to be elected by ballot, as hereafter directed. The board of aldermen shall consist of eight members, to be elected for two years, two to be residents of, and chosen from, each ward, by the qualified voters therein; and the board of common council shall consist of twelve members, to be elected for one year; three to be residents of, and chosen from, each ward, in manner aforesaid; and each board shall meet at the council chamber on the second Monday in June next (for the despatch of business), at ten o'clock in the morning, and on the same day, and at the same hour, annually, thereafter. A majority of each board shall be necessary to form a quorum to do business, but a less number may adjourn from day to day. The board of aldermen, im- **277\*** mediately after they shall \*have assembled in consequence of the first election, shall divide themselves by lot into two classes; the

seats of the first class shall be vacated at the expiration of one year, and the seats of the second class shall be vacated at the expiration of two years, so that one-half may be chosen every year. Each board shall appoint its own president from among its own members, who shall preside during the sessions of the board, and shall have a casting vote on all questions where there is an equal division; provided such equality shall not have been occasioned by his previous vote.

SEC. 2. And be it further enacted, That no person shall be eligible to a seat in the board of aldermen or board of common council, unless he shall be more than twenty-five years of age, a free white male citizen of the United States, and shall have been a resident of the city of Washington one whole year next preceding the day of the election; and shall, at the time of his election, be a resident of the ward for which he shall be elected, and possessed of a freehold estate in the said city of Washington, and shall have been assessed two months preceding the day of election. And every free white male citizen of lawful age, who shall have resided in the city of Washington for the space of one year next preceding the day of election, and shall be a resident of the ward in which he shall offer to vote, and who shall have been assessed on the books of the corporation, not less than two months prior to the day of election, shall be qualified to vote for members to serve in the said board of aldermen and board of common \*council, and no other person whatever [**\*278** shall exercise the right of suffrage at such election.

SEC. 3. And be it further enacted, That the present mayor of the city of Washington shall be, and continue such, until the second Monday in June next, on which day, and on the second Monday in June annually thereafter, the mayor of the said city shall be elected by ballot of the board of aldermen and board of common council, in joint meeting, and a majority of the votes of all the members of both boards shall be necessary to a choice; and if there should be an equality of votes between two persons after the third ballot, the two Houses shall determine by lot. He shall, before he enters upon the duties of his office, take an oath or affirmation in the presence of both boards, "lawfully to execute the duties of his office to the best of his skill and judgment, without favor or partiality." He shall, *ex officio*, have, and exercise all the powers, authority, and jurisdiction of a justice of the peace, for the county of Washington, within the said county. He shall nominate, and with the consent of a majority of the members of the board of aldermen, appoint to all offices under the corporation (except the commissioners of elections), and every such officer shall be removed from office on the concurrent remonstrance of a majority of the two boards. He shall see that the laws of the corporation be duly executed, and shall report the negligence or misconduct of any officer to the two boards. He shall appoint proper persons to fill up all vacancies during the recess of the board of aldermen, to hold such \*appointment until the end [**\*279** of the then ensuing session. He shall have power to convene the two boards, when, in his opinion, the good of the community may

require it, and he shall lay before them from time to time, in writing, such alterations in the laws of the corporation as he shall deem necessary and proper, and shall receive for his services annually, a just and reasonable compensation, to be allowed and fixed by the two boards, which shall neither be increased or diminished during the period for which he shall have been elected. Any person shall be eligible to the office of mayor, who is a free white male citizen of the United States, who shall have attained to the age of thirty years, and who shall be a *bona fide* owner of a freehold estate in the said city, and shall have been a resident in the said city two years immediately preceding his election, and no other person shall be eligible to the said office. In case of the refusal of any person to accept the office of mayor, upon his election thereto, or of his death, resignation, inability or removal from the city, the said two boards shall elect another in his place, to serve the remainder of the year.

SEC. 4. And be it further enacted, That the first election for members of the board of aldermen, and board of common council, shall be held on the first Monday in June next, and on the first Monday in June annually thereafter. The first election to be held by three commissioners, to be appointed in each ward by the mayor of the city, and at such place in each ward as he may direct; and all subsequent elections shall be held by a like number **280\*** of commissioners, to be appointed in each ward by the two boards, in joint meeting, which several appointments, except the first, shall be at least ten days previous to the day of each election. And it shall be the duty of the mayor for the first election, and of the commissioners for all subsequent elections, to give at least five days' public notice of the place in each ward where such elections are to be held. The said commissioners shall, before they receive any ballot, severally take the following oath or affirmation, to be administered by the mayor of the city, or any justice of the peace for the county of Washington: "I, A. B., do solemnly swear or affirm (as the case may be), that I will truly and faithfully receive, and return the votes of such persons as are by law entitled to vote for members of the board of aldermen, and board of common council, in ward No.—, according to the best of my judgment and understanding, and that I will not, knowingly, receive or return the vote of any person who is not legally entitled to the same, so help me God." The polls shall be opened at ten o'clock in the morning, and be closed at seven o'clock in the evening, of the same day. Immediately on closing the polls, the commissioners of each ward, or a majority of them, shall count the ballots, and make out under their hands and seals a correct return of the two persons for the first election, and of the one person for all subsequent elections, having the greatest number of legal votes, together with the number of votes given to each, as members of the board of aldermen; and of the three persons having the greatest number of legal **281\*** votes, together with the number of votes given to each, as members of the board of common council. And the two persons at the first election, and the one person at all subsequent elections, having the greatest number

of legal votes for the board of aldermen; and the three persons having the greatest number of legal votes for the board of common council, shall be duly elected; and in all cases of an equality of votes, the commissioners shall decide by lot. The said returns shall be delivered to the mayor of the city, on the succeeding day, who shall cause the same to be published in some newspaper printed in the city of Washington. A duplicate return, together with a list of the persons who voted at such election, shall also be made by the said commissioners, to the register of the city; on the day succeeding the election, who shall preserve and record the same, and shall, within two days thereafter, notify the several persons so returned, of their election; and each board shall judge of the legality of the elections, returns and qualifications of its own members, and shall supply vacancies in its own body, by causing elections to be made to fill the same, in the ward, and for the board in which such vacancies shall happen, giving at least five days' notice previous thereto; and each board shall have full power to pass all rules necessary and requisite to enable itself to come to a just decision in cases of a contested election of its own members; and the several members of each board shall, before entering upon the duties of their office, take the following oath or affirmation: \***"I do swear (or solemnly, sincerely, [\*282 and truly affirm and declare, as the case may be), that I will faithfully execute the office of** to the best of my knowledge and ability," which oath or affirmation shall be administered by the mayor, or some justice of the peace, for the county of Washington.

SEC. 5. And be it further enacted, That in addition to the powers heretofore granted to the corporation of the city of Washington, by an act, entitled, "An act to incorporate the inhabitants of the city of Washington, in the District of Columbia," and an act, entitled, "An act, supplementary to an act, entitled, an act to incorporate the inhabitants of the city of Washington, in the District of Columbia," the said corporation shall have power to lay taxes on particular wards, parts, or sections of the city, for their particular local improvements.

That after providing for all objects of a general nature, the taxes raised on the assessable property in each ward, shall be expended therein, and in no other; in regulating, filling up, and repairing of streets and avenues, building of bridges, sinking of wells, erecting pumps, and keeping them in repair; in conveying water in pumps, and in the preservation of springs; in erecting and repairing wharves; in providing fire engines and other apparatus for the extinction of fires, and for other local improvements and purposes, in such manner as the said board of aldermen and board of common council shall provide; but the sums raised for the support of the poor, \*aged and infirm, **[\*283 shall be a charge on each ward in proportion to its population or taxation, as the two boards shall decide. That whenever the proprietors of two-thirds of the inhabited houses, fronting on both sides of a street, or part of a street, shall by petition to the two branches, express the desire of improving the same, by laying the curb-stone of the foot pavement, and paving the**



gutters or carriageway thereof, or otherwise improving said street, agreeably to its graduation, the said corporation shall have power to cause to be done at any expense, not exceeding two dollars and fifty cents per front foot, of the lots fronting on such improved street or part of a street, and charge the same to the owners of the lots fronting on said street, or part of a street, in due proportion; and also on a like petition to provide for erecting lamps for lighting any street or part of a street, and to defray the expense thereof by a tax on the proprietors or inhabitants of such houses, in proportion to their rental or valuation, as the two boards shall decide.

SEC. 6. And be it further enacted, That the said corporation shall have full power and authority to erect and establish hospitals or pest-houses, work-houses, houses of correction, penitentiary, and other public buildings for the use of the city, and to lay and collect taxes for the defraying the expenses thereof; to regulate party and other fences, and to determine by whom the same shall be made and kept in repair; to lay open streets, avenues, lanes and alleys, and to regulate or prohibit all inclosures thereof, and to occupy and improve for public **284\*** purposes, by \*and with the consent of the President of the United States, any part of the public and open spaces or squares in said city, not interfering with any private rights; to regulate the measurement of, and weight, by which all articles brought into the city for sale shall be disposed of; to provide for the appointment of appraisers, and measurers of builders' work and materials, and also of wood, coal, grain and lumber; to restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes and mulattoes, and to punish such slaves by whipping, not exceeding forty stripes, or by imprisonment not exceeding six calendar months, for any one offense; and to punish such free negroes and mulattoes for such offenses, by fixed penalties, not exceeding twenty dollars for any one offense; and in case of inability of any such free negro or mulatto to pay and satisfy any such penalty and costs thereon, to cause such free negro or mulatto to be confined to labor for such reasonable time, not exceeding six calendar months, for any one offense, as may be deemed equivalent to such penalty and costs; to cause all vagrants, idle or disorderly persons, all persons of evil life or ill-fame, and all such as have no visible means of support, or are likely to become chargeable to the city as paupers, or are found begging or drunk in or about the streets or loitering in or about tippling houses, or who can show no reasonable cause of business or employment in the city; and all suspicious persons, and all who have no fixed place of residence, or cannot give a good account of themselves, all eaves-droppers and night-walkers, all who **285\*** are guilty of open profanity, or grossly indecent language or behaviour publicly in the streets, all public prostitutes, and such as lead a notoriously lewd or lascivious course of life, and all such as keep public gaming tables, or gaming houses, to give security for their good behavior for a reasonable time, and to indemnify the city against any charge for their support, and in case of their refusal or inability to give such security, to cause them to be

confined to labor for a limited time, not exceeding one year at a time, unless such security should be sooner given. But if they shall afterwards be found again offending, such security may be again required, and for want thereof, the like proceedings may again be had, from time to time, as often as may be necessary; to prescribe the terms and conditions upon which free negroes and mulattoes, and others who can show no visible means of support, may reside in the city; to cause the avenues, streets, lanes and alleys to be kept clean, and to appoint officers for that purpose. To authorize the drawing of lotteries for effecting any important improvement in the city, which the ordinary funds or revenue thereof will not accomplish. Provided, That the amount to be raised in each year shall not exceed the sum of ten thousand dollars. And provided also, that the object for which the money is intended to be raised, shall be first submitted to the President of the United States, and shall be approved of by him. To take care of, preserve and regulate the several burying-grounds within the city; to provide for registering of births, deaths and marriages; to cause abstracts or minutes \*of all transfers of real prop- **[\*286** erty, both freehold and leasehold, to be lodged in the registry of the city, at stated periods; to authorize night watches and patrols, and the taking up and confining by them, in the night time, of all suspected persons; to punish by law corporally any servant or slave guilty of a breach of any of their by-laws or ordinances, unless the owner or holder of such servant or slave shall pay the fine annexed to the offense; and to pass all laws which shall be deemed necessary and proper for carrying into execution the foregoing powers, and all other powers vested in the corporation, or any of its officers, either by this act, or any former act.

SEC. 7. And be it further enacted, That the marshal of the District of Columbia shall receive, and safely keep, within the jail for Washington county, at the expense of the city, all persons committed thereto under the sixth section of this act, until other arrangements be made by the corporation for the confinement of offenders, within the provisions of the said section; and in all cases where suit shall be brought before a justice of the peace, for the recovery of any fine or penalty arising or incurred for a breach of any by-law or ordinance of the corporation, upon a return of "*nulla bona*" to any *fiery facias* issued against the property of the defendant or defendants, it shall be the duty of the clerk of the Circuit Court for the county of Washington, when required, to issue a writ of *capias ad satisfaciendum* against every such defendant, returnable to the next Circuit Court for the county of Washington thereafter, \*and which shall be proceeded **[\*287** on as in other writs of the like kind.

SEC. 8. And be it further enacted, That unimproved lots in the city of Washington, on which two years' taxes remain due and unpaid, or so much thereof as may be necessary to pay such taxes, may be sold at public sale for such taxes due thereon. Provided, that public notice be given of the time and place of sale, by advertising in some newspaper printed in the city of Washington, at least six months, where the property belongs to persons residing out of

the United States; three months where the property belongs to persons residing in the United States, but without the limits of the District of Columbia; and six weeks where the property belongs to persons residing within the District of Columbia or city of Washington; in which notice shall be stated the number of the lot or lots, the number of the square or squares, the name of the person or persons to whom the same may have been assessed, and also the amount of taxes due thereon. And provided, also, that the purchaser shall not be obliged to pay at the time of such sale, more than the taxes due, and the expenses of sale; and that, if within two years from the day of such sale, the proprietor or proprietors of such lot or lots, or his or their heirs, representatives, or agents, shall repay to such purchaser the moneys paid for the taxes and expenses as aforesaid, together with ten per centum per annum as interest thereon, or make a tender of the same, he shall be re-instated in his original right and title; but if no such payment or tender be made **288\***] \*within two years next after the said sale, then the purchaser shall pay the balance of the purchase money of such lot or lots into the city treasury, where it shall remain subject to the order of the original proprietor or proprietors, his or their heirs, or legal representatives; and the purchaser shall receive a title in fee-simple to the said lot or lots, under the hand of the mayor, and seal of the corporation, which shall be deemed good and valid in law and equity.

SEC. 9. And be it further enacted, That the said corporation shall, in future, be named and styled, "the mayor, aldermen, and common council of the city of Washington;" and that if there shall have been a non-election or informality of a city council, on the first Monday in June last, it shall not be taken, construed, or adjudged, in any manner, to have operated as a dissolution of the said corporation, or to affect any of its rights, privileges, or laws passed previous to the second Monday in June last, but the same are hereby declared to exist in full force.

SEC. 10. And be it further enacted, That the corporation shall, from time to time, cause the several wards of the city to be so located as to give, as nearly as may be, an equal number of votes to each ward; and it shall be the duty of the register of the city, or such officer as the corporation may hereafter appoint, to furnish the commissioners of election for each ward, on the first Monday in June, annually, previous to the opening of the polls, a list of the persons having a right to vote, agreeably to the provisions of the second section of this act.

**289\***] \*SEC. 11. And it be further enacted, That so much of any former act as shall be repugnant to the provisions of this act, be, and the same is hereby repealed.

Which statutes are still in force and unrepealed. That the lottery, denominated the national lottery, before mentioned, the ticket of which was sold by the defendants as aforesaid, was duly created by the said corporation of Washington, and the drawing thereof, and the sale of the said ticket, was duly authorized by the said corporation, for the objects and purposes, and in the mode directed by the said statute of the Congress of the United States.

If, upon this case, the court shall be of opinion, that the acts of Congress before mentioned were valid, and on the true construction of these acts, the lottery ticket sold by the said defendants as aforesaid, might lawfully be sold within the state of Virginia, notwithstanding the act or statute of the general assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants. But if the court should be of opinion, that the statute or act of the general assembly of the state of Virginia, prohibiting such sale, is valid, notwithstanding the said acts of Congress, then judgment to be entered, that the defendants are guilty, and that the commonwealth recover against them one hundred dollars and costs.

*Taylor*, for defendants.

And thereupon the matters of law arising upon the said case agreed being argued, it seems to the court here, that the law is for the commonwealth, and \*that the defend- **[\*290** ants are guilty in manner and form, as in the information against them is alleged, and they do assess their fine to one hundred dollars besides the costs. Therefore, it is considered by the court, that the commonwealth recover against the said defendants, to the use of the president and directors of the literary fund, one hundred dollars, the fine by the court aforesaid, in manner aforesaid assessed, and the costs of this prosecution, and the said defendants may be taken, &c.

From which judgment the defendants, by their counsel, prayed an appeal to the next Superior Court of law of Norfolk county, which was refused by the court, inasmuch as cases of this sort are not subject to revision by any other court of the commonwealth. Commonwealth's costs, \$31.50.

*Mr. Barbour*, for the defendant in error, moved to dismiss the writ of error in this case, and stated three grounds upon which he should insist that the court had not jurisdiction: (1) Because of the subject-matter of the controversy, without reference to the parties. (2) That considering the character of one of the parties, if the court could have jurisdiction at all, it must be original, and not appellate. (3) And, finally, that it can take neither original nor appellate jurisdiction.

1. As to the first point, it is conceded by all, that the federal government is one of limited powers. This distinguishing trait equally characterizes all its departments; it is with the judicial department only that the present inquiry is connected. It is in the \*2d section **[\*291** of the 3d article of the constitution that we find an enumeration of the objects to which the judicial power of the Union extends. That part of it which relates to the present discussion, declares, that "the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." It is not pretended, that any treaty has any sort of relation to the present case; before, then, this court can take jurisdiction, it must be shown that this is a case arising either under the constitution, or a law of the United States. I shall endeavor to prove that it does not belong to either description. These two classes of cases are obviously put in contradistinction to each



other; and there will be no difficulty in showing to the court the difference in their character. The constitution contains two different kinds of provisions; the one (if I may use the expression), self-executed, or capable of self-execution; the other, only executory, and requiring legislative enactment to give them operation; thus, the 2d section of the 4th article, which declares, that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;" the 10th section of the 1st article, which prohibits any state from making anything but gold and silver coin, a tender in payment of debts; from passing any law "impairing the obligation of contracts;" and the prohibition to Congress, in the 9th section, and to the states in the 10th section of the same article, to pass "any bill of attainder, or *ex post facto* law," \*are all examples of the self-executed provisions of the constitution; by which, I mean to say that the constitution, in these instances, is, *per se*, operative, without the aid of legislation. On the contrary, the various provisions of the 8th section of the same article, such, for example, "as the power to establish an uniform system of naturalization, and uniform laws on the subject of bankruptcy," are executory only; that is, without an act of legislation, they have no operative effect.

The cases, then, arising under the constitution, are those which arise under its self-executed provisions; and those arising under the laws of the United States, are those which occur under some law, passed in virtue of the executory provisions of the constitution. If this idea be correct, then this is not a case arising under the constitution; and it does not correspond with the other part of the description, that is, it does not arise under a law of the United States. In the first place, this court, in the case of *Hepburn v. Elzy*,<sup>1</sup> decided, that the District of Columbia was not a state, within the meaning of the constitution, and that, therefore, a citizen of that district could not sustain an action against a citizen of Virginia, in the Circuit Court of that state. Now, it would sound curiously, to call a law passed for a district, not itself exalted to the dignity of a state, a law of the United States. It would seem more strange to call a law passed by the corporation of Washington, for the local purposes of Washington, \*a law of the United States, and yet such is the character of the law under which this case arises; for the act of Congress did not itself create the lottery, but authorized the corporation of Washington to do it.

As to this sub-legislation, legislative power is a trust which cannot be transferred. *Delegatus non potest delegare*. If this can be exercised by substitution, other legislative powers can also. I would then inquire, whether in execution of the power "to lay and collect taxes," "to declare war," &c., Congress could authorize the state legislatures to do these things. It is a misnomer, to call by the name of a law of the United States, any act passed for the District of Columbia, though enacted by Congress, without calling in the aid of a corporation. It has been well observed by a former member of

this court, that every citizen in the United States sustains a two-fold political character, one in relation to the federal, the other in relation to the state governments. To put the proposition in other words, it may be stated thus: A two-fold system of legislation pervades the United States; the one of which I will call federal, the other municipal. The first belongs by the constitution of the United States to Congress, and consists of the powers of war, peace, commerce, negotiation, and those general powers which make up our external relations, together with a few powers of an internal kind, which require uniformity in their operation; the second belongs to the states, and consists of whatever is not included in the first, embracing particularly everything connected with the internal police and economy of the several states. If this system knew no exception in its operation, the present question would never have arisen; for no man would ever dream of calling a law of Virginia or Maryland, a law of the United States. But there are certain portions of territory within the United States, of which the District of Columbia is one, in which there is no state government to act; in relation to these, Congress, by the constitution, exercises not only federal, but municipal legislation also; and as the whole difficulty in this case has arisen out of this blending together of two different kinds of legislative power, so, that difficulty will be removed by a careful attention to the difference in the nature and character of these powers, and the extent of their operation respectively. Whenever a question arises, whether a law passed by Congress is a law of the United States, we have only to inquire whether it is constitutionally passed in execution of any of the federal powers; if it be, it is properly a law of the United States; since the federal powers are co-extensive with the limits of the United States, and this, though the particular act may be confined to certain persons, places or things. Thus, a law establishing federal courts in a particular state, is a law of the United States; for though its immediate operation is upon one state, yet it is in execution of a power co-extensive with the United States; but if a law, though passed by Congress, be passed in execution of a municipal power, as a law to pave the streets of Washington, then it cannot, in any propriety of language, \*be called a law of the United States. It is an axiom in politics, that legislative power has no operation, beyond the territorial limits under its authority. I do not now speak of the doctrine of the *lex loci*; of that comity, by which the different states of the civilized world receive the laws of others, as governing, in certain cases of contract, or questions of a civil nature. I speak of the intrinsic energy of the legislative power, its operation *per se*.

If this principle be true, is there anything in this case to impair its force? It is admitted on all hands, that this law was passed in virtue of the power given by the constitution to exercise exclusive legislation, over such district, not exceeding ten miles square, as should become the seat of the federal government. If we look into the history of the country, the debates of the conventions, or the declarations of the Federalist, we shall alike arrive at the conclusion, that this power was given in consequence of an in-

1.—2 Cranch, 445.

cident which had occurred in Philadelphia, and the necessity which thence seemed to result, of Congress deliberating uninterrupted and unawed. The motive, then, for granting this power, would not lead to an extension of it; still less will the terms; for, they are as restrictive as could by possibility be used. The district shall not exceed ten miles square, and as was argued in the convention of Virginia, may not exceed one mile. So far from the principle being impaired, then, it is greatly strengthened by the language of this provision. See to what consequences we should be led by the doctrine, that because this lottery was authorized by **296\*** Congress, therefore the tickets \*might be sold in any state, against its laws, with impunity. The same charter authorizes the corporation of Washington to grant licenses to auctioneers and retailers of spirituous liquors. Now, upon the doctrines contended for, what will hinder the corporation from granting licenses to persons, to vend goods and liquors in Virginia, by a corporation license, contrary to the laws of Virginia? and thus greatly impair the revenue which the state raises from these licenses; as it is said, that a saleable quality is of the essence, and constitutes the only value of a lottery ticket, and that therefore it is not competent to any state to abridge the value of that, which was rightfully created by the legislature of the Union? Would not the same reasoning justify the holders of these corporation licenses, equally to trample upon the laws of the state; lest, for want of a market, their merchandise and liquors might not be sold, and thus the value of their license diminished. These are cases in which the revenue of a state would be impaired, as well as the laws for the protection of its morals. Such is the law of Virginia, prohibiting the use of billiard tables. If Congress should authorize licenses to be issued, by the corporation of Washington, for using them, and if this law have an operation beyond the territorial limits of the district, then has Virginia lost all power of regulating the conduct of her own citizens.

The solution of the whole difficulty lies in this: That though the laws of Congress, when passed in execution of a federal power, extend over the Union, and being laws of the United **297\*** States, are a part of \*the supreme law of the land, yet, a law passed like the one in question, in execution of the power of municipal legislation, extends only so far as the power under which it was passed—that is, to the boundaries of the district; that, therefore, it is no law of the United States, and consequently not a part of the supreme law of the land. Nor is there anything novel in the idea of two powers residing in the same body, at the same time, and over the same subject, of a different kind. The idea is familiarly illustrated by cases of ordinary occurrence in the judiciary. For the same trespass, an action, or indictment, may be brought before the same court, and a different judgment pronounced, as one or the other mode is pursued. So the same court has frequently common law and chancery jurisdiction, and pronounces a different judgment in relation to the same subject, as they are exercising the one or the other jurisdiction.

Let us look further at the consequences of calling the laws of the district, laws of the

United States. By the sixth article of the constitution, laws of the United States, made in pursuance of the constitution, are declared a part of the supreme law of the land, and the judges in every state shall be bound thereby, anything in the laws of their state to the contrary notwithstanding. If, then, laws of the district be laws of the United States, within the meaning of the constitution, it will follow, that they may be carried to the extent of an interference with every department of state legislation; and whenever they shall so interfere, they are to be considered \*of paramount [**\*298** authority. Suppose the law of Virginia to declare a deed for land void against a purchaser for valuable consideration, without notice, unless recorded upon the party's acknowledgment, or the evidence of three witnesses. Suppose a law of the district to dispense with record, or to be satisfied with two witnesses. If one citizen should convey to another citizen of the district, land lying in Virginia, in conformity with the district law, upon the principle now contended for, the party must recover, in the teeth of the law of Virginia. It will be admitted, that a law passed, like the one in question, by one state, might be repelled by another; it will, also, be admitted, that if Congress had (as some think they have a right to do, but in which I do not concur) established here a local legislature, which had passed the law in question, its effects might have been repelled from the states by penal sanctions.

But if it be said, that as the dominion over the district flows from the same source with every other power possessed by the government of the Union, as it is executed by the same Congress, as it was created for the common good, and for universal purposes, that it must be of equal obligation throughout the Union in its effects, with any power known to the constitution; from whence it is inferred, that the law in question can encounter no geographical impediments, but that its march is through the Union. The answer is, that the federal powers of Congress, in their execution, encounter no geographical impediments, because no limits, short of the boundaries \*of the Union, [**\*299** are prescribed to them; but the legislative power over the district, in its execution, does encounter geographical impediments, because the limits of the district are distinctly prescribed, as the bound of its extent, and as an insurmountable barrier to its further march.

It may be said, too, that this case bears no resemblance to that of one state repelling, by penal sanctions, the effects of the laws of another; because it is said, one state is no party to the laws of another; whereas here, the law is its own law, as being represented in Congress, and thereby contributing to its passage, and capable in part of effecting its repeal. It will be seen at once, that this principle would prove too much, and, therefore, that it cannot be a sound one; for if the states are to acquiesce in this instance, because they are represented in Congress, and have, therefore, an agency in making and repealing laws, the same reasoning would justify Congress in legislating beyond their delegated powers; for example, prescribing a general course of descents. It is obvious, that they might contribute as much to the passage and repeal of this law, as any



other, and yet this ground will not be attempted to be sustained. If, then, they are not bound, because of their representation in Congress, to acquiesce in the assumption of a power not granted, they are surely as little bound, upon that ground, to permit a power, confined to ten miles square, to extend its operation with the limits of the United States.

If, then, the law in question is not a law of the United States, in the sense of that expression in the \*constitution, this is not a case arising under the law of the United States, and, consequently, the jurisdiction of this court fails as to the subject-matter.

2. My second proposition is, that if this court could entertain jurisdiction of the case at all, it must be original, and not appellate jurisdiction. This has reference to the character of one of the parties in the present contest. The constitution of the United States, after having carved out the whole mass of jurisdiction which it gives to the federal judiciary, and enumerated its several objects, proceeds in the second clause of the second section of the third article to distribute that jurisdiction amongst the several courts. To the Supreme Court, it gives original jurisdiction in two classes of cases, to wit, "in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party;" in all the other cases to which the judicial power of the United States extends, it gives the Supreme Court appellate jurisdiction. This court, in the case of *Marbury v. Madison*,<sup>1</sup> thus expresses itself in relation to this clause of the constitution: "If Congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction, where the constitution has declared their jurisdiction shall be appellate, the distribution of jurisdiction made in the constitution, is form without substance." Again, the court says, "the plain import of **301\*** the words seems to be, that in one \*class of cases, its jurisdiction is original, not appellate; in the other, it is appellate, not original;" and accordingly, in that case, which was an application for a *mandamus* to the then Secretary of State, to issue commissions to certain justices of the peace in the District of Columbia, the court, after distinctly admitting that the parties had a right, yet refused to grant the *mandamus*, upon the ground that it would be an exercise of original jurisdiction; that not being one of the cases, in which that kind of jurisdiction was given them by the constitution, it was not competent to Congress to give it.

It appears, then, from the constitution, that where a state is a party, this court has original jurisdiction; it appears from the opinion of this court just quoted, that it excludes appellate jurisdiction. But a state is a party to the present case; it is a judgment for a penalty inflicted for the violation of a public law; the prosecution commenced by a presentment of a grand jury, carried on by an information filed by the attorney for the commonwealth, and the judgment rendered in the name of the commonwealth; and the case has come before this court by a writ of error, which is surely appellate jurisdiction; if, then, when a state is a

party, this court have original jurisdiction; if the grant of original, exclude appellate jurisdiction; if, as in this case, a state be a party; and if the jurisdiction now claimed is clearly appellate, then it follows, as an inevitable conclusion, that in this case this court cannot take jurisdiction in this way, if they could take it at all.

\*3. My last proposition is, that con- [**302** sidering the nature of this case, and that a state is a party, the judicial power of the United States does not extend to the case, and that, therefore, this court cannot take jurisdiction at all. This is a criminal case, both upon principle and authority. A crime is defined to be an act committed or omitted in violation of some public law commanding or forbidding it. The offense in this case is one of commission. A prosecution in the name of a state, by information, as this has been shown to be, to inflict a punishment upon this offense, is, therefore, a prosecution for a crime; in other words, a criminal case. Upon authority, too, penal actions are called in the books criminal actions. But if it be a criminal case, it is conceded, that the courts of the United States cannot take original jurisdiction over it, inasmuch as that right fully belongs to the courts of the state whose laws have been violated; and that jurisdiction having once rightfully attached, they have a right to proceed to judgment; but if they have no original jurisdiction, I have shown, in the discussion of the second point, that they cannot have appellate jurisdiction, and it consequently follows, that they cannot have jurisdiction at all.

I will now endeavor to show, from general principles, in connection with the fair construction of the third article of the constitution, that without reference to the particular character of the case, whether as criminal or civil, the judicial power of the United States does not extend to it, on account of the character of one of the parties: in other words, \*because [**303** one of the parties is a state. It is an axiom in politics, that a sovereign and independent state is not liable to the suit of any individual, nor amenable to any judicial power, without its own consent. All the states of this Union were sovereign and independent, before they became parties to the federal compact; hence, I infer, that the judicial power of the United States would not have extended to the states, if it had not been so extended to them, *eo nomine*, upon the face of the constitution. But if it can reach them only because it is expressly given in relation to them, then it can only reach them to the extent to which it is given. By the original text of the constitution, the judicial power of the Union was extended to the following cases, in which states were parties, to wit, to controversies between two or more states, between a state and citizens of another state, and between a state and foreign states, citizens and subjects. The case of a contest between a state and one of its own citizens, is not included in this enumeration; and, consequently, if the principle which I have advanced be a sound one, the judicial power of the United States does not extend to it; but the uniform decision of this court has been, that if a party claim to be a citizen of another state, it must appear upon the record. As that does not ap-

1.—1 Cranch, 174.

pear upon the record in this case, I am authorized to say, that the plaintiffs in error are citizens of Virginia; then it is the simple case, of a contest between a state and one of its own citizens, which does not fall within the pale of federal judicial power.

**304\*** It is said, however, that the judicial power is declared, by the constitution, to extend to all cases in law or equity, arising under this constitution, the laws of the United States, and treaties made, &c.; and that by reason of the expression "all cases," where the question is once mentioned in the constitution, the federal judicial power attaches upon the case on account of the subject-matter, without reference to the parties. Notwithstanding the latitude of this expression, it will be seen upon inquiry, that in the nature of things, there must be some limitation imposed upon this provision, which the gentlemen seem to consider unlimited. In the first place there are questions arising, or which might arise under the constitution, which the forms of the constitution do not submit to judicial cognizance. Suppose, for example a state were to grant a title of nobility, how could that be brought before a judicial tribunal, so as to render any effectual judgment? If it were an office of profit, it might, perhaps, be said, an information in the nature of a *quo warranto* would lie; but I ask whether that would lie, in the case which I have stated, or whether an effectual judgment could be rendered? It is a title, a name which would still remain, after your judgment had denounced it as unconstitutional. Where a *quo warranto* lies, in relation to an office, the judgment of ouster is followed by practical and effectual consequences. Again, suppose a state should keep troops or ships of war, in time of peace, or should engage in war, when neither actually invaded, nor in imminent danger. Here would **305\*** be alarming violations of the constitution, assailing too directly the federal powers; it would be a most serious question arising under the constitution, and yet clearly such a case as this does not belong to the judicial tribunal.

If it be said that the opposite counsel mean all cases in their nature of a judicial character, still I shall be able to show that broad as this expression is, it does not reach all these. It will be remembered by the court, that the words are, not all questions, but all cases. Although, therefore, a question may arise, yet before there can be a case, there must be parties over whom the court can take jurisdiction; and if there be no such parties, the court cannot act upon the subject, though the question may arise, though it may be clearly of a judicial nature, and though there may be the clearest violation of the constitution. By the 11th article of the amendments to the constitution, it is declared, that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state." Now, suppose that a state should, without the consent of Congress, lay a duty on tonnage, which should be paid by a citizen of another state; suppose, too, that a state should cause the lands of a British subject to be escheated, contrary to the ninth article of the treaty of 1794, upon the ground

of alienage; or debts due to a British subject from individuals of the United States, or money or shares belonging to him, in the public funds or banks, to be confiscated, contrary to the \*tenth article of the same treaty, and [**306** deposit the proceeds in the public chest. It will be agreed on all hands, that the first is a palpable violation of the federal constitution, and the two others as palpable violations of the solemn stipulations of a treaty; and that, therefore, the first presents a question arising under the constitution, and the others one arising under a treaty; yet, will any man contend that the citizen of another state, in the first case, or the subject of the foreign state, in the others, could bring the offending state before the federal court, for the purpose of redressing their several wrongs? It will not be pretended; and why not? For the reason which I have given—that one of the parties in the cases supposed being a state, and the amendment referred to having declared, that a state should not be amenable to the suit of a citizen of another state, or the subject of a foreign state; although the questions have arisen, the cases have not; that is, the court cannot take judicial cognizance of the questions, because it cannot bring one of the parties interested in litigating it before them. Let us now suppose, that a state should collect a tonnage duty from one of its own citizens, could that citizen bring his own state before a federal court? The words of the 11th amendment apply to the case of a citizen of another state, or the citizen or subject of a foreign state; but the reason is, that it was only to them that the privilege of being parties in a controversy with a state, had been extended in the text of the constitution. It was only from them, therefore, that it was necessary to take away that privilege; \*but, when from [**307** those to whom a privilege had been given, that privilege had been taken away, they surely then occupy the same ground with those to whom it had never been given. When I speak here of the right of these persons under the constitution of suing a state, I speak of the interpretation of this court, particularly in the case of *Chisholm's Ex'rs v. Georgia*, in which the court decided, that a state might be made a party defendant. It was that decision which produced the 11th amendment. If I am right in the idea, that since that amendment, no matter what the character of the question, this court could not take jurisdiction in favor of the citizen of another state, or subject of a foreign state, against a state as defendant, it is equally true, that without the aid of that amendment, it never could take jurisdiction in favor of a citizen against his own state; because that is not one of the cases in which the federal judicial power extends to states, and because in this case, as in the others, although a question has arisen under the constitution, &c., a case has not arisen, inasmuch as you cannot bring one of the parties before you. That the constitution never contemplated giving jurisdiction to the federal courts in cases between a state and its own citizens, will appear manifestly, from the only reason assigned for giving it in favor of the citizens of other states, or foreign citizens. That reason was an insufficient one, even for the purpose for which it was assigned; it being, that as against



foreigners and the citizens of other states, state courts might not be impartial where their states **308**\*) were parties; but such as it is, it \*never could apply as between a state and its own citizens, whom they were under every moral and political obligation to protect, and towards whom, therefore, there could be no apprehension of a want of impartiality.

Upon a full view of this aspect of the subject, the fair construction of the constitution will be found to be this—that in carving out the general mass of jurisdiction, it had reference only to the natural and habitual parties to controversies, who are either natural persons, or corporations, short of political societies, not to states; that in relation to these, they could not have been made parties at all, but by express provision, and that, therefore, the extent to which they can be so made, is limited by the extent of that provision. It will be conceded, that the United States cannot be sued; and why? Because it is incompatible with their sovereignty. The states, before the adoption of the federal constitution, were also sovereign; and the same principle applies, unless it can be shown that they have surrendered this attribute of sovereignty; which I have endeavored to show they have not.

Upon my construction, there is consistency throughout the constitution. According to it, a state can never be subjected, at the suit of any individual, to any judicial tribunal, without its own consent; for it can never be made a party defendant in any case, or by any party, except in the cases between it and another state, or a foreign state. If it be a party plaintiff, I have already endeavored to prove that **309**\*) this \*court could never take appellate, but only original jurisdiction, and that therefore as between a state and any individual, that state never could be placed in the attitude of a defendant. This idea is further sustained by reference to the history of the country. From that we learn, that the great and radical defect in the first confederacy was, that its powers operated upon political societies or states, not upon individuals. The characteristic difference between that and the present government is, that the latter operates upon the citizens. Take, for example, the power of taxation, which addresses itself directly to the people of the United States in the shape of an individual demand, instead of a requisition upon the states, for their respective quotas.

It has been said, that if this doctrine prevail, the federal government will be prostrated at the feet of the states, and that the various limitations and prohibitions imposed upon the states by the constitution, will be a dead letter, upon the face of that instrument, for the want of some power to enforce them. Let it be remembered that the several state legislatures and judiciaries are all bound, by the solemn obligation of an oath, to support the federal constitution; that to suppose a state legislature capable of wilfully legislating in violation of that constitution, if it is to suppose that it is so lost to the moral sense as to be guilty of perjury; a supposition which, thank God, the character of your people forbids us to make, nor can it be realized, until we shall have reached a maturity of corruption, from which I trust we are separated by a long tract of

future \*time. But if the legislatures [**310** could be supposed to be so blind to the sacred dictates of conscience and of duty, as to pass such a law, we have another safeguard in the character of the state judiciaries. Before effect could be given to it, it must be supposed that the sanctity of the judicial ermine was also polluted. To him, who can for a moment entertain this unjust and injurious apprehension, I have nothing to say, but to ask him to look at the talents, the virtues, and integrity, which adorn and illustrate the benches of our state courts; and I will add, that according to the doctrine maintained by this court, in the case of *Martin, v. Hunter*<sup>1</sup> the judgments of the state courts, in questions arising under the constitution, between individuals, would be subject to the appellate jurisdiction of this court.<sup>2</sup> But if the states are under limitations by the constitution, so also is the federal government. If the state legislatures may be supposed possibly capable of violating that instrument, and the state judiciaries disposed to sustain \*them in that violation, it may [**311** as well be supposed that the federal legislature may be thus disposed, and the federal judiciary prepared to sustain them.

Whenever the states shall be determined to destroy the federal government, they will not find it necessary to act, and to act in violation of the constitution. They can quietly and effectually accomplish the purpose by not acting. Upon the state legislatures it depends to appoint the senators and Presidential electors, or to provide for their election. Let them merely not act in these particulars; the executive department, and part of the legislative, ceases to exist, and the federal government thus perishes by a sin of omission, not of commission. But I will endeavor in another way to show, that whenever the states shall have reached that point, either of corruption, or hostility, to the federal government, which they must arrive at before any of the extreme supposed violations of the constitution could occur, the jurisdiction now claimed for this court would be utterly inadequate as a remedy. Let us suppose one of the most glaring violations of the constitution: a bill of attainder or *ex post facto* law, for example, passed by a state; and that the state judiciary proceeds to conviction of the party prosecuted. Let us suppose that this court, claiming an appellate jurisdiction, forbids the execution of the party; but the state court orders its judgment to be executed, and it is executed, by putting to death the prisoner. His life cannot be recalled; that is beyond the reach of human power; can you prosecute the judges or the officer for murder? It will not be con-

1.—1 Wheat. Rep. 305.

2.—Mr. Barbour observed, in reply, that he wished to be distinctly understood, as not yielding his assent to the doctrine of *Martin, v. Hunter*. On the contrary, that he decidedly concurred with the Court of Appeals of Virginia, that the appellate jurisdiction of the Supreme Court was in relation to inferior federal courts, not state courts. But, as that question had been solemnly decided otherwise by this court, with the argument of the Court of Appeals of Virginia before them, he had forborne to discuss it; he had referred to it, however, because, whilst this court acted upon the principle of that case, there was a controlling power, on the part of the federal, over the state judiciaries, in practical operation.

**312\*]** tended. \*Of what avail, then, the jurisdiction contended for, even for the purpose for which it is claimed? I answer, of none at all.

*Mr. Smyth* stated, that he should support the motion to dismiss the writ of error granted in this case, for two causes: (1) Because the constitution gives no jurisdiction to the court in the case. (2) Because the judiciary act gives no jurisdiction to the court in this case.

1. It is a question undecided, whether the appellate jurisdiction of this court, as declared by the constitution, does or does not extend to this case. If it was in all respects similar to the case of *Martin v. Hunter*,<sup>1</sup> adjudged in this court, I should contend, that the constitutional question of jurisdiction should not be regarded as settled. In that case, the counsel conceded the constitutional question, and no argument has been offered to this court in support of the jurisdiction of the state judiciary. One of the learned judges<sup>2</sup> of this court said, in that case, when speaking of the claim of power in this court to exercise appellate jurisdiction over the state tribunals, "this is a momentous question, and one on which I shall reserve myself uncommitted, for each particular case as it shall occur." And the court said, that "in several cases, which have been formerly adjudged in this court, the same point was argued by counsel, and expressly overruled." But the case now before the court is very different from **313\*]** that of *\*Martin v. Hunter*. This is a writ of error to revise a judgment given in a criminal prosecution, and in a case wherein a state was a party.

The government of the United States being one of enumerated powers, it is not a sufficient justification of the authority claimed, to say that there is nothing in the constitution that prohibits the federal judiciary to take cognizance, by way of appeal, of cases decided in the state courts. All the powers not granted are retained by the states; judicial power is granted; but it is federal judicial power that is granted, and not state judicial power. This grant neither impairs the authority of the state courts in suits remaining within their jurisdiction, nor makes them inferior courts of the United States. The government of the United States operates directly upon the people, and not at all upon the state governments, or the several branches thereof. The state governments are not subject to this government. The people are subject to both governments. This government is in no respect federal in its operation, although it is, in some respects, federal in its organization. Power has, indeed, been vested, by the constitution, in the state legislatures, to pass certain laws necessary to organize and continue the existence of the general government, and this power Congress may in part assume. They may prescribe the time, place, and manner, of holding elections of representatives; the time and manner of choosing senators by the state legislatures; and the time of choosing electors of a President. This **314\*]** power is expressly given by \*the constitution; it was necessary Congress should possess it, for self-preservation; and, even in these cases, they have no power to prescribe to

the state legislature a legislative act. This government cannot prescribe an executive act to the executive of a state, a legislative act to the legislature of a state, or (as I contend) a judicial act to the judiciary of a state.

If the constitution does not confer on the judiciary of the United States the appellate jurisdiction claimed, it is not enough that the act of Congress may purport to confer it. The framers of the judiciary act manifested a distrust of their authority; they seem to have foreseen that the state courts would refuse to give judgment according to the opinions of the Supreme Court. The case decided in the state court was not a case in law arising under the laws of the United States. It was a prosecution under a law of the state. Should a mandate issue in this case, and obedience be refused, this court will give judgment on a prosecution for violating state laws. If the case decided in the state court be regarded as a case in which a state was a party, the Supreme Court has, by the constitution, original, and not appellate jurisdiction. The appellate jurisdiction of the Supreme Court is only conferred in cases other than those whereof the Supreme Court has original jurisdiction. Who has original jurisdiction of those other cases? The inferior federal courts. Some of those other cases are those of admiralty and maritime jurisdiction, of which, certainly, it was not intended \*that the original jurisdiction should be [**315** in the state courts.

If this writ of error be considered to be a suit in law, this court has no jurisdiction; for it is prosecuted against a state; and, by the 11th amendment to the constitution, no suit in law can be prosecuted by foreigners or citizens of another state against one of the United States. The amendment prohibits such suits commenced or prosecuted against a state. This seems expressly to extend to this writ of error, which, although not a suit in law commenced against a state, is a suit in law prosecuted against a state. This amendment, denying to foreigners and citizens of other states the right to prosecute a suit against a state, and being silent as to citizens of the same state, affords a proof that the federal courts never had jurisdiction of a suit between a citizen and the state whereof he is a citizen; for it cannot be presumed, that a right to prosecute a suit against a state would be taken from a foreigner or citizen of another state, and left to citizens of the same state. A release of all suits is a release of a writ of error;<sup>3</sup> and, consequently, a writ of error is "a suit in law," and cannot be prosecuted against a state.

The appellate jurisdiction conferred by the constitution on the Supreme Court, is merely authority to revise the decisions of inferior courts of the United States. Where the Supreme Court have not original jurisdiction, they have, by the constitution, appellate jurisdiction as to law and fact. Could it have been \*intended to confer a power to re-ex- [**316** amine decisions in the state courts; to try again the facts tried in those courts, and this even in criminal prosecutions? Surely not. Appellate jurisdiction signifies judicial power over the decisions of the inferior tribunals of the same

1.—1 Wheat. Rep. 305.

2.—*Mr. Justice Johnson*.  
Wheat. 6.

3.—*Latch*. 110; 2 *Bac. Abr.* 497; 1 *Roll. Abr.* 788.



sovereignty. Congress have power to "constitute" such tribunals; and it is made their duty to "ordain and establish" such. The framers of the constitution intended to create a new judiciary, to exercise the judicial power of a new government, unconnected with the judiciaries of the several states. Congress is not authorized to make the Supreme Court, or any other court of a state, an inferior court. They do not "constitute" such a court; they do not "ordain and establish it." The judges cannot be impeached before the senate of the United States; they receive no compensation for their services from the United States; and, consequently, cannot be required to render any services to the United States. The inferior courts, spoken of in the constitution, are manifestly to be held by federal judges. The judicial power to be exercised, is the judicial power of the United States; the errors to be corrected are those of that judicial power; and there can be no inferior courts exercising the judicial power of the United States, other than those constituted, ordained, and established by Congress.

The Supreme Court has appellate jurisdiction in cases to which the judicial power of the United States shall extend; but unless the original jurisdiction has extended to the case, the **317\*** appellate jurisdiction \*can never reach it. The original jurisdiction alone is qualified to lay hold of it. If it shall be deemed proper to extend the judicial power to all the cases enumerated, the original jurisdiction must be thus extended. The court exercising appellate jurisdiction, must not only have jurisdiction over such a cause, and such parties, but it must have jurisdiction over the tribunal before which the cause has been depending. Judicial power, includes power to decide, and power to enforce the decision. This court has rather disclaimed power to enforce its mandate to the Supreme Court of a state. If you have not power to compel state tribunals to obey your decisions, you have no appellate jurisdiction in cases depending before them. Suppose it should be found necessary to direct a new trial in a cause removed from a state court, and that the state court refuses to obey your mandate; where shall the new trial be had? If you have appellate jurisdiction in a case decided by a state court, you must have power to make your decisions a part of the record of the state court. The constitution provides that full faith and credit shall be given in each state to the judicial proceedings of every other state. A plaintiff recovers in the courts of Virginia judgment for a sum of money; you reverse the judgment; but the state court does not record your decision; the plaintiff obtains a copy of the record of the judicial proceedings of the state, and presents them as evidence before the court of another state; he must recover, notwithstanding **318\*** standing your judgment, which \*has not been made a part of that record, to which full faith and credit is to be given.

To give jurisdiction over the state courts, it is not sufficient that the constitution has said that the Supreme Court shall have appellate jurisdiction; for that will be understood to signify jurisdiction over inferior federal courts. To confer the jurisdiction claimed, the constitution should have said, that the judicial

power of the United States shall have appellate jurisdiction over the judicial power of the several states. If it had been intended to give appellate jurisdiction over the state courts, the proper expressions would have been used. There is not a word in the constitution that goes to set up the federal judiciary above the state judiciary. The state judiciary is not once named. The subjects spoken of are the judicial power of the United States; the supreme and inferior courts of the United States; and the original and appellate jurisdiction of the Supreme Court. Appellate jurisdiction is not granted to the judicial power of the United States. It is granted to the Supreme Court of the United States. Federal judicial power is authorized to correct the errors of federal judicial power. I contend, that in no case can the federal courts revise the decisions of the state courts; no such power is expressly given by the constitution; and can it be believed that it was meant that the greatest, the most consolidating of all the powers of this government, should pass by an unnecessary implication? The states have granted to the United States power to pronounce their own judgment in certain cases; but they have not \*granted the state [**319** courts to the federal government; nor power to revise state decisions.

The power of the House of Lords to hear appeals from the highest court in Scotland, has been mentioned as a precedent for the exercise of such a power as is claimed for this court; but the cases are by no means similar. Scotland is consolidated with England under the same executive and legislature; and, therefore, ought to be subject, in the last resort, to the same judicial tribunal. If the states had no executive except the President, and no legislature except Congress, the cases would have some resemblance.

If you correct the errors of the courts of Virginia, you either make them courts of the United States, or you make the Supreme Court of the United States a part of the judiciary of Virginia. The United States can only pronounce the judgment of the United States. Virginia alone can pronounce the judgment of Virginia. Consequently, none but a Virginia court can correct the errors of a Virginia court.

There is nothing in the constitution that indicates a design to make the state judiciaries subordinate to the judiciary of the United States. The argument that Congress must establish a supreme court, and might have omitted to establish inferior courts, thereby depriving the Supreme Court of its appellate jurisdiction, unless it should be exercised over the state courts, seems to be without foundation. The judicial power of the United States is vested in the Supreme Court, and inferior courts; the judges of \*the inferior courts shall receive a compensation. The possibility of Congress omitting to perform a duty positively enjoined on them, cannot change the constitution, or affect the jurisdiction of the state courts.

The federal judiciary and state judiciaries possess concurrent power in certain cases; but no authority is conferred on the one to reverse the decisions of the other. The state courts retain a concurrent authority in cases wherein they had jurisdiction previous to the adoption of the constitution, unless it is taken away by the

operation of that instrument. I say a concurrent authority, not a subordinate authority. The power of the judiciary of the United States is either exclusive or concurrent, but not paramount power. And where it is concurrent only, then, whichever judiciary gets possession of the case, should proceed to final judgment, from which there should be no appeal. If it shall be established that this court has appellate jurisdiction over the state courts in all cases enumerated in the third article of the constitution, a complete consolidation of the states, so far as respects judicial power, is produced; and it is presumed that it was not the intention of the people to consolidate the judicial systems of the states, with that of the United States. It has been said, that the courts of the United States can revise the proceedings of the executive and legislative authorities of the states, and, if they are found to be contrary to the constitution, may declare them to be of no legal validity; and that the exercise of the same right over judicial tribunals, is not a higher or more **321\***] \*dangerous act of sovereign power.<sup>1</sup> This conclusion seems to be erroneous. When the federal courts declare an act of a state legislature unconstitutional, or an act of the state executive unlawful, they exercise no higher authority than the state courts exercise, who will not only declare an act of the state legislature, but even an act of Congress, unconstitutional and void. This only proves that the federal and state judiciaries have equally authority to judge of the validity of the acts of the other branches of both governments, and has no tendency whatever to establish the claim set up by federal judicial power, of supremacy over state judicial power.

This writ of error brings up the judgment rendered in a state court, in a criminal prosecution. Every government must possess within itself, and independently, the power to punish offenses against its laws. It would degrade the state governments, and devalue them of every pretension to sovereignty, to determine that they cannot punish offenses without their decisions being liable to a re-examination, both as to law and fact (if Congress please), before the Supreme Court of the United States. The claim set up would make the states dependent, for the execution of their criminal codes, upon the federal judiciary. The cases "in which a state shall be a party," of which the Supreme Court may take cognizance, are civil controversies. This seems obvious; because, to the Supreme Court is granted original jurisdiction of **322\***] them. And it will not be contended \*that the Supreme Court shall have original jurisdiction of prosecutions carried on by a state, against those who violate its laws. If "cases in law and equity, arising under the laws of the United States," comprehend criminal prosecutions in the state courts, then every prosecution against a citizen of the state, in which he may claim some exemption under an act of Congress or a treaty, however unfounded the claim, may be re-examined, both as to law and fact (if Congress please), in the Supreme Court. And if "controversies" include such prosecutions, then every prosecution against an alien, or the citizen of another state, may be so re-

examined, whether he claim such exemption or not. Can this court bring up a capital case, wherein some exemption under a federal law is claimed by a prisoner in a state court? Would an appeal lie (should Congress so direct) from a jury? It would not, even if the trial was had in a federal court; for the accused has a right to a trial by a jury in the state and district wherein the crime shall be charged to have been committed. In all cases within the appellate jurisdiction of the Supreme Court, that jurisdiction may extend to the law and the fact. But such jurisdiction, as to the fact, cannot extend to criminal cases; consequently, it was not intended that the appellate jurisdiction should extend to criminal cases; and, therefore, the Supreme Court have no appellate jurisdiction in criminal cases. Can, then, the court take jurisdiction in this case, which was a criminal prosecution, founded on the presentment of a grand jury? Surely they cannot. This case was not a *qui tam* action, which is regarded as a civil [\***323** suit.<sup>2</sup> It was, both in form and substance, a criminal prosecution. And it has been declared by a judge of this court, that "the courts of the United States are vested with no power to scrutinize into the proceedings of the state courts, in criminal cases."<sup>3</sup>

That which is fixed by the constitution, Congress have no power to change. The jurisdiction of the state courts is fixed by the constitution. It is not a subject for congressional legislation. The people of Virginia, in adopting the constitution of the United States, had power to diminish the jurisdiction of the state judiciary; but Congress have no power over it; they can neither diminish nor extend it; they can neither take from the state tribunals one cause, or give them one to decide. As they cannot impose on the state courts any duties, so neither can they take from them any powers. Congress can neither add to or diminish the legislative power, the executive power, or the judicial power of a state, as fixed by the constitution. Congress may pass all laws necessary and proper to execute that power which is vested by the constitution in the judiciary of the United States; but this does not sanction a violation of the authority of the state courts. None can enlarge or abridge the jurisdiction of the judiciary of Virginia, except the people of Virginia, or the legislature of that state. As was the jurisdiction of the state judiciary on the 4th day of March, 1789, so it stands at this day, unless altered by the \*state. If on that [\***324** day the states retained jurisdiction of the most of the cases enumerated in the third article of the constitution, that jurisdiction must have been left to them by the constitution, and cannot be taken from them by Congress. The power either of a state legislature or a state judiciary, cannot depend on the use of, or neglect to use, a power, by Congress. Such state power is fixed by the constitution; the same to day as to-morrow, however Congress may legislate.

The judicial power of the United States is conferred by the constitution, and Congress cannot add to that power. Congress may distribute the federal judicial power among the

1.—1 Wheat. Rep. 344.

Wheat. 6.

2.—Cowp. 382.

3.—1 Wheat. Rep. 377.



federal courts, so far as the distribution has not been made by the constitution. If the constitution does not confer on this court, or on the federal judiciary, the power sought to be exercised, it is in vain that the act of Congress purports to confer it. And where the constitution confers original jurisdiction (as in cases where a state is a party), Congress cannot change it into appellate jurisdiction. The extent of the judicial power of the United States being fixed by the constitution, it cannot be made exclusive or concurrent, at the will of Congress. They cannot decide whether it is exclusive of the state courts or not; for that is a judicial question, arising under the constitution. If the judicial power of the United States is exclusive, Congress cannot communicate a part of it to the state courts, giving to the federal courts appellate jurisdiction over them. If by the constitution the state judiciary has concurrent **325\***] jurisdiction, \*Congress cannot grant to the federal courts an appellate jurisdiction over the exercise of such concurrent power. The state judiciary cannot have independent or subordinate power, at the will and pleasure of Congress.

The state judiciary have concurrent jurisdiction, by the constitution, over all the cases enumerated in the third article of the constitution, except, 1. Prosecutions for violating federal laws; 2. Cases of admiralty and maritime jurisdiction; and, 3. Cases affecting ambassadors, other public ministers, and consuls. No government can execute the criminal laws of another government. The states have parted with exterior sovereignty. As they cannot make treaties, perhaps they have not jurisdiction in the case of ministers sent to the federal government; as they cannot make war and peace, regulate commerce, define and punish piracies and offenses on the high seas, and against the law of nations, or make rules concerning captures on the water, perhaps they have no admiralty jurisdiction. The jurisdiction of the state courts over civil causes, arising under the constitution, laws, and treaties, seems to me to be unquestionable. The state judges are sworn to support the constitution, which declares them bound by the constitution, laws, and treaties. This was useless, unless they have jurisdiction of causes arising under the constitution, laws, and treaties, which are equally supreme law to the state courts as to the federal courts. The state judges are bound by oath to obey the constitutional acts of Congress; but they are not so **326\***] bound to obey the decisions of \*the federal courts; the constitution and laws of the United States are supreme; but the several branches of the government of the United States have no supremacy over the corresponding branches of the state governments.

The jurisdiction of the state courts is admitted by Congress; in the judiciary act; for, by an odious provision therein, which does not seem to be impartial, the decision of the state court, if given in favor of him who claims under federal law, is final and conclusive. Thus, the state courts have acknowledged jurisdiction; and if that jurisdiction is constitutional, Congress cannot control it.

Congress cannot authorize the Supreme Court to exercise appellate jurisdiction over the decisions of the state courts, unless they have

legislative power over those courts. Can Congress give an appeal from a federal district court to a state court of appeal? I presume it will be admitted that they cannot. And why can they not? Because they have no power over the state court. And if they cannot give an appeal to that court, they cannot give an appeal from that court.

The constitution provides, that the judicial power of the United States shall "extend to" certain enumerated cases. These words signify plainly, that the federal courts shall have jurisdiction in those cases; but this does not imply exclusive jurisdiction, except in those cases where the jurisdiction of the state courts would be contrary to the necessary effect of the provisions of the constitution. Civil \*suits, [**\*327** arising under the laws of the United States, may be brought and finally determined in the courts of foreign nations; and, consequently, may be brought and finally determined in the state courts.

The judiciary of every government must judge of its own jurisdiction. The federal judiciary and the state judiciary may each determine that it has, or that it has not, jurisdiction of the case brought before it; but neither can withdraw a case from the jurisdiction of the other. The question, whether a state court has jurisdiction or not, is a judicial question, to be settled by the state judiciary, and not by an act of Congress, nor by the judgment of the Supreme Court of the United States. Shall the states be denied the power of judging of their own laws? As their legislation is subject to no negative, so their judgment is subject to no appeal. Sovereignty consists essentially in the power to legislate, judge of, and execute laws. The states are as properly sovereign now as they were under the confederacy; and we have their united declaration that they then, individually, retained their sovereignty, freedom, and independence. The constitution recognizes the sovereignty of the states, for it admits that treason may be committed against them. They would not be entitled to the appellation of "states" if they were not sovereign.

Although the state courts should maintain a concurrent jurisdiction with the federal courts, yet foreigners would have, what before the adoption of the constitution they had not, a choice of tribunals, before which to bring their actions; and the state \*judges are now [**\*328** bound by treaties as supreme law. If an alien plaintiff sues in the state courts, he ought to be bound by their decision; and if an alien is sued in a state court, he ought to be bound by the decision of the state in which he resides or sojourns, which protects him, to which he owes a temporary allegiance, and to whose laws he should yield obedience. The people could not have intended to give to strangers a double chance to recover, while citizens should be held bound by the first decision; that the citizen should be bound by the judgment of the state alone, while the stranger should not be bound but by the judgment of the state, and also of the United States. A statute contrary to reason, is void. An act of Congress which should violate the principles of natural justice, should also be deemed void. It is worthy of consideration, whether this clause in the judiciary act, which grants an appeal to one party, and



denies it to the other, is not void, as being partial and unjust. If, in any case brought before them, the state courts shall not have jurisdiction, the defendant may plead to the jurisdiction, and the Supreme Court of the state will finally decide the point. If this is not a sufficient security for justice, as I apprehend it is, an amendment to the constitution may provide another remedy. If the defendant submits to the jurisdiction of the state court, and takes a chance of a fair trial, it is reasonable that he should be bound by the result.

As I deny to this court authority to remove, by writ of error, a cause from a state court, so **329\*** I likewise deny the authority of this court to remove, before judgment, from a state court, a suit brought therein. It will be equally an invasion of the jurisdiction of the state court, although less offensive in form, than a removal after judgment has been rendered. Congress can neither regulate the state courts, nor touch them by regulation.

Let the Supreme Court declare (for it is a judicial question) what cases are within the exclusive jurisdiction of the federal courts, by the constitution; and let Congress pass the necessary and proper laws for carrying that power into effect. Although I do not admit that the state courts would be absolutely bound by such a declaration, yet I have no doubt that the state courts would acquiesce. It is not for jurisdiction over certain cases that the state courts contend. It is for independence in the exercise of the jurisdiction that is left to them by the constitution.

2. Does the 25th section of the judiciary act comprehend this case, so that the court may take jurisdiction thereof?

In this case the construction of a statute of the United States is said to have been drawn in question, and the decision in the state court was against the exemption claimed by the defendant in that court. This court has no jurisdiction, if it shall appear that the defendant really had no exemption to set up in the state court, under a statute of the United States. If the act of Congress has no application, no bearing **330\*** on the case, the court has no jurisdiction.<sup>1</sup> The parties cannot, by making an act of Congress, which does not affect the cause, a part of the record, give this court jurisdiction.

This court have said, that "the sovereignty of a state in the exercise of its legislation, is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of their constitutional charter."<sup>2</sup> This court have also said, that "the sovereign powers vested in the state governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States."<sup>3</sup> The state legislatures retain the powers not granted, and not repugnant to the exercise of the powers granted to Congress; and it is not denied, that the legislature

of Virginia possessed, previous to the passage of the act of Congress for incorporating the city of Washington, authority to prohibit the sale of lottery tickets in Virginia. That legislature still possesses the power, unless the exercise thereof obstructs some means adopted by Congress for executing their delegated powers.

Actions are lawful or criminal, as the laws of the land determine. Whether an action done in Virginia is lawful or criminal, depends on the laws of that state, unless the action [**\*331**] has been authorized or prohibited by Congress in carrying into execution some power granted to them, or the power of some department or officer of the government. The state governments are charged with the police of the states. They, considering certain acts as having a demoralizing tendency, have prohibited them. Shall Congress authorize those very acts to be done within the body of a state?

So entirely is the police of a state to be regulated by its own laws, that if Congress taxed licenses to sell lottery tickets, the payment of the tax would not confer on him who paid it, any authority to sell tickets contrary to the laws of a state. Congress imposed a tax on licenses to sell spirituous liquors by retail; but that did not prevent the state governments from regarding tippling-houses as nuisances, and punishing those retailers of spirits who were not licensed tavern-keepers. The license is grantable by the state; when granted, the federal government may tax it; but they have no power to grant it. The police belongs to the state government; and the federal government cannot, by the power of taxation, interfere with the police, so as to legalize any act which a state prohibits.

It is said that a lottery ticket owes its value to its salable quality. It is true that the salability of the ticket by the managers is essential to make the lottery of value to the corporation. But, those sales may be made in Washington. And, if they cannot, must the constitution yield to a lottery? The proprietor of property has not a right everywhere to dispose of it [**\*332**] as he pleases. A man may own poison, but he must not sell it as a medicine. He may own money; but he may not, in Virginia, part with it at public gaming. He may come to Washington and purchase a lottery ticket; but if he takes it to Virginia he must not sell it there. A lottery ticket is a chose in action, and not assignable by the common law. The state laws determine whether bonds, bills, notes, &c., are assignable or not. Spirituous liquors are property; but they cannot be sold by retail, without the license of the state government.

The act of Congress under which this lottery has been authorized, is not an act passed in the execution of any of those specific powers which Congress may exercise over the states. The acts of Congress must be passed in pursuance of the constitution, or they are void. If they have passed a statute authorizing an act to be done in a state which they had no power to authorize in a state, their statute is void. The acts of Congress, to be supreme law in a state, must be passed in execution of some of the powers delegated to Congress, or to some department or officer of the government. Congress may pass all laws necessary and proper to carry a given power into effect; but they must have a given

1.—4 Wheat. Rep. 311; Wheat. Digest, sec. 301; 2 Wheat. Rep. 363; 4 Wheat. Rep. 314.

2.—5 Wheat. Rep. 48.

3.—1 Wheat. Rep. 325.



power. Now, what is the given power for the execution of which the sale of lottery tickets in the states is an appropriate means? It is sufficient to show that the act passed is a means of carrying into execution some delegated power. The degree of its necessity or propriety will not be questioned by this court; but it must **333\***] obviously tend to the execution or sanction of some enumerated power. If it shall appear on the face of the act, that it is not passed for the purpose of carrying into effect an enumerated power, and that it is passed for some other purpose, the act would not be constitutional.

As to the object being a national one for which the money is raised by the lottery in question, the nation has no particular interest in anything in the city of Washington, except the public property and buildings belonging to the United States. The improvements to be made in the city by the proceeds of this lottery, are not national buildings for the accommodation of the federal government; they are corporation buildings for the accommodation of the city, the charge of which is to be borne out of the revenues of the city. But, it is not admitted, that if the money was to be applied to building of the capitol, that Congress would have power, for that purpose, to authorize the sale of lottery tickets in a state, contrary to state laws.

The nation is interested in the prosperity of every city within the limits of the Union. All may be made to contribute to the public treasury—the city of Washington as well as others. If these improvements in the city of Washington are such as the United States should pay for, let the money be advanced from the treasury, and raised by taxes or by loans in a constitutional manner, and let the taxes imposed on the city of Washington, for the purpose of making these improvements, be declared unconstitutional. They doubtless are so if the people of Washington alone are taxed for purposes truly **334\***] national. \*This measure is not adopted to aid the revenue of the United States. It is adopted for the purpose of aiding the revenue of the city of Washington; for effecting objects which the revenue of the city should effect, but which the ordinary revenue is unequal to. It is to raise an extraordinary revenue for the city of Washington. Virginia, in which state it has been attempted to raise a part of this extraordinary revenue, has no more interest in the penitentiaries and city halls of Washington than in those of Baltimore.

Our opponents must maintain that this is an act of Congress authorizing the sale of lottery tickets in Virginia. For if it is not, the question is at an end. I call upon them to show a power granted to Congress, which the sale of lottery tickets in a state is an appropriate means of executing. Suppose that Congress had passed an act expressly authorizing P. & M. Cohen to vend lottery tickets in Virginia, for the purpose of raising a fund to diminish the taxes laid by the corporation of Washington on the inhabitants, for their own benefit; would such an act have been constitutional? Which of the enumerated powers of Congress would such an act have been an appropriate means of carrying into effect? Suppose that Congress had considered lotteries as pernicious gambling; could they have prohibited the sale of lottery tickets in the

states? It will be admitted that they could not. And if they cannot prohibit the sale of tickets in a state, it is contended that they cannot authorize such a sale. Let us suppose that Congress have passed an act authorizing the sale of lottery tickets in the states, for the purpose of raising money to build a city hall in the city of Washington. Is such an act within the constitutional powers of Congress? Is it a mode of laying and collecting taxes? Or is it a mode of borrowing money? And is it for the purpose of paying the debts or providing for the general welfare of the United States? Should it even be said that this lottery is a tax, or a mode of borrowing money, yet the tax is laid, or the money borrowed, not by and for the United States, but by the corporation for the city of Washington.

Congress have two kinds or grades of power: (1) Power to legislate over the states in certain enumerated cases. (2) Power to legislate over the ten miles square, and the sites of forts and arsenals, in all cases whatsoever. These powers, so very dissimilar, should be kept separate and distinct. The advocates of the corporation confound them. They pass the act of Congress by the power to legislate over the ten miles square, unlimited as to objects, but confined within the lines of the district, and they extend its operations over the states, by the power to legislate over them, limited as to objects, but co-extensive with the Union. The act incorporating the city of Washington was certainly not passed to carry into execution any power of Congress, other than the power to legislate over the District of Columbia. If the clause conferring power to legislate in all cases over the ten miles square, had been omitted, could Congress establish lotteries? Could an act establishing a lottery be ascribed to any of the specific powers, in the execution of which Congress may legislate over all the states?

If the act authorizing a lottery is justified by the powers which extend to the states, there is no occasion to rest it on the power to legislate in all cases over Columbia. And if it is not justified by the powers which extend to the states, it cannot be justified by that power which, being limited to the district, does not extend to the states. If the act of Congress has effect in Virginia, it is a law over the states, and must have been passed by a power to legislate over the states. Now, a law over the states cannot be passed by a power to legislate over Columbia. But it is the power to legislate over Columbia that has been exercised. Therefore, no law has been passed over the states. Consequently, no law has been passed having effect in the states. It is, then, by the power to legislate over the ten miles square that the authority to sell lottery tickets in the states must be defended.

The power to legislate over the ten miles square is strictly confined to its limits, and does not authorize the passage of a law for the sale of lottery tickets in the states.<sup>1</sup> When Congress legislate exclusively for Columbia, they are restrained to objects within the district. An act of Congress, passed by the authority to

1.—Virginia Debates in Convention, Vol. II., p. 21.  
29.



legislate over the district, cannot be the supreme law in a state; for if, by the power to legislate, in all cases whatsoever, over the district, Congress may legislate over the states, it **337\*** will necessarily \*follow, that Congress may legislate over the states in all cases whatsoever.

The constitution gives to Congress power to exercise exclusive legislation over the ten miles square, in all cases whatsoever. In the case of *Loughborough v. Blake*, the court said, that "on the extent of these terms, according to the common understanding of mankind, there can be no difference of opinion." What is the opinion in which all mankind will unite as to the extent of those terms? Not an opinion that the laws passed in legislating over the district shall operate in the states. The opinion in which it is presumed that mankind generally will unite, is, that all acts of Congress, not contrary to reason or the restrictions of the constitution, passed in legislating over the district, shall operate exclusively within its limits, but not at all beyond them. The power given to Congress, is power to legislate exclusively in all cases over the district. What are the appropriate means of executing that power? To frame a code of laws having effect within the district only; to establish courts having jurisdiction within the district only, &c. But what are the powers claimed? Power to repeal the penal laws of a state; power to pass laws "that know no locality in the Union;" laws "that can encounter no geographical impediments;" laws "whose march is through the Union." I admit, that all the powers of Congress, except this of exclusive legislation in all cases, extend **338\*** throughout the Union; but this, by \*the most express words, and from its nature, is local. Yet, in this case, by a power to legislate for a district ten miles square, Congress is made to assume a power to legislate over the whole Union; and because an act is authorized to be done in Columbia, over which Congress may legislate in all cases whatsoever, it is, therefore, to be a legal act when done in a state, the laws of such state notwithstanding.

The power given to Congress to legislate over the district in all cases whatsoever, is precisely of the same extent as if this had been the only power conferred on them. Now, had it been the only power conferred on Congress, could there have arisen any doubt about its extent? When Congress legislate for the District of Columbia, they are a local legislature. The authority to legislate over the district in all cases whatsoever, is as strictly limited as is that of the legislature of Delaware to legislate only over Delaware. The acts of the local legislature have no operation beyond the limits of the place for which they legislate.

If this clause confers on Congress any legislative power over the states, it must be of the kind granted. But the power granted is exclusive, and no one will contend, that an exclusive power to legislate over the states is conferred on Congress. The power given extends to all cases whatsoever, and no one will contend, that Congress have power to legislate over the states in all cases whatsoever. The grant is of an exclusive power in all cases over

ten miles square. The claim set up is a claim of paramount power over the whole United States.

\*Any single measure which Congress [**\*339** may adopt, must be justified by some single grant of power, or not at all. No combination of several powers can authorize Congress to adopt a single measure which they could not adopt either by one or another of those powers, combined with the power to pass necessary and proper laws for carrying such single power into effect.

There is no repugnancy between the acts of Virginia against selling lottery tickets within that state, and the power granted to Congress to legislate over the District of Columbia. There can be none; for the line of the district completely separates them. The act passed by Congress is confined to the district; the act of the state legislature is confined to the state. How can there be any repugnancy? A power to legislate over Virginia cannot come into collision with a power to legislate over the district, unless those to whom they are entrusted pass the limits of their jurisdiction. It is not alleged, that the legislature of Virginia have passed the limits of their jurisdiction. If Congress have authorized a lottery to be drawn within the city, the sale of tickets, and the drawing of the lottery are thereby legalized within the city. Congress have never said that lottery tickets may be sold in the states. Those tickets may be sold in any place where the local laws will admit. But that they should be sold in Virginia, where such a sale is unlawful, Congress have neither enacted, or had power to enact. It is said, that without a power to sell the tickets, the power to draw the lottery is \*ineffectual. I answer, [**\*340** if a power to sell lottery tickets necessarily follows a power to draw lotteries, as the lotteries must be drawn in the city, so there the tickets must be sold. The authority to sell is the authority to draw; and as the principal authority (to draw) is confined to the city, so is the consequent authority (to sell). Can the corporation draw lotteries in the states? If not, where is their authority to sell where they have no authority to draw? If the seller of lottery tickets is the agent of the corporation, then they can clothe him with no legal authority to be executed in a state, contrary to the law of the state. The corporation must sell their tickets where they have authority, or where they are permitted to sell. If the seller was a purchaser of tickets, and desires to sell again, the city has no interest in that subsequent sale; and the purchaser must sell where he is permitted to sell. Why should the owners of these tickets have an exclusive privilege in Virginia, to sell their tickets, contrary to the laws of the land?

It has been, in effect, maintained, that Congress may not only themselves legislate over the Union, but that they may exercise this power by substitute. Power to legislate over a state must be derived from the people; and cannot be transferred. If the power to legislate over the city may be vested in the representatives of the people thereof, yet, surely, a power to legislate over the states cannot be transferred to the representatives of the people of the city. When Congress pass an act which



**341\***] shall have the \*effect of law in the states, it must be passed in pursuance of power delegated to them by the people of the states. The constitution declares, that "all legislative power herein granted shall be vested in a Congress of the United States." This vested power cannot be transferred to a corporation. It must be exercised by Congress, and in the manner prescribed by the constitution. Legislative power is not, in its nature, transferable. The people do not consent to obey any laws except those passed by their representatives according to the constitution. They who legislate for the nation must represent the nation. The corporation of Washington cannot receive power to legislate over the people of the United States. To incorporate the people of the city of Washington with power to make by-laws for the government and police of the city, is no transfer of power. It is an authority to exercise an inherent power. There is in every body of people a natural inherent right to legislate for themselves; but small societies must have permission or authority, from the great societies, of which they form a part. Thus, Congress authorized the people of Missouri to form a constitution, and govern themselves. Is this a transfer of power? No, certainly; it is an authority to exercise the inherent power of the people in governing themselves. Congress may authorize the people of Washington, or the people of Arkansas, to govern themselves; but it was never heard, until this case arose, that a local corporation, authorized by Congress to legislate for themselves, could **342\***] pass laws of \*obligation throughout the Union; laws paramount in the states to the laws of the states.

It seems to have been considered by the advocates of the corporation, that what Congress authorizes to be done, that they do. This is not so. Congress authorized Missouri to form a constitution; but Congress did not therefore form the constitution of Missouri. The corporation of Washington were left free to act on the subject of lotteries. They were empowered to authorize the drawing of lotteries, and to pass the laws necessary and proper for carrying that power into effect. The law establishing the lottery in question, is the by-law of the corporation. The by-laws of the city of London are not acts of Parliament, or laws of the realm; neither have the by-laws of the city of Washington any force beyond the limits of the city.

Congress have not said that the lottery tickets should be sold in the states. They have not even said that there shall be a lottery. Congress empowered the corporation to pass the law, and the corporation passed it; the ordinance of the corporation establishing a lottery, is no more a part of the act of Congress than the territorial laws now passing in Arkansas will be parts of the acts of Congress. It is not an act of Congress under which these tickets have been sold in Virginia, contrary to the laws of that state; it is a by-law of the corporation of Washington that gave existence to this lottery. An act of Congress does not apply to the case; and therefore this court have no jurisdiction under the judiciary act.

**343\***] \*The powers of the corporation of Washington are confined within the limits of

the city. Being a corporation for government, all within the corporate limits are subject to them; but no others.<sup>1</sup> They cannot make a by-law affecting even their own members, beyond the corporate limits; they have no power to pass a law authorizing the sale of lottery tickets in Georgetown, much less have they the power to authorize the sale of them in a state, contrary to its laws. This by-law either extends beyond the limits of the city, or it does not. If it does, it is void; and if it does not, it can have no effect in Virginia. The by-laws of a corporation are to be subject to the laws of the land, even within their limits. The laws of the states are the laws of the land, within their limits, on subjects not committed to congress. To those laws all corporate laws are subject.<sup>2</sup> But there cannot be that kind of collision between by-laws of the corporation of Washington and state laws, as between the by-laws of the corporation of the city of London, and the laws of England. As the by-laws of London may come in collision with the laws of England, but cannot come in collision with the laws of Ireland and Scotland, in those countries; so the by-laws of the corporation of \*Washington [**344**] may come in collision with the laws of the United States in the ten mile square; but can never come in collision with the laws of a state, for they cannot have operation in a state.

The court will maintain the powers of Congress as granted by the people, and for the purposes for which they were granted by the people; and will, if possible, to preserve harmony, prevent the clashing of federal and state powers. Let each operate within their respective spheres; and let each be confined to their assigned limits. We are all bound to support the constitution. How will that be best effected? Not by claiming and exercising unacknowledged power. The strength thus obtained will prove pernicious. The confidence of the people constitutes the real strength of this government. Nothing can so much endanger it as exciting the hostility of the state governments. With them it is to determine how long this government shall endure. I shall conclude by again reminding the court of a declaration of their own, that, "no power ought to be sought, much less adjudged, in favor of the United States, unless it be clearly within the reach of their constitutional charter."

*Mr. D. B. Ogden*, contra, (1) stated, that he should not argue the general question whether this court had an appellate jurisdiction, in any case, from the state courts, because it had been already solemnly adjudged by this court, in the case of *Martin v. Hunter*.<sup>3</sup>

\*2. This is a case arising under the [**345**] constitution and laws of the Union, and therefore the jurisdiction of the federal courts extends to it by the express letter of the constitution; and the case of *Martin v. Hunter* has determined that this jurisdiction may be exercised by this court in an appellate form. But it is said, that the present case does not arise under the constitution and laws of the United

1.—1 Bac. Abr. 544; 2 Comyn's Dig. 154; 3 Mod. 159; 1 Nels. Abr. 415; T. Jones 144; 1 Nels. Abr. 413; 3 Yeates, (Penn.) 473.

2.—1 Bac. Abr. 544, 545, 551; Hobart, 211, 5 Co. 63, and 8 Co. Rep. 126.

3.—Wheat. Rep. 304.



States, because the legislative powers of Congress, as respects the District of Columbia, are limited and confined to that district. But, if the law be thus limited in its operation, how is this to be discovered but by examining the constitution? and how is this examination to be had but by taking jurisdiction of the case? In the whole argument, constant reference was had, and necessarily had, to the constitution, in order to decide the case between the parties, upon this question of jurisdiction; and yet it is said to be a case not arising under the constitution. It is also contended, that it is not an act of Congress, the validity of which is drawn in question in the present case; but an ordinance of the corporation of the city of Washington; and the maxim of *delegatus non potest delegare*, is referred to, in order to show that the corporation cannot exercise the legislative power of Congress. Is it meant by this to assert that Congress cannot authorize the corporation to make by-laws? Even the soundness of this position cannot be determined without examining the constitution and acts of Congress, and adjudging upon their interpretation. The whole District of Columbia, and all its subordinate municipal corporations, are the **346\*** creatures \*of the constitution; and the acts of Congress, relative to it, must be determined by the constitution, and must be laws of the United States. Are not the extent of the powers vested in Congress, and the manner in which these powers are to be executed, necessarily, questions arising under the constitution, by which the powers are given? How can the question, whether this is a lottery authorized by an ordinance of the corporation, and not by a law of the United States, be decided, but by a reference to the laws of the Union, and the constitution under which they were enacted? The plaintiffs in error set up a right to sell lottery tickets in the state of Virginia, under the constitution and laws of the United States, and the state denies it. By whom is this question to be decided? It is a privilege or exemption, within the very words of the judiciary act, set up or claimed, by the party, under the constitution and laws of the Union. It is immaterial for the present purpose whether the claim be well or ill founded. The question is, whether the party setting up the claim, is to be turned out of court, without being heard upon the merits of his case. If you have not jurisdiction, you cannot hear him upon the merits. Upon this motion to quash the writ of error, you can only inquire into the jurisdiction, and cannot look into the merits; but you are asked to turn the party out of court for defect of jurisdiction, and without giving him an opportunity to show that by the laws and constitution of the Union, he is entitled to the privilege and exemption which he claims. It is no answer to say that **347\*** \*any individual may allege that he has such a privilege, in order to remove his case from the state court to this; because no injury would ensue, as the case would be sent back with damages; and even if there might be some inconveniences, from improperly bringing causes here, they ought rather to be submitted to, than to hazard the possible violation of the constitutional rights of a citizen.

Wheat. 6.

3. It is no objection to the exercise of the judicial powers of this court, that the defendant in error is one of the states of the Union. Its authority extends, in terms, to all cases arising under the constitution, laws, and treaties of the United States; and if there be any implied exceptions, it is incumbent on the party setting up the exception to show it. In order to except the states, it is said that they are sovereign and independent societies, and therefore not subject to the jurisdiction of any human tribunal. But we deny, that since the establishment of the national constitution, there is any such thing as a sovereign state, independent of the Union. The people of the United States are the sole sovereign authority of this country. By them, and for them, the constitution was established. The people of the United States in general, and that of Virginia in particular, have taken away from the state governments certain authorities which they had before, so that they are no longer sovereign and independent in that sense which exempts them from all coercion by judicial tribunals. Every state is limited in its powers by the provision of the constitution; and whether a state passes those limits, is a question \*which the people of the Union [**\*348** have not thought fit to trust to the state legislatures or judiciaries, but have conferred it exclusively on this court. The court would have the jurisdiction without the word *state* being mentioned in the constitution. The term "all cases," means *all*, without exception; and the states of the Union cannot be excepted, by implication, because they have ceased to be absolutely sovereign and independent. The constitution declares that every citizen of one state, shall have all the privileges of the citizens of every other state. Suppose Virginia were to declare the citizens of Maryland aliens, and proceed to escheat their lands by inquest of office: the party is without a remedy, unless he can look for protection to this court, which is the guardian of constitutional rights. Because the state, which is the wrong-doer, is a party to the suit, is that a reason why he should not have redress? By the original text of the constitution, there is no limitation in respect to the character of the parties, where the case arises under the constitution, laws, and treaties of the Union; and the amendment to the constitution respecting the suability of states, merely applies to the other class of cases, where it is the character of the parties, and not the nature of the controversy, which alone gives jurisdiction. The original clause giving jurisdiction on account of the character of the parties, as aliens, citizens of different states, &c., does not limit, but extends the judicial power of the Union. The amendment applies to that alone. It leaves a suit between a state and a citizen, arising under the constitution, laws, &c., \*where it [**\*349** found it; and the states are still liable to be sued by a citizen, where the jurisdiction arises in this manner, and not merely out of the character of the parties. The jurisdiction in the present case arises out of the subject-matter of the controversy, and not out of the character of the parties; and, consequently, is not affected by the amendment.

But it is said, that admitting the court has



jurisdiction where a state is a party, still that jurisdiction must be original, and not appellate; because the constitution declares, that in cases in which a state shall be party, the Supreme Court shall have original jurisdiction, and in all other cases, appellate jurisdiction. The answer is, that this provision was merely intended to prevent states from being sued in the inferior courts of the Union; that the Supreme Court is to have appellate jurisdiction in all cases arising under the constitution, laws, and treaties of the United States; that where, in such a case, a state sues in its own courts, it must be understood as renouncing its privilege or exemption, and to submit itself to the appellate power of this court; since, if the jurisdiction in this class of cases be concurrent, it cannot be exercised originally in the Supreme Court, wherever the state chooses to commence the suit in its own courts. Nor is there any hardship in this construction. The state cannot be sued in its own courts; but if it commences a suit there against a citizen, and a question arises in that suit under the constitution, laws, and treaties of the Union, there must be power in this court to revise the decision of the state **350\*** court, in order to \*produce uniformity in the construction of the constitution, &c. So, if a consul sues in the Circuit Court, this court has appellate jurisdiction, although the consul could not be sued in the Circuit Court. And if the United States, who cannot be sued anywhere, think proper to sue in the District or Circuit Court, they are amenable to the appellate jurisdiction of this court. Even granting, therefore, that a state cannot be sued in any case; the state is not sued here: she has sued a citizen, in her own tribunals, who implores the protection of this high court to give him the benefit of the constitution and laws of the Union. The jurisdiction does not act on the state; it merely prevents the state from acting on a citizen, and depriving him of his constitutional and legal rights.

It is true, there are some cases where this court cannot take jurisdiction, though the constitution and laws of the Union are violated by a state. But wherever a case is fit for judicial cognizance, or wherever the state tribunals take cognizance of it, whether properly or not, the appellate power of this court may intervene, and protect the constitution and laws of the Union from violation. Doubtless, a state might grant titles of nobility, raise and support ar-

mies and navies, and commit many other attacks upon the constitution, which this court could not repel. But if these attacks were made by judicial means, or if judicial means were used to compel obedience to these illegal measures, the authority of this court could, and would, intervene. Nor can \*this argument ap- **\*351** ply to a case which is entirely judicial in its very origin, and, therefore, steers clear of the supposed difficulty of vindicating the constitution and laws of the Union from violation in other cases which may be imagined.

Neither is this a criminal case. The offense in question is not made a misdemeanor by the law of Virginia. That law merely imposes a penalty, which may be recovered by action of debt, or information, or indictment. The present prosecution is a mere mode of recovering the penalty. But suppose it is a criminal case. The constitution declares, that the court shall have jurisdiction in all cases arising under it, or the laws and treaties of the Union; which includes criminal as well as civil cases; unless, indeed, Congress has refused jurisdiction over the former in the judiciary act, which we insist it has not.

*Mr. Pinkney*, on the same side, (1) argued, that there was no authority produced, or which could be produced, for the position on the other side, that this court could not, constitutionally, exercise an appellate jurisdiction over the judgments or decrees of the state courts, in cases arising under the constitution, laws, and treaties of the Union. The judiciary act of 1789, c. 20, contains a cotemporaneous construction of the constitution in this respect, of great weight, considering who were the authors of that law; and which has been since confirmed by the repeated decisions of this court, constantly exercising \*the jurisdiction in **\*352** question.<sup>1</sup> This legislative and judicial exposition has been acquiesced in, since no attempt has ever been made to repeal the law upon the ground of its repugnancy to the constitution. *Transiit in rem judicatam*. But even before the constitution was adopted, and whilst it was submitted to public discussion, this interpretation was given to it by its friends, who were anxious to avoid every objection which could render it obnoxious to state jealousy. But they well knew that this interpretation was unavoidable, and the authors of the celebrated Letters of Publius or the Federalist, have stated it in explicit terms.<sup>2</sup>

1.—*Clarke v. Harwood*, 3 Dall. 342; *Gordon v. Caldeleugh*, 3 Cranch, 268; *Smith v. Maryland*, 6 Cranch, 286; *Matthews v. Zane*, 4 Cranch, 382; *Owings v. Norwood's Lessee*, 5 Cranch, 344; *Martin v. Hunter*, 1 Wheat. Rep. 304; *Otis v. Walter*, 2 Wheat. Rep. 18; *Miller v. Nicholls*, 4 Wheat. Rep. 311; *Gelston v. Hoyt*, 3 Wheat. Rep. 246; *M'Intire v. Wood*, 7 Cranch, 505; *Sloeum v. Mayberry*, 2 Wheat. Rep. 1; *M'Culloch v. Maryland*, 4 Wheat. Rep. 316.

2.—Here another question occurs—what relation would subsist between the national and the state courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter to the Supreme Court of the United States. The constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance, in which it is not to have an original one; without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from

the reason of the thing, it ought to be construed to extend to the state tribunals. Either this must be the case or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and state systems are to be regarded as one whole. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions. The evident aim of the plan of the convention is, that all the causes of the spec-



**353\*]** \*But it is said, that the jurisdiction of the state courts is concurrent with those of the Union, over that class of cases arising under the constitution, laws, and treaties of the United States. This, however, is not of absolute necessity, but at the discretion of Congress, who may restrain and modify this concurrent jurisdiction, or render it exclusive in the federal tribunals at their pleasure. The supremacy of the national constitution and laws, is a fundamental principle of the federal government, and would be entirely surrendered to state usurpation, if Congress \*could not, at its option, invest the courts of the Union with exclusive jurisdiction over this class of cases, or give those courts an appellate jurisdiction over them from the decisions of the state tribunals. Every other branch of federal authority might as well be surrendered. To part with this, leaves the Union a mere league or confederacy of states entirely sovereign and independent. This particular portion of the judicial power of the Union is indispensably necessary to the existence of the Union. It is an axiom of political science, that the judicial power of every government must be commensurate with its legislative authority; it must be adequate to the protection, enforcement, and assertion of all the other powers of the government. In some cases this power must necessarily be directly exercised by the federal tribunals, as in enforcing the penal laws of the Union. But in other cases, it is merely a protecting power, and cannot, from the very nature of things, be exercised, in the first instance, by the courts of the Union. Such are suits between citizen and citizen on contract. Here the state courts must necessarily have original jurisdiction; but if the party defendant sets up a defense, founded (for example) upon an act of the state legislature supposed to impair the obligation of contracts, and the decision of the state court is in favor of the law thus set up, the judicial authority of the Union must be exerted over the cause, or that clause of the constitution which prohibits any state from making a law impairing the obligation of contracts is a dead letter. There is nothing in the constitution which prohibits the **355\*]** \*exercise of such a controlling authority. On the contrary, it is expressly declared, that where the case arises under the constitution and laws of the Union, the judicial power of the Union shall extend to it. It is the case, then, and not the forum in which it arises, that is to determine whether the judicial authority of the Union shall be exercised over it. But there is a class of cases which must necessarily originate in the state tribunals, because it cannot be known at the time the suit is commenced, whether it will or will not involve any question arising under the constitution and laws of the Union. Over this class of cases, then, the courts of the Union must have appellate jurisdiction. The appellate power of this court is extended by the constitution to all cases within the judicial authority of the Union, and not in-

cluded within the original jurisdiction of this court. Its appellate power, so far as respects the constitution, depends, then, on two questions only: is the case within the judicial power of the Union? and is it within the original cognizance of this court? The first question being answered affirmatively, and the second negatively, the appellate power under the constitution is completely established in any given case.

But the power of removing this class of causes, *pendente lite*, is also denied; and it is said that the authority to remove, before judgment, a suit brought in the state court, into the federal court, is repugnant to the constitution. In *Martin v. Hunter*, the argument was the other way, and it was insisted, that Congress ought to have given to this court the \*power of evoking this **[\*356]** description of causes from the state tribunals, the moment any question arose respecting the constitution and laws of the Union, in order to avoid the offensive exercise of an appellate jurisdiction over the state courts.<sup>1</sup> *Quaecunque via data*—it is immaterial; for the power of removal, if it be not unconstitutional, is an appellate power, and analogous to a writ of error. If it be unconstitutional, the necessity for the controlling power of a writ of error, is only the more manifest. Take away both, and the constitution, laws, and treaties of the Union lie at the mercy of the state judicatures.

Again. It is said, that the judges of the state courts take an oath to support the constitution of the Union, and the laws and treaties of the Union are their supreme law; and it is inferred that the constitution reposes implicit confidence in them, and there ought to be no revision of their judgments. But, it may be asked, if the constitution reposes this implicit confidence in the state tribunals, why does it authorize the establishment of federal courts, which, upon this supposition, would be wholly useless? And why are the members of the state legislatures and executives required to take the same oath? They are bound to support the constitution by the same solemn sanctions, and yet their acts may confessedly be set aside by the national judicatures, as being repugnant to that constitution. The actual constitution of this country is not a government of confidence; it is a scheme of government \*conceived in the spirit of jealousy, **[\*357]** and rendered adequate to all its own purposes, by its own means; and the judicial power of the Union is the principal means of giving effect to it. This it is which distinguishes it from the confederation. Experience has shown the necessity and wisdom of this provision. If the state courts may adjudicate conclusively for the Union, why may not the state legislatures legislate for it; and where is the utility of distinct and appropriate powers, if it cannot maintain them from violation? In *Martin v. Hunter*,<sup>2</sup> the court considered this argument fully, and thought it operated the other way.

fixed classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union. To confine, therefore, the general expressions, giving appellate jurisdiction to the Supreme Court, to appeals from the subordinate federal courts, instead of allowing their extension to the state courts, would be to abridge

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the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation." No. LXXXIII.

1.—1 Wheat. Rep. 319.

2.—1 Wheat. Rep. 349.



The care which the constitution takes to make the state courts respect it, and the laws and treaties made under it, proves that it was supposed that cases might come before them by original suit, which would involve the rights and interests of the Union, and lay a foundation for appeal or revision. This was anticipated, and the constitution endeavors to make the first decision correct, by the sanction of an oath. But it does not improvidently rely upon that alone. The judges of the inferior courts of the Union take the same oath, and lie under the same obligation; but they are not the less subject to the appellate jurisdiction of the Supreme Court.

But it is asked, can Congress grant an appeal from the District or Circuit Court, to a state court? The question is answered in the negative, and it is thence inferred that they cannot **[358\*]** grant an appeal \*from a state to a federal court. This seems to imply that you can do nothing unless you can do its opposite. Such a proposition would repeal all the physical and moral laws of the universe. As well might it be asked, can Congress grant an appeal from the Supreme to the District Court? and because there is something absurd in the idea of an ap-

peal from a superior to an inferior tribunal, it would be inferred that the opposite appeal could not be granted. But, until the relation of supreme and subordinate is destroyed, the state laws and judicatures must be considered as subordinate to those of the Union, in all cases within the scope of its powers and jurisdiction. Such was once the doctrine asserted by Virginia herself, and to which it is confidently believed she will revert in a moment of calmer reflection<sup>1</sup>.

\*2. It is further contended on the **[\*359]** other side, that this court has no jurisdiction of the present case, because the writ of error presents no question arising \*under the **[\*360]** constitution or laws of the United States. And to show this, it is said that the record speaks only of the validity of the act of Congress, \*and nobody denies its validity, **[\*361]** and therefore no question arises under an act of Congress. But the words of the judiciary act are pursued by this writ of error, as they always have been in other cases. It is the validity of the act of Congress, and the validity of the act of Virginia, as compared with it, which are drawn into question. The court below decided against the first, and in favor of the last,

1.—The learned counsel here read the following resolutions of the legislature of Virginia:

Extract from the journal of the Senate of the commonwealth of Virginia, begun and held at the capitol in the city of Richmond, the 4th day of December, 1809.

Friday, January 26, 1810. "Mr. Nelson reported from the committee to whom were committed the preamble and resolutions on the amendment proposed by the legislature of Pennsylvania, to the constitution of the United States, by the appointment of an impartial tribunal to decide disputes between the state and federal judiciary, that the committee had, according to order, taken the said preambles and resolutions under their consideration, and directed him to report them without any amendment. And on this question being put thereupon, the same were agreed to unanimously, by the House, as follows: The committee to whom was referred the communication of the Governor of Pennsylvania, covering certain resolutions of the legislature of that state, proposing an amendment to the constitution of the United States, by the appointment of an impartial tribunal to decide disputes between the state and federal judiciary, have had the same under their consideration, and are of opinion that a tribunal is already provided by the constitution of the United States, to wit: The Supreme Court, more eminently qualified from their habits and duties, from the mode of their selection, and from the tenure of their offices, to decide the disputes aforesaid, in an enlightened and impartial manner, than any other tribunal which could be created. The members of the Supreme Court are selected from those in the United States, who are most celebrated for virtue and legal learning, not at the will of a single individual, but by the concurrent wishes of the President and Senate of the United States; they will therefore have no local prejudices and partialities. The duties they have to perform lead them necessarily to the most enlarged and accurate acquaintance with the jurisdiction of the federal, and several state courts, together with the admirable symmetry of our government. The tenure of their offices enables them to pronounce the sound and correct opinions they may have formed, without fear, favor, or partiality. The amendment to the constitution proposed by Pennsylvania, seems to be founded upon the idea that the federal judiciary will, from a lust of power, enlarge their jurisdiction, to the total annihilation of the jurisdiction of the state courts; that they will exercise their will instead of the law and the constitution. This argument, if it proves anything, would operate more strongly against the tribunal proposed to be created, which promises so little, than against the

Supreme Court, which, for the reasons given before, have everything connected with their appointment calculated to insure confidence. What security have we, were the proposed amendment adopted, that this tribunal would not substitute their will and their pleasure in place of the law? The judiciary are the weakest of the three departments of government, and least dangerous to the political rights of the constitution. They hold neither the purse nor the sword; and even to enforce their own judgments and decrees, must ultimately depend upon the executive arm. Should the federal judiciary, however, unmindful of their weakness, unmindful of the duty which they owe to themselves and their country, become corrupt and transcend the limits of their jurisdiction, would the proposed amendment oppose even a probable barrier to such an improbable state of things? The creation of a tribunal such as is proposed by Pennsylvania, so far as we are enabled to form an idea of it, from the description given in the resolutions of the legislature of that state, would, in the opinion of your committee, tend rather to invite, than prevent a collision between the federal and state courts. It might also become, in process of time, a serious and dangerous embarrassment to the operations of the general government.

Resolved, therefore, that the legislature of this state do disapprove of the amendment to the constitution of the United States proposed by the legislature of Pennsylvania.

Resolved, also, that his excellency the Governor, be, and is hereby requested to transmit forthwith, a copy of the foregoing preamble and resolutions to each of the senators and representatives of this state, in Congress, and to the executives of the several states in the Union, and request that the same be laid before the legislatures thereof.

Extract from the journal of the House of Delegates of the commonwealth of Virginia:

"Tuesday, January 23, 1810. The House, according to the order of the day, resolved itself into a committee of the whole house on the state of the commonwealth, and after some time spent therein, Mr. Speaker, resumed the chair, and Mr. Robert Stanard reported that the committee had, according to order, had under consideration the preamble and resolutions of the select committee to whom were referred that part of the Governor's communication which relates to the amendment proposed to the constitution of the United States, by the legislature of Pennsylvania, had gone through the same, and directed him to report them to the House without amendment; which he handed in at the clerk's table, and the question being put on agreeing to the said preamble and resolutions, they were agreed to by the House unanimously.



to the full extent of the case. The validity of the act of Congress, means the effect attributed to it by the defendant who sets it up as a defense against so much of the act of the state as inflicts a penalty upon him for doing what the act of Congress authorizes. The defendant relies upon the act of Congress, as creating an exception in favor of his case, out of the act of Virginia. He says it is valid, or available, or efficacious to create such an exception. That was the question which the record shows was before the court below; and the court decided that it was not so valid, or available, or efficacious. Whether it is so or not, is the question which the writ of error presents for inquiry; **362\*** and it is such a question as the appellate power of this court can deal with. But the question on this motion to dismiss the writ of error, is not whether the act of Congress is valid as against the act of Virginia; but whether that question is presented by the record, so that this court can determine it, after it has concluded to entertain the writ of error. It is the claim of a right, privilege, or exemption under the statute of the United States, which gives the jurisdiction.<sup>1</sup> The decision upon that claim, as it appears upon the record, is the exercise of the jurisdiction. That the claim to exemption appears upon the record cannot be denied in this case more than any other. The claim may even be an absurd one; but this court cannot be called upon, on a motion to dismiss the writ of error, to condemn it as such. All argument upon the sufficiency of the claim is premature, so long as it is, *sub judice*, whether the court can examine its sufficiency.

But it is said, that the question does not arise under any statute of the United States, but under a mere by-law of the city of Washington; and that the case involves nothing but that by-law; and it is said to be absurd to call a by-law of the city of Washington a law of the United States. It is immaterial whether it be so or not. The by-law is the execution of a power given by a law of the United States. The effect of the execution of that power, involves the effect of the law; and although the execution of the power is not a law [of the **363\*** United States, yet that which gives the power is. The question, therefore, is, not what is the mere effect of the execution of the power in the abstract, or unconnected with the law which gives it, but what is the effect of the power by force of the law which gives it; and that question compels you to mount up to the constitution itself.

The course of the inquiry will then be: (1) What has the party done? and what is the immediate authority under which he did it? (2) What is the nature and extent of that authority? what its qualities under the law which gave it, and the constitution under which that law was passed?

If an officer of the United States does any act for which a state court calls him to account, and he relies in his defense upon the authority, real or supposed, of a statute of Congress, his act is not a law of the United States; but his defense is referred to the effect and validity of a law of the United States, and that is again

referred to the constitution, which is the paramount law. The last act done need not be a law of the United States. It is sufficient, if it is attempted to be justified, or its consequences maintained, under a law of the United States, which it is alleged gave to it a protecting power in the case before the court.

It is, however, asserted, that the constitution gives jurisdiction only in cases arising under it, or the laws, or treaties of the United States; and that this case does not arise under a law of the United States, because the act of Congress now in question is not a law of the United States. An act of the Congress, \*in its [**364** capacity of local sovereign of the District of Columbia, is said not to be a law of the United States. But whose law, then, is it? The United States in Congress assembled, are the local sovereigns of the district, and it is by them that this law is passed. Is it less a law of the United States, because it does not operate directly upon the Union at large? A statute is not a law of the United States on account of the subject on which it acts being limited or unlimited. It is a law of the United States, because it is passed by the legislative power of the United States. The legislative authority over the District of Columbia, is that of the Union. Its sphere is limited, but the power itself is even greater than the general federal power of the Union. It is the power of the people and the states combined, exerted upon their peculiar domain. It is the same Congress which passes both description of laws. The question, whether the law operates beyond the district, is the question upon the merits hereafter to be discussed.

Again, it is said, that the by-law alone is in question, and not the act of Congress: because the by-law is not passed by virtue of the act of Congress, but by virtue of the inherent power of the people of the district to govern themselves. The act of Congress only calls this inherent power into action: and this inherent power, when so called into action, is the only power which this court can deal with. The fallacy of this argument consists in its confounding inherent power with an inherent capacity to receive power. The subordinate legislative power of the \*territories and [**365** districts, which belong to the Union in full sovereignty, is not their power, but that of their superior. But admit this abstract doctrine of inherent power: the question still recurs, what is the constitutional effect of this power being exerted into action by the paramount power. The action of the inherent power will still depend upon the power by which it is set in motion; and what it can, or cannot do, under that impulse, is just the same question with the other.

It is also objected, that a law emanating from the local power of Congress over the District of Columbia, cannot bind the Union. But whether it can or not is the very question to be determined, when the merits come to be discussed; which the writ of error gives authority to decide; and which cannot be decided without entertaining the writ of error. The argument on the other side, proceeds in a vitious circle. It is asserted, that you must quash the writ of error, because you have no jurisdiction over the case or question. It is, then, said, that you must take jurisdiction of, and inquire

1.—Wheat. Dig. Dec. tit. Const. Law, V. (B.) 186. Wheat. 6.



into, the case and the question, in order that you may dismiss the writ of error; or, in other words, you have, and you have not, jurisdiction over the case and question, and you ought to decide them in order to see that you ought not to decide them. And here again the supposed absurdity of the claim of protection, by the defendant on the record, against the act of Virginia, is urged to authorize a refusal to inquire upon the writ of error, whether it is absurd or not.

**366\***] \*3. The next ground of objection to the jurisdiction is, that the writ of error is itself a suit against a state by a citizen of that or some other state. And Bac. Abr. tit. Error (L.), is cited as an authority to show that a release of all suits is a release of a writ of error. But even admitting that it may sometimes be technically called a suit, it is not such a suit as is contemplated by the constitution. A writ of error, where a party is to be restored to something, may be released by a release of all suits or actions, because in this respect it resembles an action. But this writ of error is not a suit, because the party is not to be restored to anything. A reversal of the judgment below will leave things just as they were before the judgment. But the state of Virginia is not compelled to come into this court by the writ of error. A citation, or *scire facias ad audiendum errores*, is only notice to the state, leaving it at her option voluntarily to appear. It does not act compulsorily upon the state. It acts upon the court, which she has used as the instrument to enforce her law. A case is presented by the interference of the judiciary of the state, for the interposition of the appellate power of this court. The object is to reverse the judgment, and that done, there is an end of the exercise of power. The United States are liable to the same coercion. They may be called before this court in the same manner, and the judgments obtained in their favor may be reversed. And is it, then, derogatory to the sovereignty of a particular state, that its judgments should be liable to be controlled in the same manner, in **367\***] cases within the judicial \*power of the Union? This control is exerted upon the judiciary; upon the judgments of the judiciary. The state is incidentally affected; but that has been already determined in this court to be immaterial.<sup>1</sup> Nor is this sort of control more exceptionable than that which is constantly exercised, in suits between private parties, over the acts of the state legislatures and executives, upon the same ground of their repugnancy to the constitution and laws of the Union.

If it be asked whether you can give costs against the state, and enforce the payment, the answer is, that you cannot do so in any case upon a mere reversal of a judgment. And even if you could in a case between private parties, is it any objection to the appellate jurisdiction of this court, where the United States are plaintiffs below, that you cannot award and enforce the payment of costs against them? It is not jurisdiction over the state of Virginia that is claimed, but over a question arising under the laws of that state, and over the judgments of her courts construing those laws. This point is incidentally touched in *Martin v. Hunter*, in consid-

ering the question as to removal of suits, before judgment, and it is there said by the court that the remedy of removal of suits would be utterly inadequate to the purposes of the constitution, if it could act only on the parties, and not upon the state courts.<sup>2</sup>

\*4. Lastly. It is insisted, for the de- **[368** fendant in error, that this court has no jurisdiction in the present case, because a state is a party to the original controversy which the writ of error brings before the court. That the jurisdiction of this court in all cases, where a state is a party, is original, and therefore it cannot have appellate jurisdiction in this case.

The obvious answer to this argument is, that the jurisdiction now claimed does not arise under that part of the constitution which gives original jurisdiction to the Supreme Court in cases in which a state is a party; but the jurisdiction is asserted under that clause which gives the federal judiciary cognizance of all cases arising under the constitution, laws, and treaties of the United States, without regard to the character of the parties. In this latter class of cases the Supreme Court has appellate jurisdiction. In some of this description of cases, the jurisdiction could not be originally exercised. The penal laws of a state cannot be originally enforced, or enforced at all, by a judicature of the Union. They cannot therefore form the subject of, or create subjects for, its original jurisdiction. The courts of the United States can here exert only a controlling or restraining power for the protection of the rights of the Union, and this can only be done by appeal or writ of error. This view of the subject is taken in *Martin v. Hunter*. The court there says: "Suppose an indictment for a crime in a state court, and the defendant should allege, in his defense, that the crime was committed by an *ex post facto* act of the state; must not the state court, in \*the exercise of a jurisdiction **[369** which has already rightfully attached, have a right to pronounce on the sufficiency and validity of the defense? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated in illustration of the position; and unless the state courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mischiefs of a most enormous magnitude would inevitably ensue."<sup>3</sup> So the court afterwards say, in the context of the passage before cited, speaking of the inadequacy of the remedy of removal of suits to accomplish the purposes of the constitution, "in respect to criminal prosecutions, the difficulty seems admitted to be insurmountable,"<sup>2</sup> &c. What difficulty? The difficulty of controlling them by the courts of the United States without the aid of a writ of error, because those courts could take no original cognizance of this description of cases, and they could not be removed before judgment. As, then, the federal courts have no original jurisdiction of cases arising merely under the constitution, laws, and treaties of the Union, it follows, that the clause of the constitution which

1.—Wheat. Dig. Dec. tit. Const. Law, V. (C.) 211.

2.—1 Wheat. Rep. 350.

3.—1 Wheat. Rep. 341.

speaks of cases in which a state shall be a party, does not apply to it; and the appellate power, now in question, is to be sought for in that part of the same article which declares, that the judicial power of the Union shall extend to all **370\*** cases arising under the \*constitution, laws, and treaties of the Union, coupled with the subsequent provision, which declares, that in all cases to which that judicial power extends, this court shall have appellate, where it has not original jurisdiction, with such exceptions, and under such regulations as Congress may prescribe. That it has appellate jurisdiction in all cases arising under the constitution, laws, and treaties of the United States, is established by the authority of the case of *Martin v. Hunter*; and that this appellate power is competent to control the state courts, is also proved by that case.<sup>1</sup> There is, therefore, no open question but this: Does the fact of a state being a party prosecutor in the state court, make this case an exception, and take it out of the general rule? Upon the plain policy and purpose of the constitution it does not. This jurisdiction has already been shown to be different in its nature from the original jurisdiction which was exercised over states before the amendment of the constitution. But that other jurisdiction will go far to show that there is nothing unnatural in giving appellate power over state courts in cases where a state is a party plaintiff. The constitution authorized direct coercion over states or private citizens indifferently. The amendment has partly taken this away; but the spirit of the constitution is still manifested by the former provision. The same constitution also authorized appellate control over state courts; and is it natural that it should condemn the same control, merely be- **371\*** cause \*a state has obtained the judgment to be revised? The constitution had no delicacy with regard to states on this matter. It considered them as directly amenable where original jurisdiction can be exerted. Why not empower its tribunals to affect their interests in an appellate form, by acting, not on the state, but on its courts, as unquestionably it does in all cases where individuals are parties below? The appellate power is trifling, compared with the original as it formerly stood; and a constitution which gave the last could have no scruples about the first. The appellate control is respectful to the state sovereignties compared with the original; and it stands upon high considerations of self-defense, upon grounds of constitutional necessity not applicable to the other. The suability of the states might have been dispensed with, and the constitution still be safe. But the judicial control of the Union over state encroachments and usurpations, was indispensable to the sovereignty of the constitution—to its integrity—to its very existence. Take it away, and the Union becomes again a loose and feeble confederacy—a government of false and foolish confidence—a delusion and a mockery! Why is it in cases, in which individuals are parties in a state court, that the judgment may be revised in this court? Because the judiciary of the Union ought to possess ample power to preserve the constitution and laws, and treaties of the Union, from violation

by other judicatures. Its judicial powers should be commensurate with its other powers and rights, and prerogatives. They might else be evaded and \*trampled under foot by [**\*372** judicatures in which the constitution does not confide. This high motive is as strong, at least, where a state is plaintiff or prosecutor in its own courts, as where it is not. Indeed, it is far stronger; for all the motives to judicial leanings and partialities here operate in their fullest force, though the state judges may not be conscious of their influence. The sovereignty of the state law—state pride—state interests—are here in paramount vigor as inducements to error; and judicial usurpation is countenanced by legislative support and popular prejudice. Let the court look to the consequences of this distinction. A state passes a law repugnant to the national constitution. It gives a remedy in the name of an individual—a common informer. You may control this law, if the state judiciary acts upon it. But the state may avoid this (as it seems) by authorizing the remedy in its own name; and you thus lose your protecting jurisdiction over the subject, although you might still exercise it, as in the other case, in the inoffensive mode of confining your control to the state judiciary. The whole constitution of the Union might thus be overturned unless force should be resorted to; and the object of the constitution was to avoid force, by giving ordinary judicial power of correction.

It has been said that a sovereign state of the Union is not amenable to judicature, unless made so by express words—*eo nomine*. I deny this as respects appellate jurisdiction, which acts, not on the state, but on its courts. The words of the constitution \*are suffi- [**\*373** ciently express, and all reason is on that side; especially since it is, or must be admitted, that these courts may be thus controlled, and the legislative power of the state be reached through them, and controlled also; and especially, too, when the constitution has not scrupled, in other cases, to subject the states to direct control.

But it is contended, that there are cases arising under the constitution and laws of the Union, which, from their very nature, are not the subjects of judicial cognizance, and consequently are exceptions out of the general grant of judicial power under the constitution; such as the prohibition to the states to grant titles of nobility, &c.; and that the present case may be such an exception. But the very supposition admits, that if the case in question is suited to the exertion of judicial power, it is not an exception; and the moment a state judiciary intervenes, judicial jurisdiction can, and ought to be exerted. It is unnecessary to inquire how the case must, in general, exist, in order to become the proper object of judicial cognizance; for here it does exist in a proper shape for that purpose. A state court has intervened, and the regular appellate power of this court may act. Nor does the proof of some exceptions, arising from necessity, establish other exceptions free from that necessity. Many unlawful things cannot be restrained by judicature; but does it follow that where they can be restrained, they shall not?

Again. It is said that the states may destroy the federal government at their pleasure, mere-

1.—1 Wheat. Rep. 304.



**374\***] ly by forbearing \*to elect senators, and to provide for the election of a President and representatives, and that the authority of the Union is incompetent to coerce them. Such extreme arguments prove nothing to the present purpose; but suppose the states could not be coerced in such a case to do their duty, because no intervening court or agent is necessary to the accomplishment of such a desperate purpose, does this prove that you cannot defensively control active violations of the constitution or laws, when a controllable judicature or agent intervenes to perpetrate these violations?

It is also said, that this is a prosecution under a penal statute, and that criminal cases peculiarly belong to the domestic forum. The answer is, that so was the case of *M' Culloch v. Maryland*, a *qui tam* action, under a penal law of that state, giving one-half of the penalty to the state, and the other half to the informer; yet this court did not consider the nature of the suit, or the circumstance of a state being a party, as forming a valid objection to the jurisdiction.<sup>1</sup> Nobody objects to a state enforcing its own penal laws; all that is claimed is, that in executing them, it should not violate the laws of the Union, which are paramount. *Sic utere tuo ut alienum non laedas.*

The other suppositions which have been stated of bills of attainder and *ex post facto* laws passed by the states, and attempted to be executed, but decided by this court to be unconstitutional, and yet the \*state courts persisting in carrying them into effect, even in capital cases, are too wild and extravagant to illustrate any question which can ever practically arise.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court:

This is a writ of error to a judgment rendered in the Court of Hustings for the borough of Norfolk, on an information for selling lottery tickets, contrary to an act of the legislature of Virginia. In the state court, the defendant claimed the protection of an act of Congress. A case was agreed between the parties, which states the act of Assembly on which the prosecution was founded, and the act of Congress on which the defendant relied, and concludes in these words: "If upon this case the court shall be of opinion that the acts of Congress before mentioned were valid, and on the true construction of those acts, the lottery tickets sold by the defendants as aforesaid, might lawfully be sold within the state of Virginia, notwithstanding the act or statute of the General Assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants. And if the court should be of opinion that the statute or act of the General Assembly of the state of Virginia, prohibiting such sale, is valid, notwithstanding the said acts of Congress, then judgment to be entered that the defendants are guilty, and that the commonwealth recover against them one hundred dollars and costs.

**376\***] \*Judgment was rendered against the defendants; and the court in which it was rendered being the highest court of the state in which the cause was cognizable, the record has

been brought into this court by a writ of error.<sup>2</sup>

The defendant in error moves to dismiss this writ, for want of jurisdiction.

In support of this motion, three points have been made, and argued with the ability which the importance of the question merits. These points are:

1st. That a state is a defendant.

2d. That no writ of error lies from this court to a state court.

3d. The third point has been presented in different forms by the gentlemen who have argued it. The counsel who opened the cause said, that the want of jurisdiction was shown by the subject-matter of the case. The counsel who followed him said, that jurisdiction was not given by the judiciary act. The court has bestowed all its attention on the arguments of both gentlemen, and supposes that their tendency is to show that this court has no jurisdiction of the case, or, in other words, has no right to review the judgment of the state court, because neither the constitution nor any law of the United States has been violated by that judgment.

The questions presented to the court by the two \*first points made at the bar are [**377** of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry whether the constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every state of the Union. That the constitution, laws, and treaties, may receive as many constructions as there are states; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision without permitting inquiry, affirms that the decision he asks does not depend on inquiry.

If such be the constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of this court to say so; and to perform that task which the American people have assigned to the judicial department.

\*1st. The first question to be con- [**378** sidered is, whether the jurisdiction of this court is excluded by the character of the parties, one of them being a state, and the other a citizen of that state?

The second section of the third article of the

2.—The plaintiff in error prayed an appeal from the judgment of the Court of Hustings, but it was refused, on the ground that there was no higher state tribunal which could take cognizance of the case.

1.—4 Wheat. Rep. 316.



constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended "controversies between two or more states, between a state and citizens of another state," "and between a state and foreign states, citizens or subjects." If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.

The counsel for the defendant in error have stated that the cases which arise under the constitution must grow out of those provisions **379\*** which are capable \*of self-execution; examples of which are to be found in the 2d section of the 4th article, and in the 10th section of the 1st article.

A case which arises under a law of the United States must, we are likewise told, be a right given by some act which becomes necessary to execute the powers given in the constitution, of which the law of naturalization is mentioned as an example.

The use intended to be made of this exposition of the first part of the section, defining the extent of the judicial power, is not clearly understood. If the intention be merely to distinguish cases arising under the constitution, from those arising under a law, for the sake of precision in the application of this argument, these propositions will not be controverted. If it be to maintain that a case arising under the constitution, or a law, must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. Congress seems to have intended to give its own construction of this part of the constitution in the 25th section of the judiciary act; and we perceive no reason to depart from that construction.

The jurisdiction of the court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would **380\*** withdraw \*any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.

The counsel for the defendant in error have undertaken to do this; and have laid down the Wheat. 6.

general proposition, that a sovereign independent state is not suable except by its own consent.

This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a state has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear that the state has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides.

The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience, that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent states. Under the influence of this opinion, and thus instructed by experience, \*the American people, in [**381** the conventions of their respective states, adopted the present constitution.

If it could be doubted, whether from its nature, it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration, that "this constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding."

This is the authoritative language of the American people; and, if gentlemen please, of the American States. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of the states. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there be any who deny its necessity, none can deny its authority.

To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared, that they are given "in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity."

\*With the ample powers confided to [**382** this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the states, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the



sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. When we consider the situation of the government of the Union and of a state, in relation to each other; the nature of our constitution; the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution<sup>a</sup> and laws of the United States is confided to the judicial department, are we at liberty to insert in this general grant, an exception of those cases in which a state may be a **383** \*party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case.

Had any doubt existed with respect to the just construction of this part of the section, that doubt would have been removed by the enumeration of those cases to which the jurisdiction of the federal courts is extended, in consequence of the character of the parties. In that enumeration, we find, "controversies between two or more states, between a state and citizen of another state," "and between a state and foreign states, citizens, or subjects."

One of the express objects, then, for which the judicial department was established, is the decision of controversies between states, and between a state and individuals. The mere circumstance, that a state is a party, gives jurisdiction to the court. How, then, can it be contended, that the very same instrument, in the very same section, should be so construed as that this same circumstance should withdraw a case from the jurisdiction of the court, where the constitution or laws of the United States are supposed to have been violated? The constitution gave to every person having a claim upon a state, a right to submit his case to the court of the nation. However unimportant his claim might be, however little the community might be interested in its decision, the framers of our constitution thought it necessary, for the purposes of justice, to provide a tribunal **384** \*as superior to influence as possible, in which that claim might be decided. Can it be imagined, that the same persons considered a case involving the constitution of our country and the majesty of the laws—questions in which every American citizen must be deeply interested—as withdrawn from this tribunal, because a state is a party?

While weighing arguments drawn from the nature of government, and from the general spirit of an instrument, and urged for the pur-

pose of narrowing the construction which the words of that instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import. One of these, which has been pressed with great force by the counsel for the plaintiffs in error, is, that the judicial power of every well-constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.

If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it as an abstract question, there would, probably, exist no contrariety of opinion respecting it. Every argument, proving the necessity of the department, proves also the propriety of giving this extent to it. We do not mean to say, that the jurisdiction of the courts of the Union should be construed to be co-extensive with the legislative, merely because it is fit that it should be so; but we mean to say, that this fitness furnishes an argument \*in construing the **385** constitution which ought never to be overlooked, and which is most especially entitled to consideration, when we are inquiring, whether the words of the instrument which purport to establish this principle, shall be contracted for the purpose of destroying it.

The mischievous consequences of the construction contended for on the part of Virginia, are also entitled to great consideration. It would prostrate, it has been said, the government and its laws at the feet of every state in the Union. And would not this be its effect? What power of the government could be executed by its own means, in any state disposed to resist its execution by a course of legislation? The laws must be executed by individuals acting within the several states. If these individuals may be exposed to penalties, and if the courts of the Union cannot correct the judgments by which these penalties may be enforced, the course of the government may be, at any time, arrested by the will of one of its members. Each member will possess a veto on the will of the whole.

The answer which has been given to this argument, does not deny its truth, but insists that confidence is reposed, and may be safely reposed, in the state institutions; and that, if they shall ever become so insane or so wicked as to seek the destruction of the government, they may accomplish their object by refusing to perform the functions assigned to them.

We readily concur with the counsel for the defendant, \*in the declaration that the **386** cases which have been put of direct legislative resistance for the purpose of opposing the acknowledged powers of the government, are extreme cases, and in the hope that they will never occur; but we cannot help believing, that a general conviction of the total incapacity of the government to protect itself and its laws in such cases, would contribute in no inconsiderable degree to their occurrence.

Let it be admitted, that the cases which have been put are extreme and improbable, yet there are gradations of opposition to the laws, far short of those cases, which might have a baneful influence on the affairs of the nation.



Different states may entertain different opinions on the true construction of the constitutional powers of Congress. We know, that at one time, the assumption of the debts contracted by the several states, during the war of our revolution, was deemed unconstitutional by some of them. We know, too, that at other times, certain taxes, imposed by Congress, have been pronounced unconstitutional. Other laws have been questioned partially, while they were supported by the great majority of the American people. We have no assurance that we shall be less divided than we have been. States may legislate in conformity to their opinions, and may enforce those opinions by penalties. It would be hazarding too much to assert, that the judicatures of the states will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many states the judges are dependent for office and **387\*** for salary on the will of the legislature. The constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a state shall prosecute an individual who claims the protection of an act of Congress. These prosecutions may take place even without a legislative act. A person making a seizure under an act of Congress, may be indicted as a trespasser, if force has been employed, and of this a jury may judge. How extensive may be the mischief if the first decisions in such cases should be final!

These collisions may take place in times of no extraordinary commotion. But a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose **388\*** on its own courts, rather than on others. There is certainly nothing in the circumstances under which our constitution was formed; nothing in the history of the times, which would justify the opinion that the confidence reposed in the states was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union. The requisitions of Congress, under the confederation, were as constitutionally obligatory as the laws enacted by the present Congress. That they were habitually disregarded, is a fact of universal notoriety. With a knowledge of this fact, and under its full pressure, a convention was assembled to change the system. Is it so

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improbable that they should confer on the judicial department the power of construing the constitution and laws of the Union in every case, in the last resort, and of preserving them from all violation from every quarter, so far as judicial decisions can preserve them, that this improbability should essentially affect the construction of the new system? We are told, and we are truly told, that the great change which is to give efficacy to the present system, is its ability to act on individuals directly, instead of acting through the instrumentality of state governments. But, ought not this ability, in reason and sound policy, to be applied directly to the protection of individuals employed in the execution of the laws, as well as to their coercion. Your laws reach the individual without the aid of any other power; why may they not protect him from punishment for performing his duty in executing them?

\*The counsel for Virginia endeavor **[389]** to obviate the force of these arguments by saying, that the dangers they suggest, if not imaginary, are inevitable; that the constitution can make no provision against them; and that, therefore, in construing that instrument, they ought to be excluded from our consideration. This state of things, they say, cannot arise until there shall be a disposition so hostile to the present political system as to produce a determination to destroy it; and, when that determination shall be produced, its effects will not be restrained by parchment stipulations. The fate of the constitution will not then depend on judicial decisions. But, should no appeal be made to force, the states can put an end to the government by refusing to act. They have only not to elect senators, and it expires without a struggle.

It is very true that, whenever hostility to the existing system shall become universal, it will be also irresistible. The people made the constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will. But this supreme and irresistible power to make or to unmake, resides only in the whole body of the people; not in any sub-division of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.

The acknowledged inability of the government, then, to sustain itself against the public will, and, by force or otherwise, to control the whole nation, is no sound argument in support of its constitutional \*inability to pre- **[390]** serve itself against a section of the nation acting in opposition to the general will.

It is true, that if all the states, or a majority of them, refuse to elect senators, the legislative powers of the Union will be suspended. But if any one state shall refuse to elect them, the Senate will not, on that account, be the less capable of performing all its functions. The argument founded on this fact would seem rather to prove the subordination of the parts to the whole, than the complete independence of any one of them. The framers of the constitution were, indeed, unable to make any provisions which should protect that instrument against a general combination of the states, or of the people, for its destruction; and, conscious of this inability, they have not made the attempt. But



they were able to provide against the operation of measures adopted in any one state, whose tendency might be to arrest the execution of the laws, and this it was the part of true wisdom to attempt. We think they have attempted it.

It has been also urged, as an additional objection to the jurisdiction of the court, that cases between a state and one of its own citizens, do not come within the general scope of the constitution; and were obviously never intended to be made cognizable in the federal courts. The state tribunals might be suspected of partiality in cases between itself or its citizens and aliens, or the citizens of another state, but not in proceedings by a state against its own citizens. That jealousy which might exist in the first case, could not exist in the last, and therefore the judicial power is not extended to the last.

**391\*]** \*This is very true, so far as jurisdiction depends on the character of the parties; and the argument would have great force if urged to prove that this court could not establish the demand of a citizen upon his state, but is not entitled to the same force when urged to prove that this court cannot inquire whether the constitution or laws of the United States protect a citizen from a prosecution instituted against him by a state. If jurisdiction depended entirely on the character of the parties, and was not given where the parties have not an original right to come into court, that part of the 2d section of the 3d article which extends the judicial power to all cases arising under the constitution and laws of the United States, would be mere surplusage. It is to give jurisdiction where the character of the parties would not give it, that this very important part of the clause was inserted. It may be true, that the partiality of the state tribunals, in ordinary controversies between a state and its citizens, was not apprehended, and therefore the judicial power of the Union was not extended to such cases; but this was not the sole nor the greatest object for which this department was created. A more important, a much more interesting object, was the preservation of the constitution and laws of the United States, so far as they can be preserved by judicial authority; and therefore the jurisdiction of the courts of the Union was expressly extended to all cases arising under that constitution and those laws. If the constitution or laws may be violated by proceedings **392\*]** \*instituted by a state against its own citizens, and if that violation may be such as essentially to affect the constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which expressly extends the judicial power of the Union to all cases arising under the constitution and laws?

After bestowing on this subject the most attentive consideration, the court can perceive no reason founded on the character of the parties for introducing an exception which the constitution has not made; and we think that the judicial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever may be the parties.

It has been also contended, that this jurisdiction, if given, is original, and cannot be exercised in the appellate form.

The words of the constitution are, "in all

cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction."

This distinction between original and appellate jurisdiction, excludes, we are told, in all cases, the exercise of the one where the other is given.

The constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others.

Among those in which jurisdiction must be exercised in the appellate \*form, are [**\*393** cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected. If a state be a party, the jurisdiction of this court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a state is a party may arise under the constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the court? Certainly, we think, so to construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument.

In one description of cases, the jurisdiction of the court is founded entirely on the character of the parties; and the nature of the controversy is not contemplated by the constitution. The character of the parties is everything, the nature of the case nothing. In the other description of cases, the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the constitution. In these, the nature of the case is everything, the character of the parties nothing. When, then, the constitution declares the jurisdiction, in cases where a state shall be a party, to be original, and in all cases arising under the constitution or a law, to be appellate, the conclusion seems irresistible, that its framers designed to include in the first class \*those cases in which [**\*394** jurisdiction is given, because a state is a party; and to include in the second, those in which jurisdiction is given, because the case arises under the constitution or a law.

This reasonable construction is rendered necessary by other considerations.

That the constitution or a law of the United States, is involved in a case, and makes a part of it, may appear in the progress of a cause in which the courts of the Union, but for that circumstance, would have no jurisdiction, and which of consequence could not originate in the Supreme Court. In such a case, the jurisdiction can be exercised only in its appellate form. To deny its exercise in this form is to deny its existence, and would be to construe a clause, dividing the power of the Supreme Court, in such a manner as in a considerable degree to defeat the power itself. All must perceive, that this construction can be justified only where it is absolutely necessary. We do not think the article under consideration presents that necessity.

It is observable, that in this distributive clause,

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no negative words are introduced. This observation is not made for the purpose of contending that the legislature may "apportion the judicial power between the supreme and inferior courts according to its will." That would be, as was said by this court in the case of *Marbury v. Madison*, to render the distributive clause "mere surplusage," to make it "form without substance." This cannot, therefore, be the true construction of the article.

**395\*]** \*But although the absence of negative words will not authorize the legislature to disregard the distribution of the power previously granted, their absence will justify a sound construction of the whole article, so as to give every part its intended effect. It is admitted, that "affirmative words are often, in their operation, negative of other objects than those affirmed;" and that where "a negative or exclusive sense must be given to them, or they have no operation at all," they must receive that negative or exclusive sense. But where they have full operation without it; where it would destroy some of the most important objects for which the power was created; then, we think, affirmative words ought not to be construed negatively.

The constitution declares, that in cases where a state is a party, the Supreme Court shall have original jurisdiction; but does not say that its appellate jurisdiction shall not be exercised in cases where, from their nature, appellate jurisdiction is given, whether a state be or be not a party. It may be conceded, that where the case is of such a nature as to admit of its originating in the Supreme Court, it ought to originate there; but where, from its nature, it cannot originate in that court, these words ought not to be so construed as to require it. There are many cases in which it would be found extremely difficult, and subversive of the spirit of the constitution, to maintain the construction, that appellate jurisdiction cannot be exercised where one of the parties might sue or be sued in this court.

The constitution defines the jurisdiction of **396\*]** the \*Supreme Court, but does not define that of the inferior courts. Can it be affirmed, that a state might not sue the citizen of another state in a circuit court? Should the Circuit Court decide for or against its jurisdiction, should it dismiss the suit, or give judgment against the state, might not its decision be revised in the Supreme Court? The argument is, that it could not; and the very clause which is urged to prove that the Circuit Court could give no judgment in the case, is also urged to prove that its judgment is irreversible. A supervising court, whose peculiar province it is to correct the errors of an inferior court, has no power to correct a judgment given without jurisdiction, because, in the same case, that supervising court has original jurisdiction. Had negative words been employed, it would be difficult to give them this construction if they would admit of any other. But, without negative words, this irrational construction can never be maintained.

So, too, in the same clause, the jurisdiction of the court is declared to be original, "in cases affecting ambassadors, other public ministers, and consuls." There is, perhaps, no part of the article under consideration so much required

by national policy as this; unless it be that part which extends the judicial power "to all cases arising under the constitution, laws, and treaties of the United States." It has been generally held, that the state courts have a concurrent jurisdiction with the federal courts, in cases to which the judicial power is extended, unless the jurisdiction of the federal courts be rendered exclusive \*by the words of the [**397** third article. If the words, "to all cases," give exclusive jurisdiction in cases affecting foreign ministers, they may also give exclusive jurisdiction, if such be the will of Congress, in cases arising under the constitution, laws, and treaties of the United States. Now, suppose an individual were to sue a foreign minister in a state court, and that court were to maintain its jurisdiction, and render judgment against the minister, could it be contended, that this court would be incapable of revising such judgment, because the constitution had given it original jurisdiction in the case? If this could be maintained, then a clause inserted for the purpose of excluding the jurisdiction of all other courts than this, in a particular case, would have the effect of excluding the jurisdiction of this court in that very case, if the suit were to be brought in another court, and that court were to assert jurisdiction. This tribunal, according to the argument which has been urged, could neither revise the judgment of such other court, nor suspend its proceedings; for a writ of prohibition, or any other similar writ, is in the nature of appellate process.

Foreign consuls frequently assert, in our prize courts, the claims of their fellow subjects. These suits are maintained by them as consuls. The appellate power of this court has been frequently exercised in such cases, and has never been questioned. It would be extremely mischievous to withhold its exercise. Yet the consul is a party on the record. The truth is, that where the words confer only appellate jurisdiction, original jurisdiction is most \*clearly not given; but where the words [**398** admit of appellate jurisdiction, the power to take cognizance of the suit originally, does not necessarily negative the power to decide upon it on an appeal, if it may originate in a different court.

It is, we think, apparent, that to give this distributive clause the interpretation contended for, to give to its affirmative words a negative operation, in every possible case, would, in some instances, defeat the obvious intention of the article. Such an interpretation would not consist with those rules which, from time immemorial, have guided courts, in their construction of instruments brought under their consideration. It must, therefore, be discarded. Every part of the article must be taken into view, and that construction adopted which will consist with its words, and promote its general intention. The court may imply a negative from affirmative words, where the implication promotes, not where it defeats the intention.

If we apply this principle, the correctness of which we believe will not be controverted, to the distributive clause under consideration, the result, we think, would be this: the original jurisdiction of the Supreme Court, in cases where a state is a party, refers to those cases in which, according to the grant of power made



in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal courts; not to those cases in which an original suit might not be **399\*** \*instituted in a federal court. Of the last description, is every case between a state and its citizens, and, perhaps, every case in which a state is enforcing its penal laws. In such cases, therefore, the Supreme Court cannot take original jurisdiction. In every other case, that is, in every case to which the judicial power extends, and in which original jurisdiction is not expressly given, that judicial power shall be exercised in the appellate, and only in the appellate form. The original jurisdiction of this court cannot be enlarged, but its appellate jurisdiction may be exercised in every case cognizable under the third article of the constitution, in the federal courts, in which original jurisdiction cannot be exercised; and the extent of this judicial power is to be measured, not by giving the affirmative words of the distributive clause a negative operation in every possible case, but by giving their true meaning to the words which define its extent.

The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the court, in the case of *Marbury v. Madison*.

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are **400\*** considered\* in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

In the case of *Marbury v. Madison*, the single question before the court, so far as that case can be applied to this, was, whether the legislature could give this court original jurisdiction in a case in which the constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case. But, in the reasoning of the court in support of this decision, some expressions are used which go far beyond it. The counsel for *Marbury* had insisted on the unlimited discretion of the legislature in the apportionment of the judicial power; and it is against this argument that the reasoning of the court is directed. They say that, if such had been the intention of the article, "it would certainly have been useless to proceed farther than to define the judicial power, and the tribunals in which it should be vested." The court says, that such a construction would render the clause, dividing the jurisdiction of the court into original and appellate, totally useless; that "affirmative words are often, in their operation, negative of other objects than those which are affirmed; and, in this case (in the case of *Marbury v. Madison*), a negative or exclusive sense must be given to

them, or they have no operation at all." "It cannot be presumed," adds the court, "that any clause in the constitution is intended to be without \*effect; and, therefore, such a [**401** construction is inadmissible, unless the words require it."

The whole reasoning of the court proceeds upon the idea that the affirmative words of the clause giving one sort of jurisdiction, must imply a negative of any other sort of jurisdiction, because otherwise the words would be totally inoperative, and this reasoning is advanced in a case to which it was strictly applicable. If in that case original jurisdiction could have been exercised, the clause under consideration would have been entirely useless. Having such cases only in its view, the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its principle. The reasoning sustains the negative operation of the words in that case, because otherwise the clause would have no meaning whatever, and because such operation was necessary to give effect to the intention of the article. The effort now made is, to apply the conclusion to which the court was conducted by that reasoning in the particular case, to one in which the words have their full operation when understood affirmatively, and in which the negative, or exclusive sense, is to be so used as to defeat some of the great objects of the article.

To this construction the court cannot give its assent. The general expressions in the case of *Marbury v. Madison* must be understood with the limitations which are given to them in this opinion; limitations \*which in no [**402** degree affect the decision in that case, or the tenor of its reasoning.

The counsel who closed the argument put several cases for the purpose of illustration, which he supposed to arise under the constitution, and yet to be, apparently, without the jurisdiction of the court.

Were a state to lay a duty on exports, to collect the money and place it in her treasury, could the citizen who paid it, he asks, maintain a suit in this court against such state, to recover back the money?

Perhaps not. Without, however, deciding such supposed case, we may say, that it is entirely unlike that under consideration.

The citizen who has paid his money to his state, under a law that is void, is in the same situation with every other person who has paid money by mistake. The law raises an *assumpsit* to return the money, and it is upon that *assumpsit* that the action is to be maintained. To refuse to comply with this *assumpsit* may be no more a violation of the constitution than to refuse to comply with any other; and as the federal courts never had jurisdiction over contracts between a state and its citizens, they may have none over this. But let us so vary the supposed case as to give it a real resemblance to that under consideration. Suppose a citizen refuse to pay this export duty, and a suit be instituted for the purpose of compelling him to pay it. He pleads the constitution of the United States in bar of the action, notwithstanding which the court gives judgment

against him. This would be a case arising **403\*** under \*the constitution, and would be the very case now before the court.

We are also asked, if a state should confiscate property secured by a treaty, whether the individual could maintain an action for that property.

If the property confiscated be debts, our own experience informs us that the remedy of the creditor against his debtor remains. If it be land which is secured by a treaty, and afterwards confiscated by a state, the argument does not assume that this title, thus secured, could be extinguished by an act of confiscation. The injured party, therefore, has his remedy against the occupant of the land for that which the treaty secures to him, not against the state for money which is not secured to him.

The case of a state which pays off its own debts with paper money, no more resembles this than do those to which we have already adverted. The courts have no jurisdiction over the contract. They cannot enforce it, nor judge of its violation. Let it be that the act discharging the debt is a mere nullity, and that it is still due. Yet the federal courts have no cognizance of the case. But suppose a state to institute proceedings against an individual, which depended on the validity of an act emitting bills of credit; suppose a state to prosecute one of its citizens for refusing paper money, who should plead the constitution in bar of such prosecution. If his plea should be overruled and judgment rendered against him, his case would resemble this; and, unless the jurisdiction of this court might be exercised **404\*** over it, the constitution would \*be violated, and the injured party be unable to bring his case before that tribunal to which the people of the United States have assigned all such cases.

It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do, is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.

To escape the operation of these comprehensive words, the counsel for the defendant has mentioned instances in which the constitution might be violated without giving jurisdiction to this court. These words, therefore, however universal in their expression, must, he contends, be limited and controlled in their construction by circumstances. One of these instances is, the grant by a state of a patent of nobility. The court, he says, cannot annul this grant.

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\*This may be very true; but by no **[\*405]** means justifies the inference drawn from it. The article does not extend the judicial power to every violation of the constitution which may possibly take place, but to "a case in law or equity," in which a right, under such law, is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the constitution, to which the judicial power of the United States would extend. The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although they show that there may be violations of the constitution, of which the courts can take no cognizance, they do not show that an interpretation more restrictive than the words themselves import ought to be given to this article. They do not show that there can be "a case in law or equity," arising under the constitution, to which the judicial power does not extend.

We think, then, that, as the constitution originally stood, the appellate jurisdiction of this court, in all cases arising under the constitution, laws, or treaties of the United States, was not arrested by the circumstance that a state was a party.

This leads to a consideration of the 11th amendment.

It is in these words: "The judicial power of the United States shall not be construed to extend to any \*suit in law or equity com- **[\*406]** menced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state."

It is a part of our history, that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases; and in these a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those \*cases, because it might be essen- **[\*407]** tial to the preservation of peace. The amend-



ment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states.

The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a state is made by an individual in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a state the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation.

The words of the amendment appear to the court to justify and require this construction. The judicial power is not "to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, &c."

What is a suit? We understand it to be the prosecution, or pursuit, of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, "the being put in possession of that right whereof the party injured is deprived." "The instruments whereby this remedy is obtained, are a diversity of suits and ac-  
408\*] tions, which are defined by the \*Mirror to be 'the lawful demand of one's right.' Or, as Bracton and Fleta express it, in the words of Justinian, '*jus prosequendi in judicio quod alicui debetur.*'" Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right.

To commence a suit, is to demand something by the institution of process in a court of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a state, we should understand process sued out by that individual against the state, for the purpose of establishing some claim against it by the judgment of a court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the actor is still the same. Suits had been commenced in the Supreme Court against some of the states before this amendment was introduced into Congress, and others might be commenced before it should be adopted by the state legislatures, and might be depending at the time of its adoption. The object of the amendment was not only to prevent the commencement of future suits, but to arrest the prosecution of those which might be commenced when this article should form a part of the constitution. It therefore embraces both objects; and its meaning is, that the judicial power shall not be construed to extend to any suit which may be commenced, or which, if  
409\*] already commenced, may be \*prose-  
cuted against a state by the citizen of another state. If a suit, brought in one court, and carried by legal process to a supervising court, be a continuation of the same suit, then this suit

is not commenced nor prosecuted against a state. It is clearly in its commencement the suit of a state against an individual, which suit is transferred to this court, not for the purpose of asserting any claim against the state, but for the purpose of asserting a constitutional defense against a claim made by a state.

A writ of error is defined to be a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and, on such examination, to affirm or reverse the same according to law. If, says my Lord Coke, by the writ of error, the plaintiff may recover, or be restored to anything, it may be released by the name of an action. In Bacon's Abridgment, tit. Error, L., it is laid down, that "where by a writ of error, the plaintiff shall recover, or be restored to any personal thing, as debt, damage, or the like, a release of all actions personal is a good plea; and when land is to be recovered or restored in a writ of error, a release of actions real is a good bar; but where by a writ of error the plaintiff shall not be restored to any personal or real thing, a release of all actions, real or personal, is no bar." And for this we have the authority of Lord Coke, both in his Commentary on Littleton and in his Reports. A writ of error, then, is in the nature of a suit or action when it is to restore the party who obtains it to the possession of anything which is withheld from him, \*not when its operation is entirely de- [\*410  
fensive.

This rule will apply to writs of error from the courts of the United States, as well as to those writs in England.

Under the judiciary act, the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where, then, a state obtains a judgment against an individual, and the court, rendering such judgment, overrules a defense set up under the constitution or laws of the United States, the transfer of this record into the Supreme Court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can with no propriety, we think, be denominated a suit commenced or prosecuted against the state whose judgment is so far re-examined. Nothing is demanded from the state. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. Essentially, it is an appeal on a single point; and the defendant who appeals from a judgment rendered against him, is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. The writ of error is given rather than an appeal, because it is the more usual mode of removing suits at common law; and because, perhaps, it is more technically proper where a single point of law, and not the whole case, is to \*be [\*411  
re-examined. But an appeal might be given, and might be so regulated as to effect every purpose of a writ of error. The mode of removal is form, and not substance. Whether it be by writ of error or appeal, no claim is asserted, no demand is made by the original defendant; he

only asserts the constitutional right to have his defense examined by that tribunal whose province it is to construe the constitution and laws of the Union.

The only part of the proceeding which is in any manner personal, is the citation. And what is the citation? It is simply notice to the opposite party that the record is transferred into another court, where he may appear, or decline to appear, as his judgment or inclination may determine. As the party who has obtained a judgment is out of court, and may, therefore, not know that his cause is removed, common justice requires that notice of the fact should be given him. But this notice is not a suit, nor has it the effect of process. If the party does not choose to appear, he cannot be brought into court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his non-appearance, but the judgment is to be re-examined, and reversed or affirmed, in like manner as if the party had appeared and argued his cause.

The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union, has been well illustrated by a reference to the course of this court in suits instituted by the United States. The universally received opinion is, **412\***] that no suit can be commenced \*or prosecuted against the United States; that the judiciary act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court, where they have, like those in favor of an individual, been re-examined, and affirmed or reversed. It has never been suggested, that such writ of error was a suit against the United States, and, therefore, not within the jurisdiction of the appellate court.

It is, then, the opinion of the court, that the defendant who removes a judgment rendered against him by a state court into this court, for the purpose of re-examining the question, whether that judgment be in violation of the constitution or laws of the United States, does not commence or prosecute a suit against the state, whatever may be its opinion where the effect of the writ may be to restore the party to the possession of a thing which he demands.

But should we in this be mistaken, the error does not affect the case now before the court. If this writ of error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted "by a citizen of another state, or by a citizen or subject of any foreign state." It is not, then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties. **413\***] \*2d. The second objection to the jurisdiction of the court is, that its appellate power cannot be exercised, in any case, over the judgment of a state court.

This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a state from that of the Union, and their entire independence of each other. The argument considers the federal judiciary as completely foreign to that of a

state; and as being no more connected with it, in any respect whatever, than the court of a foreign state. If this hypothesis be just, the argument founded on it is equally so; but if the hypothesis be not supported by the constitution, the argument fails with it.

This hypothesis is not founded on any words in the constitution, which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it; and on the incompatibility of the application of the appellate jurisdiction to the judgments of state courts, with that constitutional relation which subsists between the government of the Union and the governments of those states which compose it.

Let this unreasonableness, this total incompatibility, be examined.

That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In \*many other re- **414** spects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a state, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate.

In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution or law of a state, if it be repugnant to the constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a state tribunal enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the constitution?

We think it is not. We think that in a government \*acknowledgedly supreme, [**415** with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the state tribunals which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects.

The propriety of entrusting the construction of the constitution, and laws made in pursuance thereof, to the judiciary of the Union, has



not, we believe, as yet, been drawn into question. It seems to be a corollary from this political axiom, that the federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them, by the state tribunals. If the federal and state courts have concurrent jurisdiction in all cases arising under the constitution, laws, and treaties of the United States; and if a case of this description brought in a state court cannot be removed before judgment, nor revised after judgment, then the construction of the constitution, laws, and treaties of the United States, is not confided particularly to their judicial department, but is confided equally to that department and to the state courts, however they may be constituted. "Thirteen independent courts," says a very celebrated statesman (and we have now more than twenty such courts), "of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from **416\*** \*which nothing but contradiction and confusion can proceed."

Dismissing the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a state or its courts, the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved.

We are not restrained, then, by the political relations between the general and state governments, from construing the words of the constitution, defining the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import.

They give to the Supreme Court appellate jurisdiction in all cases arising under the constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided. In expounding them, we may be permitted to take into view those considerations to which courts have always allowed great weight in the exposition of laws.

The framers of the constitution would naturally examine the state of things existing at the time; and their work sufficiently attests that they did so. All acknowledge that they were convened for the purpose of strengthening the confederation by enlarging the powers of the **417\*** government, and by giving efficacy \*to those which it before possessed, but could not exercise. They inform us themselves, in the instrument they presented to the American public, that one of its objects was to form a more perfect union. Under such circumstances, we certainly should not expect to find, in that instrument, a diminution of the powers of the actual government.

Previous to the adoption of the confederation, Congress established courts which received appeals in prize causes decided in the courts of the respective states. This power of the government, to establish tribunals for these appeals, was thought consistent with, and was founded on, its political relations with the states. These courts did exercise appellate

jurisdiction over those cases decided in the state courts, to which the judicial power of the federal government extended.

The confederation gave to Congress the power "of establishing courts for receiving and determining finally appeals in all cases of captures."

This power was uniformly construed to authorize these courts to receive appeals from the sentences of state courts, and to affirm or reverse them. State tribunals are not mentioned; but this clause in the confederation necessarily comprises them. Yet the relation between the general and state governments was much weaker, much more lax, under the confederation than under the present constitution; and the states being much more completely sovereign, their institutions were much more independent.

The convention which framed the constitution, on \*turning their attention to the [**\*418** judicial power, found it limited to a few objects, but exercised, with respect to some of those objects, in its appellate form, over the judgments of the state courts. They extend it, among other objects, to all cases arising under the constitution, laws, and treaties of the United States; and in a subsequent clause declare, that in such cases, the Supreme Court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a state court, on the constitution, laws, or treaties of the United States, from this appellate jurisdiction.

Great weight has always been attached, and very rightly attached, to contemporaneous exposition. No question, it is believed, has arisen to which this principle applies more unequivocally than to that now under consideration.

The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed. These essays having been published while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of state sovereignty, are entitled to the more consideration where they \*frank- [**\*419** ly avow that the power objected to is given, and defend it.

In discussing the extent of the judicial power, the Federalist says: "Here another question occurs: what relation would subsist between the national and state courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter to the Supreme Court of the United States. The constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this

circumstance, and from the reason of the thing, it ought to be construed to extend to the state tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judicial authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and state systems are to be regarded as one whole. The courts of the latter will of course be natural **420\*** auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of natural justice, and the rules of national decision. The evident aim of the plan of the national convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union. To confine, therefore, the general expressions which give appellate jurisdiction to the Supreme Court, to appeals from the subordinate federal courts, instead of allowing their extension to the state courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation."

A contemporaneous exposition of the constitution, certainly of not less authority than that which has been just cited, is the judiciary act itself. We know that in the Congress which passed that act were many eminent members or the convention which formed the constitution. Not a single individual, so far as is known, supposed that part of the act which gives the Supreme Court appellate jurisdiction over the judgments of the state courts in the cases therein specified, to be unauthorized by the constitution.

While on this part of the argument, it may be also material to observe that the uniform decisions of this court on the point now under consideration, have been assented to, with a single exception, by the courts of every state in the Union whose judgments have been revised. **421\*** It has been the unwelcome duty of this tribunal to reverse the judgments of many state courts in cases in which the strongest state feelings were engaged. Judges, whose talent and character would grace any bench, to whom a disposition to submit to jurisdiction that is usurped, or to surrender their legitimate powers, will certainly not be imputed, have yielded without hesitation to the authority by which their judgments were reversed, while they, perhaps, disapproved the judgment of reversal.

This concurrence of statesmen, of legislators, and of judges, in the same construction of the constitution, may justly inspire some confidence in that construction.

In opposition to it, the counsel who made this point has presented in a great variety of forms, the idea already noticed, that the federal and state courts must, of necessity, and from the nature of the constitution, be in all things

totally distinct and independent of each other. If this court can correct the errors of the courts of Virginia, he says it makes them courts of the United States, or becomes itself a part of the judiciary of Virginia.

But, it has been already shown that neither of these consequences necessarily follows. The American people may certainly give to a national tribunal a supervising power over those judgments of the state courts, which may conflict with the constitution, laws, or treaties of the United States, without converting them into federal courts, or converting the national into a state tribunal. The one court still de- **[422]** rives its authority from the state, the other still derives its authority from the nation.

If it shall be established, he says, that this court has appellate jurisdiction over the state courts in all cases enumerated in the 3d article of the constitution, a complete consolidation of the states, so far as respects judicial power, is produced.

But, certainly, the mind of the gentleman who urged this argument is too accurate not to perceive that he has carried it too far; that the premises by no means justify the conclusion. "A complete consolidation of the states, so far as respects the judicial power," would authorize the legislature to confer on the federal courts appellate jurisdiction from the state courts in all cases whatsoever. The distinction between such a power, and that of giving appellate jurisdiction in a few specified cases in the decision of which the nation takes an interest, is too obvious not to be perceived by all.

This opinion has been already drawn out to too great a length to admit of entering into a particular consideration of the various forms in which the counsel who made this point has, with much ingenuity, presented his argument to the court. The argument in all its forms is essentially the same. It is founded, not on the words of the constitution, but on its spirit, a spirit extracted, not from the words of the instrument, but from his view of the nature of our Union, and of the great fundamental principles on which the fabric stands.

To this argument, in all its forms, the same answer may be given. Let the nature and objects of our Union be considered; let **[423]** the great fundamental principles, on which the fabric stands, be examined; and we think the result must be, that there is nothing so extravagantly absurd in giving to the court of the nation the power of revising the decisions of local tribunals on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction. The question, then, must depend on the words themselves; and on their construction we shall be the more readily excused for not adding to the observations already made, because the subject was fully discussed and exhausted in the case of *Martin v. Hunter*.

3d. We come now to the third objection, which, though differently stated by the counsel, is substantially the same. One gentleman has said that the judiciary act does not give jurisdiction in the case.

The cause was argued in the state court, on a case agreed by the parties, which states the prosecution under a law for selling lottery tickets, which is set forth, and further states the



act of Congress by which the city of Washington was authorized to establish the lottery. It then states that the lottery was regularly established by virtue of the act, and concludes with referring to the court the questions, whether the act of Congress be valid? whether on its just construction, it constitutes a bar to the prosecution? and, whether the act of Assembly, on which the prosecution is founded, be not itself invalid? These questions were decided against the operation of the act of Congress, and in favor of the operation of the act of the state.

**424\*]** \*If the 25th section of the judiciary act be inspected, it will at once be perceived that it comprehends expressly the case under consideration.

But it is not upon the letter of the act that the gentleman who stated this point in this form, founds his argument. Both gentlemen concur substantially in their views of this part of the case. They deny that the act of Congress, on which the plaintiff in error relies, is a law of the United States; or, if a law of the United States, is within the second clause of the sixth article.

In the enumeration of the powers of Congress, which is made in the 8th section of the first article, we find that of exercising exclusive legislation over such district as shall become the seat of government. This power, like all others which are specified, is conferred on Congress as the legislature of the Union; for, strip them of that character, and they would not possess it. In no other character can it be exercised. In legislating for the district, they necessarily preserve the character of the legislature of the Union; for, it is in that character alone that the constitution confers on them this power of exclusive legislation. This proposition need not be enforced.

The 2d clause of the 6th article declares, that "this constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land."

The clause which gives exclusive jurisdiction is, unquestionably, a part of the constitution, and, as such, binds all the United States. Those who contend that acts of Congress, made **425\*]** in pursuance of \*this power, do not, like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of Congress, clothed in all the forms which attend other legislative acts, and passed in virtue of a power conferred on, and exercised by Congress, as the legislature of the Union, is not a law of the United States, and does not bind them.

One of the gentlemen sought to illustrate his proposition that Congress, when legislating for the district, assumed a distinct character, and was reduced to a mere local legislature, whose laws could possess no obligation out of the ten miles square, by a reference to the complex character of this court. It is, they say, a court of common law and a court of equity. Its character, when sitting as a court of common law, is as distinct from its character when sitting as a court of equity, as if the powers belonging to those departments were vested in different tribunals. Though united in the same

tribunal, they are never confounded with each other.

Without inquiring how far the union of different characters in one court may be applicable, in principle, to the union in Congress of the power of exclusive legislation in some places, and of limited legislation in others, it may be observed, that the forms of proceedings in a court of law are so totally unlike the forms of proceedings in a court of equity, that a mere inspection of the record gives decisive information of the character in which the court sits, and consequently of the extent of its powers. But \*if the forms of proceeding were **\*426** precisely the same, and the court the same, the distinction would disappear.

Since Congress legislates, in the same forms, and in the same character, in virtue of powers of equal obligation, conferred in the same instrument, when exercising its exclusive powers of legislation, as well as when exercising those which are limited, we must inquire whether there be anything in the nature of this exclusive legislation which necessarily confines the operation of the laws made in virtue of this power to the place with a view to which they are made.

Connected with the power to legislate within this district, is a similar power in forts, arsenals, dock-yards, &c. Congress has a right to punish murder in a fort, or other place within its exclusive jurisdiction; but no general right to punish murder committed within any of the states. In the act for the punishment of crimes against the United States, murder committed within a fort, or any other place or district of country, under the sole and exclusive jurisdiction of the United States, is punished with death. Thus Congress legislates in the same act, under its exclusive and its limited powers.

The act proceeds to direct, that the body of the criminal, after execution, may be delivered to a surgeon for dissection, and punishes any person who shall rescue such body during its conveyance from the place of execution to the surgeon to whom it is to be delivered.

\*Let these actual provisions of the **\*427** law, or any other provisions which can be made on the subject, be considered with a view to the character in which Congress acts when exercising its powers of exclusive legislation.

If Congress is to be considered merely as a local legislature, invested, as to this object with powers limited to the fort, or other place, in which the murder may be committed, if its general powers cannot come in aid of these local powers, how can the offense be tried in any other court than that of the place in which it has been committed? How can the offender be conveyed to, or tried in, any other place? How can he be executed elsewhere? How can his body be conveyed through a country under the jurisdiction of another sovereign, and the individual punished, who, within that jurisdiction, shall rescue the body.

Were any one state of the Union to pass a law for trying a criminal in a court not created by itself, in a place not within its jurisdiction, and direct the sentence to be executed without its territory, we should all perceive and acknowledge its incompetency to such a course of legislation. If Congress be not equally incompetent, it is because that body unites the pow-



ers of local legislation with those which are to operate through the Union, and may use the last in aid of the first; or because the power of exercising exclusive legislation draws after it, as an incident, the power of making that legislation effectual, and the incidental power may **428\*** be exercised \*throughout the Union, because the principal power is given to that body as the legislature of the Union.

So, in the same act, a person who, having knowledge of the commission of murder, or other felony, on the high seas, or within any fort, arsenal, dock-yard, magazine, or other place, or district of country within the sole and exclusive jurisdiction of the United States, shall conceal the same, &c., he shall be adjudged guilty of misprision of felony, and shall be adjudged to be imprisoned, &c.

It is clear, that Congress cannot punish felonies generally; and, of consequence, cannot punish misprision of felony. It is equally clear, that a state legislature—the state of Maryland, for example—cannot punish those who, in another state, conceal a felony committed in Maryland. How, then, is it that Congress, legislating exclusively for a fort, punishes those who, out of that fort, conceal a felony committed within it?

The solution, and the only solution of the difficulty is, that the power vested in Congress, as the legislature of the United States, to legislate exclusively within any place ceded by a state, carries with it, as an incident, the right to make that power effectual. If a felon escape out of the state in which the act has been committed, the government cannot pursue him into another state, and apprehend him there, but must demand him from the executive power of that other state. If Congress were to be considered merely as the local legislature for the fort or other place in which the offense might be committed, then this principle would **429\*** apply to them as to other local legislatures, and the felon who should escape out of the fort, or other place, in which the felony may have been committed, could not be apprehended by the marshal, but must be demanded from the executive of the state. But we know that the principle does not apply; and the reason is, that Congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution.

Whether any particular law be designed to operate without the district or not, depends on the words of that law. If it be designed so to operate, then the question, whether the power so exercised be incidental to the power of exclusive legislation, and be warranted by the constitution, requires a consideration of that instrument. In such cases the constitution and the law must be compared and construed. This is the exercise of jurisdiction. It is the only exercise of it which is allowed in such a case. For the act of Congress directs, that “no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the

face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties,” &c.

The whole merits of this case, then, consist in the construction of the constitution and the act of Congress. \*The jurisdiction of [**430** the court, if acknowledged, goes no further. This we are required to do, without the exercise of jurisdiction.

The counsel for the state of Virginia have, in support of this motion, urged many arguments of great weight against the application of the act of Congress to such a case as this; but those arguments go to the construction of the constitution, or of the law, or of both; and seem, therefore, rather calculated to sustain their cause upon its merits, than to prove a failure of jurisdiction in the court.

After having bestowed upon this question the most deliberate consideration of which we are capable, the court is unanimously of opinion, that the objections to its jurisdiction are not sustained, and that the motion ought to be overruled.

*Motion denied.*

The cause was this day argued on the merits.

*Mr. D. B. Ogden*, for the plaintiffs in error, stated, that the question of conflict between the act of Congress and the state law, which arose upon the record, depended upon the 8th section of the first article of the constitution, giving to Congress the exclusive power of legislation, in all cases whatsoever, over the district which had become the seat of the government of the United States, by cession from the states to whom it formerly belonged. Under this power, Congress has authorized the establishment of a lottery at the seat of government. Can \*the state of Virginia prevent the [**431** sale of tickets in that lottery within her territory, consistently with the constitution? This question must depend upon the nature of the constitutional power of Congress, and of the law by which it is exercised. It was said by the counsel for the defendant in error, on the former argument, that the power is municipal, to be exercised over the district only, and, of course, confined in its operation to the limits of the district. But, in order to determine whether this is the true interpretation of the clause in question, we must more minutely examine what is the nature of the authority granted. The clause was not intended to give to Congress an unlimited power to legislate in all cases, without reference to other provisions of the constitution. Otherwise Congress might pass bills of attainder and *ex post facto* laws, and exercise a despotic authority over the District of Columbia, and its citizens would thus be deprived of their rights entirely. Nor was it intended to authorize the exercise by Congress of its general powers as a national legislature, within the district. Nor to exempt the district from the operation of those general powers. But the clause was inserted for the purpose of securing the independence of the national legislature, and government, from state control. The object in view was, therefore, strictly a national object. The district was created only for national purposes, and every law passed for its government



is peculiarly a national law. The words, “**ex-432\***clusive \*legislation in all cases whatsoever,” were meant to exclude all state legislative power; and to vest in Congress in addition to its general powers over the whole Union, all possible powers of legislation over the district. The law in question, is the expression of the national will on a national object. It is, then, an act of the general legislative power of the Union, and its operation must be co-extensive with the limits of the Union, unless it is limited to the District of Columbia in express terms, or from the nature of the power itself being incapable of acting without the district. That the whole Union has an interest in the city of Washington, as the national capital, is shown by the contemporaneous exposition of the constitution by its framers, and by the subsequent acts of the national legislature, providing for its improvement and embellishment. It is admitted, that some of the provisions of the law now in question, are local in their very nature, and, therefore, confined to the city, or the district, in their operation. But the power of the corporation to establish lotteries, with the consent of the President, is not of this nature. Lottery tickets are an article of commerce, vendible in every part of the Union, as well as in the District of Columbia. A state law which forbids a citizen to sell or buy a ticket in a lottery, legally established by the national legislature, for national purposes, infringes the constitutional rights of the citizen, and tends to impede and defeat the exercise of this national power. He cannot be punished by a state, for selling or buying that which **433\*** Congress \*has, in the exercise of a great national power, authorized to be bought or sold. The authority of establishing this lottery, so far from being confined to the city, could not be conveniently or effectually exercised without extending the salable quality of the tickets throughout the Union. As a source of revenue, it would be inadequate to the objects for which it was established, without this extension. It is not one of the ordinary sources of revenue for the mere municipal wants of the city. It is a national grant for national purposes, to be used in each particular instance, with the approbation of the President. It is, then, a national law, enacted for a national purpose, and has no other limits in its operation than the limits of the legislative power itself. If Congress had intended to confine its operation within the District of Columbia, they would have expressed that intention. If, then, Congress have a right to raise a revenue, for any national purpose, by establishing a lottery, they had a right to establish this lottery; and no state law can defeat this, any more than the exercise of any other national power. But even supposing that it is not a tax or duty, such as Congress have the express power of establishing; yet if it be necessary and proper, in the judgment of the court, to carry into effect any power expressly granted, such as that of establishing and governing the city, it may be exercised throughout the Union. Congress have the same power to establish lotteries for this purpose as the state legislatures, and every other legislature, have. The only difference is, **434\*** that \*with Congress it is the exercise of a national power, and must, therefore, be co-

extensive in its operation with the Union, although the money to be raised by it cannot be applied to the use of any other city in the Union than that which is the national capital, and in which, consequently, all the states, and all the people, have a common interest.

*Mr. Webster*, contra, insisted, that Congress had not the power, under the constitution, of establishing a lottery in the District of Columbia, for municipal purposes, and of forcing the sale of the tickets throughout the Union, in contravention of the state laws; and, that even if they had the power, the law now in question did not purport to authorize the corporation of the city of Washington thus to force the sale of the tickets. It is clear that Congress, as a legislative body, exercise two species of legislative power: the one, limited as to its objects, but extending all over the Union; the other, an absolute, exclusive legislative power over the District of Columbia. The preliminary inquiry in the case now before the court, is, by virtue of which of these authorities was the law in question passed? When this is ascertained, we shall be able to determine its extent and application. In this country, we are trying the novel experiment of a divided sovereignty, between the national government and the states. The precise line of division between these is not always distinctly marked. Government is a moral, not a mathematical science; and the powers of such a government especially, cannot be defined with mathematical \*accuracy [**\*435** and precision. There is a competition of opposite analogies. We arrive at a just conclusion by reasoning from these analogies, and by a general regard to the objects and purposes of this scheme of government. With a view to the present question, it may, perhaps, be safely admitted, that there are certain acts of legislation passed by Congress, with a local reference to this district, which proceed from the general powers with which Congress are invested. They are local in their immediate operation and effect, but they are passed in virtue of general legislative powers. Such are the acts appropriating moneys for constructing the navy yard and the capitol. Some other acts are of a mixed nature. There are others clearly local, and passed in virtue of the local, exclusive jurisdiction. And of this latter class is the act now under consideration. It is for the establishment of a local city government, which arises from the exclusive power of legislation; and the clause authorizing the establishment of lotteries, is combined with other clauses of a mere municipal character. *Noscitur a sociis*. Every act of legislation must be limited by its subject-matter, and there is nothing to show that this power is to be exercised more extensively than the other powers of the corporation; nothing to show that this municipal power is to be carried beyond the city. It may be exercised within the city alone, and Congress has not said, and the court cannot intend, that it is to be exercised in other parts of the Union. Congress could not give such a charter to any other city in the Union, and if every federal \*power granted in [**\*436** the constitution were destroyed, this power would remain. It exists independently, and the legislative powers of the states can never conflict with it, because it can never operate within the states. Being a case of mere local



legislation, it is not a *casus fœderis* within that clause of the constitution which declares that the laws of the United States shall be the supreme law of the land. There can be no question of supremacy and subordination where there is no connection or conflict. The constitution makes this provision, because other legislative powers were to operate throughout the Union; the Congress and the states were to legislate over the same subjects, and over the same territory; and therefore there might be conflict. It was because the two codes were to prevail in the same places, and over the same persons. But the provision cannot extend to laws enacted by Congress for the mere local municipal government of the city, because the reason on which it is founded does not extend to a case where all legislation is necessarily exclusive. There was no more reason in this instance to provide for a conflict of the two authorities, than in the case of the laws of a foreign state, which, except in the familiar example of questions relative to the *lex loci contractus*, cannot come in collision with our own laws, because they cannot operate extraterritorially. So here, from the very nature of things, there can arise no conflict between the local laws of the District of Columbia, and those of the states, because each code is confined to its own territory. Any sound interpretation of the **437** \*] law \*in question, must limit it to the city of Washington. It does not even extend to the other municipal corporations within the District of Columbia, because it contains provisions expressly for the government of Washington alone, and does not profess to extend any of them beyond the limits of that city. A law cannot exceed the authority of the law-giver, and that does not extend beyond the district, and is limited in its actual exercise to the city. There is no authority showing that a grant of power of this kind to a municipal corporation extends beyond the local limits of the city.

The *Attorney-General*, for the plaintiffs in error, in reply, contended, that Congress, in passing the law under consideration, acted in the name of the whole nation, and for a great national object. Congress did not, as contended in the argument on the jurisdiction of the court, succeed, by the cession, merely to the legislative powers of Maryland and Virginia, over this district. They are not the trustees of those states only; they are the trustees of the whole Union. The cession was to the Congress and government of the United States. The jurisdiction over the territory belongs to the entire people of the United States. It is not the power of Maryland and Virginia which Congress represents, but the power of all the states; and the territory ceded is to be looked at, not with reference to its origin, not as still forming ideally a part of Maryland and Virginia, but is to be regarded as if incorporated into every state in the Union. The question is not, then, **438** \*] to be solved by asking \*what those states could do with respect to this territory, but what each state of the Union could do, with regard to its own territory; because, to borrow an expression from the municipal law, each state of the Union is seized jointly with all the rest, *per me et per tout*, of the whole jurisdiction over this territory. The acts of the Congress in legislating for the District of Columbia are

the acts of all the people of all the states. It is therefore a fallacy in argument to represent Congress as succeeding merely to the same degree of power which Maryland and Virginia formerly had over this territory. Could those states have taxed the other states, or borrowed money on their credit, for the improvement of this territory, as Congress have done? Although the jurisdiction of the states who formerly held the sovereignty and domain of this territory has been supplanted by Congress, the substituted jurisdiction is far more extensive than that which they held. It is a jurisdiction, which in the instances mentioned, and many others which might be enumerated, is capable of affecting all the states. It cannot be denied that the character of the jurisdiction which Congress has over the district, is widely different from that which it has over the states; for, over them, Congress has not exclusive jurisdiction. Its powers over the states are those only which are specifically given, and those which are necessary to carry them into effect; whilst over the district it has all the powers which it has over the states, and in addition to these, a power of legislation exclusive of \*all the states. [**439** But although the jurisdiction over the district is of a different and more extensive character, yet it is not so circumscribed that it may not incidentally affect the states, although exerted for a local purpose, as it is called. Such is sometimes the delusive effect of single words and phrases, that the position, that in legislating for the District of Columbia, Congress is a local legislature, for local purposes, and therefore cannot affect the states by its laws, has almost become an aphorism with indolent or prejudiced inquirers. But in what sense can that be called a local government which proceeds from the whole body of the nation? And how can that be termed a local object, which is closely and inseparably connected with the general interest of the whole people of the Union? As well might it be asserted that Congress acted as a local legislature, when it established offices for the sale of lands in the western states, or fortifications at particular points on the seacoast. It will not be pretended that the first establishment of the seat of government in this district, was an act done by Congress in its character of a local legislature, and for local purposes. How, then, can the subsequent acts for the improvement and embellishment of the city be so regarded? The act of May 6th, 1796, authorized the commissioners for erecting the public buildings to borrow money for that purpose. Would it have been competent for the legislatures of the states to have impeded this loan by punishing their citizens for subscribing to this stock? And could the states prohibit the sale of the city lots within their territory, and thus arrest \*the improvement of the [**440** city? And if they could not, it is not because what Congress in the legitimate exercise of its powers has made it lawful to sell, the states cannot make it unlawful to buy? Let us test by these considerations the question before the court; and let us distinguish between Congress legislating for the municipal government of the city, and Congress, in its national character, providing the means of adding necessary public improvements to the national capital. Congress has itself made this distinction. When a regu-



lation for the mere internal police of the city is to be made, it is done by the corporation, or some other inferior agent, without the interference of the President of the United States. But, when an alteration of the plan of the city, or a public improvement affecting the whole of the city in a national point of view, is to be made, it is uniformly subjected to the control of the President. So here the specific purpose in view, and for which the lottery was authorized by the President, was the establishment of a city hall, a necessary consequence of the establishment of the city, which last was also a necessary consequence of the establishment of the seat of government.

The opinion of the court was delivered by *Mr. Chief Justice MARSHALL*:

This case was stated in the opinion given on the motion for dismissing the writ of error for want of jurisdiction in the court. It now comes on to be decided on the question whether the Borough Court of Norfolk, in overruling the **441\*** defense set up under \*the act of Congress, has misconstrued that act. It is in these words:

"The said corporation shall have full power to authorize the drawing of lotteries for effecting any important improvement in the city, which the ordinary funds or revenue thereof will not accomplish. Provided, that the sum to be raised in each year shall not exceed the amount of \$10,000. And provided, also, that the object for which the money is intended to be raised shall be first submitted to the President of the United States, and shall be approved of by him."

Two questions arise on this act:

1st. Does it purport to authorize the corporation to force the sale of these lottery tickets in states where such sales may be prohibited by law? If it does,

2d. Is the law constitutional?

If the first question be answered in the affirmative, it will become necessary to consider the second. If it should be answered in the negative, it will be unnecessary, and consequently improper, to pursue any inquiries, which would then be merely speculative, respecting the power of Congress in the case.

In inquiring into the extent of the power granted to the corporation of Washington, we must first examine the words of the grant. We find in them no expression which looks beyond the limits of the city. The powers granted are all of them local in their nature, and all of them such as would, in the common course of things, **442\*** if not necessarily, be exercised \*within the city. The subject on which Congress was employed when framing this act was a local subject; it was not the establishment of a lottery, but the formation of a separate body for the management of the internal affairs of the city, for its internal government, for its police. Congress must have considered itself as delegating to this corporate body powers for these objects, and for these objects solely. In delegating these powers, therefore, it seems reasonable to suppose that the mind of the legislature was directed to the city alone, to the action of the being they were creating within the city, and not to any extraterritorial operations. In de-

scribing the powers of such a being, no words of limitation need be used. They are limited by the subject. But, if it be intended to give its acts a binding efficacy beyond the natural limits of its power, and within the jurisdiction of a distinct power, we should expect to find, in the language of the incorporating act, some words indicating such intention.

Without such words, we cannot suppose that Congress designed to give to the acts of the corporation any other effect, beyond its limits, than attends every act having the sanction of local law, when anything depends upon it which is to be transacted elsewhere.

If this would be the reasonable construction of corporate powers generally, it is more especially proper in a case where an attempt is made so to exercise those powers as to control and limit the penal laws of a state. This is an operation which was not, \*we think, in [**443** the contemplation of the legislature, while incorporating the city of Washington.

To interfere with the penal laws of a state, where they are not leveled against the legitimate powers of the Union, but have for their sole object the internal government of the country, is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and the intention would be clearly and unequivocally expressed.

An act, such as that under consideration, ought not, we think, to be so construed as to imply this intention, unless its provisions were such as to render the construction inevitable.

We do not think it essential to the corporate power in question, that it should be exercised out of the city. Could the lottery be drawn in any state of the Union? Does the corporate power to authorize the drawing of a lottery imply a power to authorize its being drawn without the jurisdiction of a corporation, in a place where it may be prohibited by law? This, we think, would scarcely be asserted. And what clear legal distinction can be taken between a power to draw a lottery in a place where it is prohibited by law and a power to establish an office for the sale of tickets in a place where it is prohibited by law? It may be urged, that the place where the lottery is drawn is of no importance to the corporation, and therefore the act need not be so construed as to give power over the place, but that the right to sell tickets throughout the United \*States is of im- [**444** portance, and therefore ought to be implied.

That the power to sell tickets in every part of the United States might facilitate their sale, is not to be denied; but it does not follow that Congress designed, for the purpose of giving this increased facility, to overrule the penal laws of the several states. In the city of Washington, the great metropolis of the nation, visited by individuals from every part of the Union, tickets may be freely sold to all who are willing to purchase. Can it be affirmed that this is so limited a market that the incorporating act must be extended beyond its words, and made to conflict with the internal police of the states, unless it be construed to give a more extensive market?

It has been said that the states cannot make

it unlawful to buy that which Congress has made it lawful to sell.

This proposition is not denied; and, therefore, the validity of a law punishing a citizen of Virginia for purchasing a ticket in the city of Washington, might well be drawn into question. Such a law would be a direct attempt to counteract and defeat a measure authorized by the United States. But a law to punish the sale of lottery tickets in Virginia, is of a different character. Before we can impeach its validity, we must inquire whether Congress intended to empower this corporation to do any act within a state which the laws of that state might prohibit.

**445\*]** \*In addition to the very important circumstance, that the act contains no words indicating such intention, and that this extensive construction is not essential to the execution of the corporate power, the court cannot resist the conviction, that the intention ascribed to this act, had it existed, would have been executed by very different means from those which have been employed.

Had Congress intended to establish a lottery for those improvements in the city which are deemed national, the lottery itself would have become the subject of legislative consideration. It would be organized by law, and agents for its execution would be appointed by the President, or in such other manner as the law might direct. If such agents were to act out of the district, there would be, probably, some provision made for such a state of things, and in making such provisions Congress would examine its power to make them. The whole subject would be under the control of the government, or of persons appointed by the government.

But in this case no lottery is established by law, no control is exercised by the government over any which may be established. The lottery emanates from a corporate power. The corporation may authorize, or not authorize it, and may select the purposes to which the proceeds are to be applied. This corporation is a being intended for local objects only. All its capacities are limited to the city. This, as well as every other law it is capable of making, is a by-law, and, from its nature, is only co-extensive with the city. It is not probable that such **446\*]** \*an agent would be employed in the execution of a lottery established by Congress; but when it acts, not as the agent for carrying into effect a lottery established by Congress, but in its own corporate capacity, from its own corporate powers, it is reasonable to suppose that its acts were intended to partake of the nature of that capacity and of those powers; and, like all its other acts, be merely local in its nature.

The proceeds of these lotteries are to come in aid of the revenues of the city. These revenues are raised by laws whose operation is entirely local, and for objects which are also local; for no person will suppose, that the President's house, the Capitol, the Navy Yard, or other public institution, was to be benefitted by these lotteries, or was to form a charge on the city revenue. Coming in aid of the city revenue, they are of the same character with it; the mere creature of a corporate power.

The circumstances, that the lottery cannot be Wheat. 6.

drawn without the permission of the President, and that this resource is to be used only for important improvements, have been relied on as giving to this corporate power a more extensive operation than is given to those with which it is associated. We do not think so.

The President has no agency in the lottery. It does not originate with him, nor is the improvement to which its profits are to be applied to be selected by him. Congress has not enlarged the corporate power by restricting its exercise to cases of which the President might approve.

\*We very readily admit, that the act [**\*447** establishing the seat of government, and the act appointing commissioners to superintend the public buildings, are laws of universal obligation. We admit, too, that the laws of any state to defeat the loan authorized by Congress, would have been void, as would have been any attempt to arrest the progress of the canal, or of any other measure which Congress may adopt. These, and all other laws relative to the district, have the authority which may be claimed by other acts of the national legislature; but their extent is to be determined by those rules of construction which are applicable to all laws. The act incorporating the city of Washington is, unquestionably, of universal obligation; but the extent of the corporate powers conferred by that act, is to be determined by those considerations which belong to the case.

Whether we consider the general character of a law incorporating a city, the objects for which such law is usually made, or the words in which this particular power is conferred, we arrive at the same result. The corporation was merely empowered to authorize the drawing of lotteries; and the mind of Congress was not directed to any provision for the sale of the tickets beyond the limits of the corporation. That subject does not seem to have been taken into view. It is the unanimous opinion of the court, that the law cannot be construed to embrace it.

*Judgment affirmed.*

\*JUDGMENT.—This cause came on to [**\*448** be heard on the transcript of the record of the Quarterly Session Court for the borough of Norfolk, in the commonwealth of Virginia, and was argued by counsel. On consideration whereof, it is adjudged and ordered, that the judgment of the said Quarterly Session Court of the borough of Norfolk, in this case, be, and the same is hereby affirmed, with costs.

Cited—5 Pet. 42, 202, 205, 206, 222; 6 Pet. 566; 11 Pet. 397, 585; 12 Pet. 720, 722, 723, 727, 744, 748; 14 Pet. 624; 16 Pet. 621; 12 How. 315; 14 How. 119; 16 How. 287; 19 How. 616; 20 How. 433, 437; 24 How. 205; 1 Wall. 252, 600; 3 Wall. 661; 4 Wall. 113; 6 Wall. 253, 488; 10 Wall. 261, 291; 12 Wall. 533; 16 Wall. 386; 1 Otto, 146; 3 Otto, 87, 142; 6 Otto, 201; 7 Otto, 690; 10 Otto, 264, 270, 286; 12 Otto, 140; Bald. 403, 406, 561; 4 Cranch, C. C. 392, 393; 5 Cranch, C. C. 247, 260, 277; Taney, 39; 1 Wood. & M. 85; 2 Wood. & M. 455; 5 Bank. Reg. 468; 7 Bank. Reg. 426; 10 Bank. Reg. 229; 18 Bank. Reg. 485; 3 Dill. 380; 2 Sawy. 449; 5 Sawy. 43; Blatchf. & H. 251; 3 Blatchf. 264; 11 Blatchf. 410; 3 Woods, 230, 234, 240.



## [PRACTICE.]

## GIBBONS v. OGDEN.

A decree of the highest court of equity of a state, affirming the decretal order of an inferior court of equity of the same state, refusing to dissolve an injunction granted on the filing of the bill, is not a final decree within the 25th section of the judiciary act of 1789, ch. 20, from which an appeal lies to this court.

**A**PPEAL from the court for the trial of impeachments and the correction of errors of the state of New York.

This was a bill filed by the plaintiff below (Ogden), against the defendant below (Gibbons), in the Court of Chancery of the state of New York, for an injunction to restrain the defendant from navigating certain steamboats on the waters of the state of New York, lying between Elizabethtown, in the state of New Jersey, and the city of New York; \*the exclusive navigation of which with steamboats had been granted, by the legislature of New York, to Livingston & Fulton, under whom the plaintiff below claimed as assignee. On this bill an injunction was granted by the Chancellor, and on the coming in of the answer, which set up a right to navigate with steamboats between the city of New York and Elizabethtown, under a license to carry on a coasting trade, granted under the laws of the United States, the defendant below moved to dissolve the injunction, which motion was denied by the Chancellor. The defendant below appealed to the court for the trial of impeachments and correction of errors; the decretal order, refusing to dissolve the injunction, was affirmed by that court; and from this last order the de-

fendant below appealed to this court, upon the ground that the case involved a question arising under the constitution, laws, and treaties of the United States.

The cause was opened for the appellant by *Mr. D. B. Ogden*; but on inspecting the record, it not appearing that any final decree in the cause, within the terms of the 25th section of the judiciary act of 1789, ch. 20, had been pronounced in the State Court, the appeal was dismissed for want of jurisdiction.

**DECREE.**—This cause came on to be heard on the transcript of the record of the court for the trial of impeachments and the correction of errors, of \*the state of New York. [\*450 On inspection whereof, it is ordered, that the appeal, in this cause be, and the same is hereby dismissed, it not appearing from the record that there was a final decree in said court for the correction of errors, &c., from which an appeal was taken.]

Cited—10 Wheat. 504; 18 How. 86.

## [PRACTICE.]

SULLIVAN ET AL.

v.

## THE FULTON STEAMBOAT COMPANY.

In order to maintain a suit in the circuit court, the jurisdiction must appear on the record; as if the suit is between citizens of different states, the

1.—*Vide* 4 Johns. Ch. Rep. 150, and 17 Johns. Rep. 488, where the learned reader will find the case reported as decided in the state courts.

**NOTE.**—See note to *Martin v. Hunter's Lessee*, 1 Wheat. 304, and note to *Matthews v. Zane*, 4 Cranch, 382.

An appeal does not lie from a decree of the Circuit Court perpetuating an injunction, but leaving some matters of account open for further consideration. It is not a final decree. *Brown v. Swann*, 9 Pet. 1.

An order or decree overruling a plea is not final within the act. *Rutherford v. Fisher*, 4 Dall. 22.

A decree for an injunction in a patent cause, and a reference to a master to take an account of profits, is not final, and an appeal does not lie therefrom. *Barnard v. Gibson*, 7 How. 650.

No writ of error or appeal lies on an interlocutory decree dissolving an injunction, though it be with costs. *Young v. Grundy*, 6 Cranch, 51; *Clark v. Shelton*, Hempst. 207.

A decree dissolving an injunction without dismissing the bill, is not final. *McCollum v. Eager*, 2 How. 61.

A decree dissolving an injunction, granted upon a petition in the nature of a bill in equity, being only interlocutory, and not a final decree, is not the subject of an appeal. *Hirast v. Ballou*, 9 Pet. 156.

A decision sustaining, or overruling a demurrer, is not a final judgment, and therefore an appeal does not lie from it. *Miner's Bk. v. U. S.*, 5 How. 213; *Blakely v. Fisk*, Hempst. 11.

A decree dismissing a cross-bill is not final, and no appeal lies therefrom. *Ayres v. Carver*, 17 How. 591.

Under section 22 of the judiciary act of 1789, error does not lie on a judgment of a circuit court, reversing with costs a judgment of a district court, such a judgment is not final. *Mayberry v. Thompson*, 5 How. 121.

A decree of the Supreme Court of probate reviewing the decree of distribution of a probate court, and remitting the cause to such inferior court for further proceedings, is not final. *Harvey v. Richards*, 2 Gall. 216.

A decree of a court of appeals in favor of plaintiff, but remanding the case to an inferior court for

further proceedings, is not final, and no writ of error lies to the Supreme Court. *Pepper v. Dunlap*, 5 How. 51; *Winn v. Jackson*, 12 Wheat. 135.

A decree granting a new trial on terms, not appealable. *Lee v. Kelly*, 15 Pet. 213.

Where, on a libel for tortious seizure, restitution with costs and damages has been decreed, but the damages have been assessed, the decree is not final, and an appeal from it cannot be sustained. *The Palmyra*, 10 Wheat. 502; *Chase v. Jaques*, 11 Wheat. 429.

Since the act of Congress of March 3, 1875, the Supreme Court has jurisdiction to review an order of a circuit court dismissing a cause, or remanding it to the state court under section 2 of that act. *Hoadley v. San Francisco*, 4 Otto, 4.

Granting a rehearing, or granting or dissolving a temporary injunction, rests in the sound discretion of the court, and furnishes no ground for an appeal. *Buffington v. Harvey*, 5 Otto, 99.

A decree which dissolves a preliminary injunction without dismissing the bill, is not reviewable on appeal. *Thomas v. Woolridge*, 23 Wall. 283.

A decree, where a cause is held for further directions, is not a final decree, reviewable on appeal. *Railroad Co. v. Swasey*, 23 Wall. 405.

Nor is a decree vacating a judicial sale of lands, and ordering a resale of them. *Butterfield v. Usher*, 1 Otto, 246.

The judgment of a circuit court, reversing that of a district court and ordering a new trial, is not final, or reviewable on appeal. *Baker v. White*, 2 Otto, 176; *Phillip v. Gardner*, 1 McArthur, 165.

A decree ordering an injunction, previously granted to restrain a sale under a deed of trust, to be dissolved, and directing a sale according to the deed of trust, and the bringing the proceeds into court, is a final decree. *Railroad Co. v. Bradleys*, 7 Wall. 575.

A decree of the circuit court where costs are to be taxed is not final, and an appeal from it is premature. A formal decree should be entered after taxation, and an appeal taken from that. *Wheeler v. Harris*, 13 Wall. 51.

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citizenship of the respective parties must be set forth.

**A** PPEAL from the Circuit Court for the Southern District of New York.

This was a bill in equity, filed in the court below, in which Sullivan, one of the plaintiffs, was described as a citizen of Massachusetts, and others of the plaintiffs, as citizens of Connecticut and Vermont, and the defendants were described as a corporate body incorporated by 451\*] the legislature of the \*state of New York, for the purpose of navigating, by steamboats, the waters of the East River, or Long Island Sound, in said state. The object of the bill was to obtain an injunction to prevent the defendants from so exercising the privileges granted to them by the said act, and by an assignment from Livingston & Fulton of their rights under certain other acts of the legislature of New York, as to obstruct the plaintiffs in the right claimed by them under the constitution and laws of the United States, and under a coasting license, of employing a certain steamboat belonging to the plaintiffs in the transportation of goods and passengers in the waters of the states of Connecticut and New York. The defendants demurred to the bill, and a decree dismissing it was entered *pro forma*, by consent, and the cause was brought by appeal to this court.

Mr. Webster, for the appellants, opened the record, from which, it not appearing that the court below had jurisdiction, as the respective parties were not described as citizens of different states, the decree, dismissing the bill, was affirmed.

**DECREE.**—On motion of the appellants, by their counsel, and on inspection of the transcript of the record of the Circuit Court for the Southern District of New York, it is decreed and ordered, that the decree of the said Circuit Court, in this case, be, and the same is hereby affirmed, it not appearing from the record that the said Circuit Court had jurisdiction 452\*] tion \*in said cause. The said affirmation to be without prejudice to the complainants on the merits of the case.

Cited—16 How. 340, 348, 350; 18 How. 364; 19 How. 473; 21 How. 216; 9 Wall. 565; 12 Wall. 135; 3 Wood. & M. 174; 1 Abb. U. S. 579; 4 Biss. 126; Hemp. 424; 1 Sawy. 156.

#### [PRACTICE.]

### THE JONQUILLE.

An admiralty suit, where an appeal has been taken from the Circuit Court to this court, but not prosecuted, will be dismissed, upon producing a certificate from the court below, that the appeal has been taken, and not prosecuted.

**MR. WHEATON** for the respondents, moved to docket and dismiss the appeal in the case, which was a prize cause, commenced in the Circuit Court of North Carolina, in which a decree for costs and damages had been entered against the captors, from which they appealed, but had not prosecuted their appeal. He produced a certificate from the court below to that effect.

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The court stated, that the case was within the spirit of the 20th rule of the court, although that rule applied, in terms, only to writs of error.

*Motion granted.*<sup>1</sup>

\*[CHANCERY.]

[\*453

HUGHES v. BLAKE.

A decree cannot be pronounced, on the testimony of a single witness, unaccompanied by corroborating circumstances, against a positive denial, by the defendant, of any matter directly charged by the bill, in the defendant's answer, or answer in support of his plea.

A replication to a plea is an admission of the sufficiency of the plea, as much as if it had been set down for argument and allowed; and all that the defendant has to do, is to prove it in point of fact, and a dismissal of the bill on the hearing is then a matter of course.

Under what circumstances a plea of a former judgment at law, for the cause of action, is a good bar in equity.

**A** PPEAL from the Circuit Court of Massachusetts.

The object of the bill in equity filed in this case, was to recover from the defendant, Blake, a sum of money arising from the sale of a tract of land, called Yazoo lands, alleged to have been made in 1795, by the defendant, as agent of certain persons named in the bill, in which lands the plaintiff, Hughes, claimed an equitable interest, in common with the immediate principals of the defendants, and, therefore, to be entitled to a proportion of the proceeds resulting from the sale. The bill also charged, that the defendant had rendered himself distinctly liable for a specific sum of money, in virtue of a certain order, having reference to the plaintiff's interest in the lands, drawn by one Gibson, in September, 1796, in favor of the plaintiff, and accepted by the defendant, with certain modifications and conditions, as particularly expressed in the acceptance.

\*The defendant pleaded in bar, both [\*454 to the relief and the discovery sought by the bill, a former verdict and judgment at law rendered in his favor, in the Supreme Court of

1.—*Vide* new rule of court of the present term. *Ante*, Rule XXXII.

**NOTE.**—Where an answer denies a fact unequivocally, and under oath, and is responsive to the bill, such fact must usually be proved, not only by testimony of one witness, so as to neutralize that denial and oath, but by some additional evidence, in order to turn the scales for the plaintiff. Bibb v. Smith, 1 Dana, 580; Smith v. Clark, 4 Paige, 368; McNeil v. Magee, 5 Mas. 244; Daniel v. Mitchell, 1 Story, 188; Higbie v. Hopkins, 1 Wash. C. C. 230; Un. Bk. of Georgetown v. Geary, 5 Pet. 99; Pomeroy v. Manin, 2 Paine, 476; Green v. Vardiman, 2 Blackf. 324; Jenison v. Graves, 2 Black. 440.

The additional evidence must be a second witness, or very strong circumstances. 1 Wash. C. C. 230; Hughes v. Blake, 1 Mason, C. C. 515; 3 Gill & Johns, 425; 1 Paige, 239; 3 Wend. 532; 2 John. Ch. 92; Clark's Ex'rs. v. Van Riemsdyk, 9 Cranch, 153; Neale v. Haythorp, 3 Bland's Ch. 567; 2 Gill & John. 208; Carpenter v. Prov. Ins. Co., 4 How. 185, 218.

Some cases introduce several qualifications or limitations to the above rule. 9 Cranch, 160; 1 J. J.



Massachusetts, in the year 1810, upon a suit commenced against him by the present plaintiffs, in 1804, being long before the exhibition of the present bill, for the same cause of action. The plea averred, that the judgment at law was still in force; that the matters in controversy, and the parties in both suits, were the same; that the whole merits of the case, as stated by the bill, were fully heard, tried, and determined in the action at law, and in a court of competent jurisdiction; and that the judgment was obtained fairly, and without fraud, covin, or misrepresentation, or the taking any undue advantage. It was also averred by the plea, that no evidence has come to the plaintiff's knowledge, since the trial at law, respecting any of the facts alleged in the bill, and which he did not, or might not have produced on such trial; and further, that the defendant has at no time, as alleged in the bill, obtained of a certain E. Williams, any allowance or payment, for, or on account of his, the defendant's, being liable as bail for Gibson, in the plaintiff's bill mentioned, and for which liability he has claimed in the action at law an indemnity out of a fund on the credit of which he had accepted the order in favor of the plaintiff. The defendant, then, without waiving his plea, proceeded to answer and deny the matters alleged by the bill, as circumstances of equity to avoid the effect of the proceedings at law, and which he had already denied by the averment in his plea.

**455\*** To this plea and answer the plaintiff filed a general replication in the usual form, and witnesses were examined by both parties.

At the hearing, the identity of the causes of action were sought to be established, without the aid of collateral proof, from a comparison of the matters set forth in the bill, with the

averments contained in the several counts of the plaintiff's declaration; it appearing, moreover, that, in the trial at law, the plaintiff had submitted to the jury, in support of these counts, the depositions of the same witnesses, on whose evidence he relied, in support of his bill. The principal other question of fact related to the subject of the negotiation respecting the lands before mentioned, alleged in the plaintiff's bill to have taken place in 1814, between the defendant and E. Williams, whose testimony respecting it was insisted by the plaintiff, not to be sufficient to outweigh the effect of the positive denials contained in his plea and answer.

The cause being heard on the issue joined, and the proofs taken in it, the court below decreed that the plea was sufficiently proved, and therefore dismissed the bill with costs, and the cause was brought by appeal to this court.

*Mr. Pinkney*, for the appellant, stated three questions for the consideration of the court: (1) Whether the plea was in itself sufficient, supposing its sufficiency to be now an open question. (2) Whether it has been proved. (3) Whether its sufficiency, supposing it to be proved, is now open for inquiry. The **456** first of these questions being answered negatively, and the third affirmatively, would produce a reversal of the decree; and let them be answered as they might, if the second be answered negatively, a reversal would equally follow.

1. The plaintiff's allegations must be taken to be true, except so far as the averments in the plea, and the answer in support of the plea, deny them.<sup>1</sup> And if the plea does not deny whatever is alleged, and if true, would make

1.—Coop. Pl. 231; 2 Atk. 155; Gilb. Ch. 158.

Marsh, 178; 4 J. J. Marsh, 213; 1 Dana, 174; 4 Bibb, 358; Knickerbocker v. Harris, 1 Paige, 212; 3 Mas. 294; Coale v. Chase, 1 Bland, 136; Haight v. Morris, Aq. 4 Wash. C. C. 601; 3 Bland, 567, note; 1 Gill & J. 270; Pennington v. Gittings, 2 Gill & J. 208; Salmon v. Claggett, 3 Bland, 141, 165; Carpenter v. Prov. Ins. Co., 4 How. 185, 218.

To outweigh an answer responsive to the allegations of the bill, the complainant must produce two witnesses, or one witness supported by corroborating circumstances. *Pember v. Mathews*, 1 Bro. Ch. R. 52; *Walton v. Hobbs*, 2 Atk. 19; *Janson v. Rany*, 2 Atk. 140; *Arnot v. Biscoe*, 1 Ves. 97; *Cooth v. Jackson*, 6 Ves. 40; *East Ind. Co. v. Donald*, 9 Ves. 275; *Piling v. Armitage*, 12 Ves. 78; *Cooke v. Clayworth*, 18 Ves. 12; *Savage v. Brock-sop*, 18 Ves. 335; *Smith v. Brush*, 1 John. Ch. 459; *Flagg v. Mann*, 2 Sumner, 489; 2 Fonbl. Eq. Book 6, ch. 2, s. 3, note; *Mortimer v. Orchard*, 2 Ves., Jun., 243; 2 Story Eq. Jur. s. 1258; *Clark v. Van Riemdsdyk*, 9 Cranch, 153; *Union Bk. v. Geary*, 5 Pet. 99; *Towne v. Smith*, 1 Wood. & M. 115; *Langdon v. Godard*, 2 Story, C. C. 267; *Daniel v. Mitchell*, 1 Story C. C. 172; *Gould v. Gould*, 3 Story, C. C. 516; *Hough v. Richardson*, 3 Story, C. C. 659; *Higbie v. Hopkins*, 1 Wash. C. C. 230; *Hoomes v. Smock*, 1 Wash. C. C. 389; *Smith v. Shane*, 1 McLean, 22; *Platt v. Vattier*, 1 McLean, 163; *Harper v. Dougherty*, 2 Cranch, C. C. 284; *Gear v. Parish*, Burn. (Wis.) 99; *Love v. Braxton*, 5 Call, 537; *Gray v. Farris*, 7 Yerg. 155.

The reason is, the plaintiff calls upon defendant to answer the allegation he makes, and thereby admits the evidence. Being testimony, it is equal to the testimony of any other witness. And as, in order that the plaintiff may prevail, he must have the balance of proof in his favor, he must have something in addition to his single witness, in order to turn the balance. *Clark v. Van Riemdsdyk*, 9 Cranch, 153.

But the rule as above stated does not necessarily require the oral testimony of even one witness to disprove the answer. Circumstances alone, if sufficiently strong, may outweigh an answer though positive and responsive to the bill. *Id.*

The general rule of courts of chancery is, that when the answer of the defendant is responsive to the bill and denies the allegations under oath, it is evidence for the defendant. *Field v. Holland*, 6 Cranch, 8; *Russell v. Clark*, 7 Cranch, 69; *Hughes v. Blake*, 6 Wheat. 453; 1 Mas. 518; *Union Bk. v. Geary*, 5 Pet. 99; *Daniel v. Brown*, 2 How. 406; *Carpenter v. Prov. Ins. Co.*, 4 How. 185; *Towne v. Smith*, 1 Wood. & M. 115; *Langdon v. Godard*, 2 Story C. C. 267; *Daniel v. Mitchell*, 1 Story, C. C. 172; *Gould v. Gould*, 3 Story, C. C. 516; *Higbie v. Hopkins*, 1 Wash. C. C. 230; *Tilghman v. Tilghman*, Baldw. 464; *Smith v. Shane*, 1 McLean, 22; *Morgan v. Tipton*, 3 McLean, 339; *Lenox v. Notrebe*, Hempst. 251.

In so far as the answer sets up new facts, by way of discharge or avoidance, or upon affirmative defenses, not responsive to the bill, these must be established by independent proof. The answer is not evidence in support of them. *Bk. of U. S. v. Beverly*, 1 How. 134; 17 Pet. 127; *McCoy v. Rhodes*, 11 How. 131; *Gaines v. Hennen*, 24 How. 553; *Flagg v. Flagg*, 2 Sumn. 486; *Rundall v. Phillips*, 3 Mas. 378; *Tilghman v. Tilghman*, Baldw. 464; *Robinson v. Cathcart*, 3 Cranch, C. C. 377; *Gear v. Parish*, Burn. (Wis.) 99; *McCoy v. Rhodes*, 11 How. 121; *Hart v. Ten Eyck*, 2 John. Ch. 88; 2 Story Eq. Jur. s. 1529.

As to how far the answer of one defendant to a bill in chancery is evidence for or against his co-defendant, see note to *Leeds v. Marine Ins. Co.*, 2 Wheat. 380.

As to the effect of an answer as evidence, according to the rule above stated, see further, 2 Cow. & Hill's notes to Phil. Ev., note 33, p. 49.

Wheat. 6.



the plea no bar, it is no plea.<sup>1</sup> The result of an examination of the allegations in the bill will be found to be, that the defendant was the legal owner of the notes taken for the sale of the lands, by taking and holding them in his own name; that the plaintiff, and the other persons interested, were *cestui que trusts* according to their respective interests, explained and known to the defendant; that the defendant's conditional acceptance of the order in the plaintiff's favor, so far as it affected to authorize him to apply the plaintiff's interest as an indemnity for his liability as Gibson's bail, being without the plaintiff's consent, did not destroy the defendant's character of trustee. That when he afterwards sold the plaintiff's interest (it being still a merely equitable one in the view of chancery, the conditional acceptance being of no force in equity), in order to apply the money to the wrongful purpose of the conditional acceptance, the defendant still remained answerable, in equity, upon the **457\*** foundation of the original trust. That the defendant knew all the material facts charged in the bill, out of which arose the trust, and breach of trust, and his alleged continuing accountability. That the defendant, insisting upon thus misapplying the money, the plaintiff mistaking the proper forum, sued the defendant at law, and a verdict and judgment passed against him; and the bill charges the defendant's breaches of trust, and abuse of his power as legal owner in taking advantage of the plaintiff, and the impossibility of his obtaining a full and fair trial of the whole merits at law, as reasons why the verdict and judgment should not be suffered to prevent relief in equity. The defendant, notwithstanding all this, pleads the verdict and judgment in bar of the relief and discovery. The plea leaves uncontradicted whatever in the bill showed a mere equitable trust, and undue advantage taken of the defendant's character of legal owner and holder of the fund. Since, then, the plaintiff could obtain relief nowhere, but upon the mere trust, which was properly cognizable in chancery; and even if it were barely possible that a court of law could relieve, and that great difficulties only stood in the way arising out of the nature of the subject, his miscarriage at law ought not to oust a court of equity of its power of relief in a matter appertaining to its jurisdiction. It cannot be denied on the other side, that a judgment at law may be relieved against in equity upon equitable inducements of various kinds. Cases of this sort furnish the familiar and ordinary **458\*** business of the Court of \*Chancery.<sup>2</sup> The only question, therefore, is upon what grounds will it relieve? I admit, with Lord Chancellors Eldon and Redesdale, that mere inattention, omission, or neglect, however fatal the consequences may be, shall not of itself be a ground of equitable relief against a judgment at law.<sup>3</sup> But where the matter is cognizable in equity, although also cognizable at law, and effectual cognizance has not, and cannot be taken at law, chancery will relieve against a

judgment at law; especially if the matter is better adapted to equitable cognizance, and forms a favorite subject of that jurisdiction. The instances put by Lord Redesdale of cases in which equity will interfere, although a verdict and judgment have been obtained at law, are only put by way of example.<sup>4</sup> They are not all the excepted cases; and the case actually before him, where he refused to interfere, was a case of *crassa negligentia* on the part of the defendant at law. If there has been no such gross negligence, and if the court of law be not only of competent jurisdiction, but competent to do justice in the case, from the nature of the subject, and its mode of proceeding, doubtless its judgment is conclusive. But this does not exclude the right of equity to control the judgment of a court of law for equitable purposes. It is no just reproach to a court of law, that it cannot do complete justice in all cases where it may have jurisdiction. The \*question is, whether [**459** it has adequate jurisdiction; and if it has not, equity will and ought to interfere; as in the case of a bond given for the purchase money of lands, and a suit at law brought upon it; and after judgment, a fatal defect discovered in the title; a court of equity will enjoin and relieve against the judgment, although it has no natural jurisdiction over a suit brought for a specialty or simple contract debt. In the view of a court of equity, a party who elects an incompetent forum, is not concluded by its judgment. The question still recurs, had he, and could he have justice there? The terms of the averment of the present plea are also important to be considered. The plea alleges, that the merits were fully and fairly tried. But if it appears that, in the nature of things, there were inherent difficulties in opposition to a full trial of the real merits, the plea cannot be true. The general rule, that whatsoever might have been, and was litigated at law, is concluded, need not be denied, if taken with this qualification, that it be fully and fairly litigated, and there be no equitable reason why the judgment should be set aside. But if there be new evidence discovered, or fraud, or an unconscientious advantage taken by the opposite party, or matters of equity which a court of law could not effectually investigate and decide, then the judgment at law is not conclusive.

Let us now see whether this case, as it appears on the bill, and the record pleaded as a bar, was properly and effectually relievable at law. And, in order to do this, it is necessary to examine the counts of \*the plaintiff's [**460** declaration in the suit at law, which a court of equity will do with a hypercritical eye, when it becomes necessary to inquire whether a judgment of a court of law is fit to bar its own jurisdiction. It does not act on such an occasion as an appellate court; but it looks to the case with a view to see whether justice could be effectually done by the court of law. Lord Redesdale, in the case before alluded to, inquired what was open before the jury;<sup>5</sup> and an examination of the counts in this declaration has the same object, and the further object, to as-

1.—Coop. Pl. 226, 266.

2.—Coop. Pl. 141; Toth. Rep. 231; 1 Ch. Cas. 56.

3.—Ware v. Harwood, 14 Ves., Jun., 31; Bateman v. Willoe, 1 Sch. & Lef. 201.

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U. S., Book 5.

4.—1 Sch. & Lef. 205.

5.—1 Sch. & Lef. 204.



certain whether any judgment could have been recovered upon them.

The learned counsel here entered into a minute analysis of the counts, in order to show that complete justice could not be done in the action at law, upon the equitable merits of the case, considered as a case of trust, complicated accounts, and fraud.

The original trust was never tried, and could not be tried. A declaration could not be framed to try it fully and effectually. A complicated account may indeed be examined at law. There is no defect of jurisdiction; but there is an insurmountable difficulty in doing justice. A court of law is not adapted, although it has jurisdiction, to arrive at a just result on such a subject; and as matters of account are a proper subject of equitable jurisdiction, equity will interpose on the mere ground of that difficulty, notwithstanding there has been a trial at law. The want of the defendant's oath, which this **461\***] bill, in seeking \*relief, calls for, was alone an insurmountable obstacle. This is not a bill for discovery merely; if it was, it could not be maintained; for then it would not be a case for equitable cognizance, and the plaintiff should have come here for a discovery during the *lis pendens* at law. But although it is a bill for relief, discovery is most important to that relief. The relief was always in the power of a court of equity, and one of the reasons why this court ought not to be satisfied with what has been done at law, is, that at law, there could be no discovery. The examination into the trust, and its abuses, could not be complete without the defendant's oath. If the plaintiff had come into equity seeking discovery and relief, while the suit was depending at law, the Court of Equity would have taken the whole cause under its care, and would have determined it as now required to do; and the principle is not altered by the suit at law having proceeded to judgment, since the cause has not yet been decided upon the defendant's oath. Where a bill alleges that a verdict has been obtained, on a matter of equitable cognizance, against the defendant's knowledge of the merits, a reliance upon such a verdict is as much against conscience as to that defendant, as the alleged breach of trust itself. In this case, the plea is no bar to the relief, if the defendant's knowledge makes the verdict unconscientious. A judgment may, indeed, be pleaded in bar, where the matter has been fully tried, and where the judgment is not impeached through the conscience of the defendant. If the bill alleges nothing, that if true, convicts the defendant of knowledge that **462\***] his \*verdict is against conscience, the plea is good. But a court of equity ought not to relinquish its jurisdiction, until the defendant has maintained the verdict, on a matter of equitable cognizance, by his oath.

2. It has already been shown, that the merits of the cause could not have been fully and fairly tried at law, and the judge's charge shows that they were not. But it is said that the plaintiff ought then to have moved for a new trial; and certainly upon a matter which a court of law only had a right to dispose of, this would have been the proper course. But this is a matter of equity, and if the party will set up a trial at law as a bar to equitable relief, he must show it, as he alleges it to be, a full and fair trial, and that

the equitable merits were really left open to the jury..

3. But supposing the plea to be proved, is its sufficiency now open for inquiry? And certainly the general rule would exclude that inquiry; pleas are not usually forestalled by the bill; but if the bill shows what, if true, would invalidate the plea, taking issue on it does not cure the defect.<sup>1</sup> But, it has been before shown, that this bill does allege such matter, and the plea admits the whole of it by not denying it. It is true that the defendant cannot amend his plea, but he may be ordered to answer, reserving him the benefit of his plea at the hearing, and in that mode justice will be done.

\**Mr. Webster* and *Mr. Jones*, contra, [**463** insisted, that no question could arise on the sufficiency of the plea in point of law, for by going to issue on the facts alleged in the plea, the parties have waived all objections of that nature; or, in the words of Gilbert, "if a party replies to a plea before it comes on to be argued, this is as full an admission of the plea as if it had been argued and allowed; for the plea by this replication is allowed to be good; only the defendant is put to the proof thereof; and so he may be, when it is argued and allowed. But if he proves his plea, the bill must be dismissed at the hearing."<sup>2</sup> Thus, if the defendant, in pleading a purchase for a valuable consideration, omits to deny notice; if the plaintiff replies to it, all that the defendant has to do, is to prove his purchase; and even if the plaintiff proves notice, it is immaterial; for it is the plaintiff's own fault if he does not set down the plea to be argued, in which case it would be overruled.<sup>3</sup> So here, if the plea had been bad, the plaintiff should have set it down for argument. The plea consists of two material parts; it alleges a judgment at law, for the same cause of action, in a court of competent jurisdiction; and it avers that there is no ground to impeach that judgment, and no new evidence discovered to enable the plaintiff to go behind it. There is the same strictness of pleading in equity, as at law;<sup>4</sup> but if the rule were not so, this plea is sufficient. \*The general principle is clear, that a [**464** judgment in a competent court, is a bar to a proceeding for the same cause of action in any other court. It is conclusive as to every matter which might have been litigated and decided in the first suit. The rule in equity is the same in this respect as at law.<sup>5</sup> Nor does it make any difference, that the case is proper, in itself, for equity jurisdiction. If so, a judgment at law could never be pleaded in bar of a suit in equity. Questions of fraud and trust are not the peculiar and exclusive subjects of equity jurisdiction. Whenever courts of common law can reach these subjects, they dispose of them effectually and conclusively.<sup>6</sup> If a particular subject is common to the two jurisdictions, the judgment of the tribunal which first

1.—Coop. Pl. 227.

2.—Gilb. For. Rom. 98; Mitf. Pl. 244; Beames's Eq. Pl. 317; 2 Eq. Abr. 79; Wyatt's Prac. Reg. 376; 1 Scho. & Lefr. 725.

3.—Harris v. Ingleden, 3 P. Wms. 95.

4.—2 Atk. 632.

5.—3 Atk. 623.

6.—1 Burr. 396; Mitf. Pl. 90; 3 Bl. Com. 431; 2 P. Wms. 156; 1 P. Wms. 154.

appropriates it to itself, must necessarily be conclusive, otherwise the party might speculate upon his chances of recovery in both; and as the courts of the Union are now constituted, we should be presented with the novel spectacle of a party suing on both sides of the circuit court for the same cause of action. Here the judgment is as good a bar to the discovery as to the relief.<sup>1</sup> So, a plea of the statute of limitations, or the statute of frauds, is a bar to discovery as well as relief.<sup>2</sup> And it is now the settled course of proceeding, that if a bill is **465\*** filed for discovery and relief, \*and the plea is sufficient to bar the relief, it is held sufficient to bar the discovery.<sup>3</sup> It is the general rule, that a plea confesses and avoids; but that principle does not apply in this case, where the defendant denies every allegation of the bill, and supports his denial by the former trial and verdict. Had it been a plea of payment, or release, or of the statute of frauds, or limitations, the rule might be applicable. The real defense is, that this matter has been before tried, and found against the plaintiff. If the defendant had answered more, he would have overruled his own plea.

Where is the authority for asserting, that it is no objection to the present bill, that a discovery was not sought *pendente lite*? What use could now be made of a discovery? It could not aid any proceeding elsewhere; and could only be used as a ground for relief in the present suit. The whole of the argument on the other side, on this point, rests on the notion, that the plaintiff may sue at law, and being defeated there, may, of course, file a bill in equity for the same matter. The unavoidable consequence of that doctrine would be, that in no case could the judgment of a court of law be pleaded in bar to a suit in equity. Here the cause of action is equally within the jurisdiction of a court of law, which has pronounced upon it, and whose judgment must, therefore, be conclusive in all other courts; and the argument against its conclusiveness, in this case, goes on the supposition, that the defendant can **466\*** not set up \*the judgment without undertaking to prove that it was a correct judgment on the merits, or, in other words, without going through the whole process of trial again. The plaintiff had to choose between three different courses. He might sue in equity; he might sue at law, and file a bill for discovery, *lite pendente*; or he might bring an action at law, and go to trial without the aid of a discovery. He elected the latter course, and must be bound by it. The verdict and judgment constitute a flat bar. The plaintiff is not now entitled to a discovery, unless he is entitled to relief; he is not entitled to relief, because it is a *res judicata*. A court of equity cannot try over again the merits which were fully tried in the former cause. To revise the merits of a cause which has been once tried between the same parties, and in a competent court, is the province of an appellate court, and not of a co-

ordinate tribunal, or one of a different jurisdiction. Parties must prosecute their rights in due time, and before the proper forum; and having once elected their forum, the decision is conclusive, not only as to the matter actually adjudged, but as to every matter which might have been litigated and decided.<sup>4</sup> In the action at law, the judge's charge might have been excepted to, if erroneous, and a new trial granted, which is in itself a sort of equitable right; but if the charge was correct, no injustice has been done. The present bill avows it to be for the same cause of action, and does not allege any \*incompetency in the jurisdiction [**467** of the court of law. It sets up no new right, but merely contends, that the plaintiff had a right then, on matter discovered since, but existing at the time. The question now is, not as to the goodness of the counts in the plaintiff's declaration, but whether the merits have been substantially tried upon them; not intending, however, to admit, that the counts were not sufficient. The regular course of the Court of Chancery, in such a case, is to refer them to the master to report whether the cause of action be substantially the same.<sup>5</sup>

As to the principles which govern courts of equity in setting aside verdicts as against equity, it must be shown that at the time of the trial at law some material fact existed, within the defendant's own knowledge, different from the finding of the jury.<sup>6</sup> Here there is no such fact; and even if there had been, if it was also within the plaintiff's knowledge, he should have filed a bill of discovery, *lite pendente*, to obtain the defendant's answer on oath. Supposing the testimony of E. Williams to be true, it establishes no fact existing at the time, which is essential to entitle the plaintiff to relief in equity.<sup>7</sup> But his testimony is explicitly contradicted by the defendant's answer; and the plea must therefore stand, being supported by the answer, and contradicted by the testimony of a single witness only, unsupported \*by circumstances to strengthen its [**468** credibility.<sup>8</sup> The transactions between the parties took place more than twenty years ago. The plaintiff had an opportunity of establishing his pretended claim in the tribunal which he had elected, and in which he failed; and the defendant has a just right to avail himself of that failure as a bar to any further proceedings in a case where, besides the solemn trial which has already been had at law, he has now purged his conscience of the allegations of fraud, which have been made against him without the slightest foundation in the facts and circumstances of the case.

*Mr. Justice LIVINGSTON* delivered the opinion of the court, and after stating the pleadings, proceeded as follows:

In examining whether there be any error in the decree of the court below, we shall have to inquire whether the plea of the respondent is proved; and if so, whether any other decree,

1.—Mitf. Pl. 193.

2.—Coop. Pl. 251, 255, 257; 1 Bro. Ch. 305.

3.—9 Ves., Jun., 75.

4.—Le Guen v. Gouverneur, 1 Johns. Cas. 436; Per Kent, C. J., Bateman v. Willoe, 1 Sch. & Lef. 201.

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5.—1 Vern. 310.; note; Raithby's ed.

6.—Lee v. Williams, 3 Atk. 224.

7.—Standish v. Radley, 2 Atk. 178.

8.—Walton v. Hobbse, 1 Atk. 19, and the cases there cited; 2 Ves., Jun., 243; 1 Bro. Ch. 52; 1 Johns. Ch. Cas. 459; 3 Ves., Jun., 170.



except that of dismissing the bill, could have been made by the court below.

In examining the question of fact, that is, whether the plea were proved or not, it will be borne in mind, that no decree can be made against a positive denial of the defendant, of any matter directly charged in the bill, on the testimony of a single witness, unaccompanied by some corroborating circumstance. **469\*** There is no pretense that there is anything untrue in any of the averments which the plea contains on the subject of the proceedings at law—such as that a judgment was obtained by the respondent—that the same is in full force, &c. The first averment in the plea, which will require a more particular consideration, is the one denying that the respondent had at any time obtained from E. Williams, any allowance or payment, for, on account of his being bail for Gibson, in an action brought against him by one Evans. The respondent had been permitted, as appears by the facts of the case, to retain out of a fund, on which the appellant had a claim, a considerable sum to save him harmless against this responsibility, and which was, in all probability, allowed to him, on the trial at law. If, therefore, it could have been shown that Blake had been fully indemnified, or paid for this liability from any other quarter, and that this fact had come to the appellant's knowledge since the judgment at law, it would seem no more than equitable, notwithstanding these proceedings, thus far to open the account between them. But has this been done? The allegation of the bill in substance is, that Blake has been twice indemnified for the same loss, or, in other words, that he had been twice re-imbursed the moneys which he paid as the bail of Gibson. This fraud, which is so unhesitatingly charged upon the respondent, is not made out by any testimony in the cause. Independent of Blake's positive and absolute denial, which is equivalent to the testimony of one witness, there is nothing in the deposition **470\*** of Williams, who is the only \*witness to this point, to establish the fact as stated in the bill. This gentleman has been twice examined, once in the year 1805, as a witness in the trial at law, and again, as a witness in this cause. On his first examination, he stated that he was informed by Blake that he held in his hand about \$6,300, which had been received of Henry Newman, as an indemnity for his having become bail for Gibson in an action by some person whose name he did not recollect, on which pretense Blake refused to pay him this sum. In the second deposition, which was taken in this cause, he swears that he was informed by Blake, that he had received from Newman about \$6,000, which he should retain, in consequence of his liability to Evans, as the bail of Gibson; and that he, Williams, allowed the respondent to apply this money for that purpose. Now, admitting that Blake retained these moneys, and with the consent of Williams, who, it appears, however, had no interest in, or control over them, with intent to apply them in this way, where is there any proof whatever, in contradiction of Blake's answer that he ever did make that use of them? He might have securities of Gibson of various kinds, the avails of which he might have a right to retain for the same object, but if he actually

made only one appropriation for such object, no one could complain. That the fund spoken of by Williams, which arose out of Newman's note, was not applied to the indemnity which has so often been mentioned, appears not only by an averment in Blake's plea to that effect, but by the testimony of Gibson \*him- [**471** self, a witness of the appellant, who declares, that the note of Newman was subject to his order; that no privity existed between Williams and Blake respecting the same; and that it had not been placed in Blake's hands as an indemnity for becoming his bail. It follows, therefore, that Blake could not have obtained from Williams any allowance or payment on account of this responsibility; and we accordingly find, from the bill itself, that on a settlement which took place between Blake and Gibson, in November, 1796, about two months after the acceptance in favor of the appellant, the former fell in debt to the latter a sum exceeding two thousand dollars, the payment of which, by Blake, is one subject of complaint in the appellant's bill. Now, it is more than probable, that in this settlement, Gibson received a credit for the very money of which Williams speaks, as Gibson acknowledges it to have been a final settlement of all the accounts between him and Blake. The court, therefore, is entirely satisfied, that the averment in the respondent's plea, which it has just been considering, is fully established, and that the proof is such as to leave no room whatever to believe, that Blake was ever repaid the moneys he advanced as the bail of Gibson, from any other fund than that which the appellant had consented should stand pledged for that purpose. As little truth is there in the allegation, that what Williams could testify on this subject, was unknown to Hughes during the pendency of the action at law; for Williams, who is examined as a witness for the \*plaintiff in this [**472** suit, swears to the very fact, which he had been produced to prove in the action at law respecting the declarations of Blake concerning Newman's note; and this he does without any variation from his former testimony, materially affecting the present suit. The other averment, therefore, in the plea, that no new evidence has come to the appellant's knowledge respecting the matters in litigation, is fully and satisfactorily established.

The truth of the plea being thus made out, what is to be the consequence? If the rule of courts of equity in England is to be applied, there can be no doubt. If a plea, in the apprehension of the complainant, be good in matter, but not true in fact, he may reply to it, as has been done here, and proceed to examine witnesses in the same way as in case of a replication to an answer; but such a proceeding is always an admission of the sufficiency of the plea itself, as much so, as if it had been set down for argument and allowed; and if the facts relied on by the plea are proved, a dismissal of the bill on the hearing is a matter of course. Whatever objection there may be to adhering strictly to this course of proceeding in every description of cases, it is considered as the long and established practice of a court of equity, which ought not lightly to be departed from. It is not perceived, that any serious mischief can arise from it. Counsel will gen-

erally be able to decide on the merits of any defense which may be spread on a plea, and if insufficient, it is not probable they will do otherwise than set it down for argument. **473\***] \*Nor will they ever take issue on it, but in a case which presents a very clear and sufficient defense, if the facts be proved. If a replication should be filed inadvertently, the court would have no difficulty in permitting it to be withdrawn. But if the plaintiff will persevere in putting the defendant to the trouble and expense of proving his plea, it must be from an entire conviction that it contains a substantial defense, and in such case there is no hardship in a court's considering it in the same light. But without applying the rule which has been mentioned, to the present case, the court has no difficulty in saying, that the matters set forth in this plea, which has been drawn with great care and judgment, constitute a complete defense to the present action, and that the appellant has failed in showing any good cause why the judgment at law should not be conclusive on all the matters stated in the bill. Whatever claim he may at one time have had on Blake for one fourth of \$75,000, secured by Barrel's notes, if Blake knew at the time of taking them of his interest to that extent, or for not taking a note for that amount in the name of Hughes himself, it is very certain, that with a full knowledge on his part, that Blake utterly denied a liability to account with anyone but Gibson, he came to a settlement with him, by allowing him to accept of Gibson's draft, in his favor, in such way as to charge the fund on which it was drawn with so many deductions as entirely to exhaust it. And when he is apprised of this conditional acceptance by his **474\***] agent, or the person who \*presented the draft, instead of returning it, or making any complaint, he acquiesces in it for seven or eight years, and then brings an action to enforce this very contract of acceptance, which he must have known put it in the power of the acceptor to make all the deductions from the fund in his hands, which were designated in the act of acceptance. After six years' litigation in a court of law, it is now attempted to revive the same controversy, at least in part, on an allegation that Blake received a compensation in some other way than out of the fund, on which the bill in his favor was drawn, for one of the liabilities mentioned in the acceptance. That this was not the case, is abundantly proved. But if Blake had other funds of Gibson, besides the note of Barrel, which he also considered as under Gibson's exclusive control, out of which his indemnity as bail might have been obtained, what right has Hughes now to complain, that such other funds were not applied in that way, after he had agreed or consented that this indemnity should come out of those funds of Gibson in the hands of Blake, out of which he was to be paid? Having come into the arrangement, Blake might well think himself at liberty, as it seems he did, to apply the other funds of Gibson in any other way which he and Gibson might think proper. Whether Gibson be liable to the appellant for the subtraction of any part of his fund for the payment of his debt, is a question not before the court; but we cannot see that an application of them in express **con-475\***] formity with the agreement of \*the Wheat. 6.

parties to this suit, can give the appellant any claim on the respondent. At any rate, the plea having denied all the allegations which were relied on as grounds for removing the bar which it was anticipated would be interposed to the appellant's bill, and all the matters stated in the plea, on which issue was taken, having been fully proved, the court is of opinion, that the decree of the Circuit Court must be affirmed, with costs.

*Decree affirmed.*<sup>1</sup>

Aff'g.—1 Mason, 515.

Cited—10 Pet. 209, 211; 14 Pet. 257; 2 Wall. 430; 16 Wall. 30; 9 Otto, 206; 5 Bank. Reg. 264; 1 Cliff. 278, 506; 2 Cliff. 51, 79; 3 Cliff. 497; 4 Cliff. 459; Bald. 491, 495; 1 Ware, 388.

#### [LOCAL LAW. PRACTICE.]

#### BARTLE v. COLEMAN.

Under the act of Assembly of Virginia, the defendant may enter special bail, and defend the suit at any time before the entering up of judgment upon a writ of inquiry executed; and the appearance of the defendant, or the entry of special bail, before such judgment, discharges the appearance bail.

If the defendant does not appear, or give special bail, the appearance bail may defend the suit, and is liable to the same judgment as the defendant would have been liable to; but the defendant cannot appear and consent to a reference, the report and judgment on which is to bind the appearance bail as well as himself. Such a joint judgment is erroneous, and will be reversed as to both.

**THIS** cause was argued by *Mr. Swann* for the \*plaintiff in error,<sup>2</sup> and by [**\*476** *Mr. Jones* and *Mr. Taylor* for the defendant in error.<sup>3</sup>

*Mr. Chief Justice MARSHALL* delivered the opinion of the court:

This is a writ of error to a judgment rendered by the Circuit Court for the District of Columbia and county of Alexandria, against Andrew Bartle and Samuel Bartle, on a writ issued by George Coleman against Andrew Bartle, on the service of which, Samuel Bartle became bail for his appearance. The defendant in the court below not having entered his appearance, a conditional judgment was entered at the rules held in the clerk's office, against the defendant and his appearance bail. This being an action on the case, the judgment at the rules was for no specific sum, but for the damages which the plaintiff in that suit has sustained, which damages are to be inquired into, and ascertained by a jury. After this writ of inquiry shall be executed, and not till then, a final judgment for the damages assessed by the jury is rendered by the court. In the meantime, the cause stands on the court docket for trial.

The act of Assembly respecting this subject is in these words: "And every judgment entered in the office against a defendant and bail,

1.—*Vide* 1 Mason's Rep. 515., S. C.

2.—He cited *Dunlop v. Laporte*, 1 Hen. & Mun. 22; *Gray v. Hines*, 4 Hen. & Mun. 437; *Fisher v. Riddle*, 1 Hen. & Mun. 329.

3.—They cited *Holdup v. Otway*, 2 Wms. Saund. 106, and the cases there cited; *Gould v. Hammersley*, 4 Taunt. 148.



477\*] or against a defendant \*and sheriff, shall be set aside, if the defendant at the succeeding court shall be allowed to appear without bail, put in good bail, being ruled so to do, or surrender himself in custody, and shall plead to issue immediately." "If the defendant shall fail to appear, or shall not give special bail, being ruled thereto by the court, the bail for appearance may defend the suit, and shall be subject to the same judgment and recovery as the defendant might or would be subject to, if he had appeared and given special bail."

The courts of Virginia have never construed this act strictly as to time. Although the absolute right given to the defendant to appear and set aside the judgment rendered in the office, is limited to "the succeeding court," he has always been allowed to appear, and set it aside, at any time before it became final. In all actions which sound in damages, the judgment cannot become final, until the damages shall be ascertained for which it is to be rendered.

In other respects, too, this law which authorizes a judgment against the appearance, or common bail, without the service of process on him, has been construed with great liberality. The cases which have been cited, show that the decisions in the Court of Appeals of Virginia have settled principles which seem to decide this case. It has not only been determined that the defendant may enter special bail, and defend the suit at any time before a final judgment, but also, that if he appears and pleads, without giving special bail, or appears and confesses judgment, the appearance bail is discharged. 478\*] \*It is also well known to be the settled practice of Virginia, if special bail be given, to discharge the appearance bail, although the defendant should not appear, but the judgment should become final, either on his default, or on the execution of a writ of inquiry.

It is then settled, that the appearance of the defendant, or the entry of special bail, before final judgment, discharges the appearance bail.

Let these principles be applied to the case before the court. While the writ of inquiry was depending, we find this entry on the record: "In the case of George Coleman, plaintiff, and Andrew Bartle, defendant; and Andrew Bartle, plaintiff, and George Coleman, defendant; by consent of parties this case is referred to Joseph Deane," &c.

Could this rule be made without consent? Or could this consent be given without the appearance of the party, by himself or his attorney? Both these questions must be answered in the negative. What party, then, did appear and give this consent? Was it Andrew Bartle, the defendant in the cause, who is named as the party, or was it Samuel Bartle, his appearance bail, who is not named? In addition to the omission of the name of Samuel Bartle, an omission which could not have been made had he actually appeared, and been a party to the rule, it is to be observed that he had no power to consent to it. The law allows him to defend the suit, but does not allow him to refer it to arbitrators. We do not hazard much in saying, that no court would or ought to permit such a rule as this to be made, without the consent of the defendant given in person, or 479\*] by his attorney. \*But were it even supposed to be in the power of Samuel Bartle,

to refer the suit of Coleman against Andrew Bartle, he could not refer that of Andrew Bartle against Coleman; and this suit also is embraced in the same rule.

It is then apparent, that it is Andrew Bartle who consented to this rule.

It has been contended, that the consent of Samuel Bartle must also be implied. We do not think so. It is reasonable to suppose that his name would have appeared, had he been a party to the rule. But it was not necessary that he should be a party to it. Andrew Bartle was himself competent to make this reference, and the appearance bail never comes into court, unless it be to defend the suit in consequence of the non-appearance of the defendant. But, were it even true that the consent of Samuel Bartle could be inferred, it would, nevertheless, be also true, that Andrew Bartle appeared, by the admission of the plaintiff; and such appearance, according to the decisions in Virginia, discharges his bail.

In the mode pursued by the clerk, in making his entry, the usual form of saying "this day came the parties," &c., is not pursued. But this is immaterial, because the parties perform an act in court, which could not be performed without appearing; they consent to a rule which implies appearance, and the form of the entry cannot affect its substance. Were it otherwise, the appearance of the defendant is entered in the usual form before final judgment. On the return of the \*award, the following [\*480 entry is made: "And now here, &c., at this day, &c., came, as well the plaintiff aforesaid, by his said attorney, as the said defendant, by Thomas Swan, his attorney, and the following award was returned," &c. The award is then recited, which shows, that the arbitrators proceeded on notice to Andrew Bartle only, and the judgment of the court is immediately rendered for the amount of the award against "Andrew Bartle, the defendant, and Samuel Bartle, the security for his appearance." Yet the appearance of Andrew Bartle is formally entered on the record previous to this judgment. If, instead of entering the judgment in pursuance of the award, it had been entered in pursuance of the confession of the defendant, this would have been the very case cited from 1 Hen. & Munf., 329. And what distinction can be taken between this case and that? The counsel for the defendant in error says, that a judgment by confession is a different judgment from that entered in the office, and, therefore, must be a substitute for it received by consent of the plaintiff. And is not this also a different judgment from that rendered in the office? And is it not entered at the instance of the plaintiff?

Were it necessary to pursue this argument further, we should all be of opinion, that judgment could not be rendered against the appearance bail on this award, and without executing the writ of inquiry, unless by his consent. But as we are of opinion, that the appearance of the defendant has discharged his bail, it is unnecessary to pursue the subject \*far- [\*481 ther. The judgment against Samuel Bartle is erroneous, and as it is joint, it must be reversed against both.

*Judgment reversed.*



[CHANCERY.]

PREVOST v. GRATZ ET AL.

GRATZ ET AL. v. PREVOST.

To establish the existence of a trust, the *onus probandi* lies on the party who alleges it.

In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief.

But as length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of the original transactions, it operates, by way of presumption, in favor of innocence, and against imputation of fraud.

The lapse of forty years, and the death of all the original parties, deemed sufficient to presume the discharge and extinguishment of a trust, proved once to have existed by strong circumstances; by analogy to the rule of law, which after a lapse of time presumes the payment of a debt, surrender of a deed, and extinguishment of a trust, where circumstances require it.

**A**PPEAL from the Circuit Court of Pennsylvania.

This was a bill in Chancery, filed in the court below, by the plaintiff, George W. Prevost, as administrator *de bonis non*, with the **482\***] will annexed, of \*George Croghan, deceased, against the defendants, Simon Gratz, Joseph Gratz, and Jacob Gratz, administrators of the estate of Michael Gratz, deceased, for a discovery and account of all the estate of G. Croghan, which had come to their hands, or possession, either personally or as the representatives of M. Gratz, who was one of the executors of G. Croghan, who died in August, 1782, having appointed M. Gratz, B. Gratz, T. Smallman, J. Tunis, and W. Powell, executors of his last will and testament. All the executors, except W. Powell, died before the commencement of the suit. B. Gratz died in 1800, and M. Gratz in 1811. W. Powell was removed from his office as executor in the manner prescribed by the laws of Pennsylvania, after the death of M. Gratz; and the plaintiff was thereupon appointed administrator *de bonis non*, with the will annexed. The bill charged M. Gratz and B. Gratz (the representatives of B. Gratz

not being made parties), with sundry breaches of trust in respect to property conveyed to them in the life-time of the testator, and with other breaches of trust in relation to the assets of the testator after his decease; and also charged the defendants with neglect of duty in relation to the property and papers of G. Croghan, which had come to their hands since the decease of M. Gratz.

The first ground of complaint, on the part of the plaintiff, related to a tract of land lying on Tenederah River, in the state of New York, which was conveyed by G. Croghan to M. Gratz, as containing 9,050 acres, by deed, dated the 2d of March, 1770, for the consideration expressed in the \*deed of £1,800. The [\***483** deed was upon its face absolute, and contained the covenants of general warranty, and for the title of the grantor, which are usual in absolute deeds. At the time of the execution of the deed, G. Croghan was in the state of New York, and M. Gratz was at Philadelphia. The land, thus conveyed, was, in the year 1795, and after the death of G. Croghan, sold, by M. Gratz, to one Lawrence, in New York, for a large sum of money. The plaintiff alleged, that this conveyance made by G. Croghan to M. Gratz, though in form absolute, was in reality a conveyance upon a secret trust, to be sold for the benefit of the grantor; and he claimed to be allowed the value of the lands at the time the present suit was brought, upon the ground of a fraudulent or improper breach of trust by the grantee, or at all events to the full amount of the profits made upon the sale in 1795, with interest up to the time of the decree. This trust was denied by the defendants, in their answer, so far as respects their own knowledge and belief; and if it did ever exist, they insisted, that the land was afterwards purchased by M. Gratz, with the consent of G. Croghan, for the sum of £850 15s. 5d., New York currency. It appeared from the evidence, that G. Croghan, and B. and M. Gratz, were intimately acquainted with each other, and a variety of accounts were settled between them, from the year 1769, to a short period before the death of G. Croghan;

NOTE.—In equity, length of time is no bar to a trust clearly established, provided no circumstances exist to raise a presumption from lapse of time of an extinguishment of the trust, and no open denial or repudiation of the trust is brought home to the knowledge of the parties in interest which requires them to act as upon an adverse title. *Baker v. Whiting*, 3 Sumn. 475; *Manning v. Hayden*, 7 Reporter, 434; 13 West. Jur., 318.

And where fraud is imputed and proved, the length of time during which that fraud has been concealed and practiced is rather an aggravation of the offense, than a circumstance to exclude relief. *Bk. of U. S. v. Beverly*, 1 How. 134; *Michoud v. Girod*, 4 How. 503; *Platt v. Oliver*, 2 McLean, 267.

Time only begins to run against an express trust from a period when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que trust*. *Boone v. Chiles*, 10 Pet. 177; *Oliver v. Platt*, 3 How. 333.

The statute of limitations does not begin to run in favor of a trustee who has received money from his *cestui que trust*, until a demand and refusal. *Taylor v. Benham*, 5 How. 238.

Where a bill in equity avers an express trust, and defendant pleads the statute of limitations, the plea must be supported by an answer denying the facts which are alleged as the evidence of the trust. *Harpending v. Ref. Dutch Ch.*, 16 Pet. 455.

A violation of trust growing out of a mistaken Wheat. 6.

construction of a will by the executors unaccompanied by fraudulent intent, is within the ten years statute of limitation of the State of New York, concerning actions for relief in cases of trust not cognizable by courts of law. *Clarke v. Boorman*, 18 Wall. 493.

The proposition that lapse of time constitutes no bar in cases of trust must be received with its appropriate qualifications. As long as the relation of trustee and *cestui que trust* is acknowledged to exist between the parties, and the trust is continued, lapse of time can constitute no bar to an account or other proper relief for the *cestui que trust*. But when this relation is no longer admitted to exist, or time so long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance; in all such cases, a court of equity will refuse relief upon the ground of lapse of time and its inability to do complete justice. This doctrine will apply even to cases of express trust, and *a fortiori* it will apply with increased strength to cases of implied or constructive trust. *Portlock v. Gardner*, 1 Hare, 594, 603, 604; *Attorney-General v. Fishmonger's Co.*, 5 Mylne & Cr. 16, 17; *Wedderburn v. Wedderburn*, 4 Mylne & Cr. 41; 2 Story Eq. Jur., s. 1520, a.

As to the effect of lapse of time (in the absence of express stationary provisions), as a bar to relief in express and constructive trusts, see *Hill on trustees*, 264, 265.



that he was involved in pecuniary embarrassments, and extensively engaged in land speculations; and some portions of his property were **484\*** conveyed to one or \*both the Messrs. Gratz upon express and open trusts. It also appeared, that in an account which was settled at Pittsburg, in May, 1775, between B. and M. Gratz, and G. Croghan, there was the following item of credit:

“ August, 1774. By cash received of Howard, for 9,000 acres of land on Tenederah, sold him for £850 15s., New York currency, is here,	£797 12 6
Interest on £797 12s. 6d. from August, 1774, to May, 1775, is eight months at 6 per cent. -	31 18 1
	£829 10 7

Upon the back of another account between B. & M. Gratz and G. Croghan, which was rendered to the latter in December, 1779, there was a memorandum in the handwriting of G. Croghan, in which he enumerates the debts then due by him to B. & M. Gratz, amounting to £1,220 1s. 2d., and then adds the following words: “ Paid of the above £144 York currency, besides the deed for the land on the Tenederah River 9,000 acres patented;” which memorandum appeared to have been made after the conveyance of the land to M. Gratz. It also appeared that the value of the land, as fixed in the account of May, 1775, was its full value; which was proved by public sales of adjoining lands at the same period when Howard was asserted to have purchased the land. A counterpart of **485\*** the account of 1775 \*was also in the possession of M. Gratz, in which the word Howard was crossed out with a pen, but so that it was still perfectly legible, and the name of Michael Gratz, in his own handwriting, written over it. M. Gratz continued in possession of the Tenederah land, paid great attention to it, and incurred great expenses in making improvements on it after the year 1786. The mother of the plaintiff was the heir of G. Croghan, and it was proved that his father had unreserved and frequent access to the papers of G. Croghan, and resided several years in Philadelphia, with the view of investigating the situation of the estate, and finally abandoned all hopes of deriving any benefit from it. The account of May, 1775, from which the alleged trust was sought to be proved, was delivered over to him by the representatives of M. Gratz, among the other papers of G. Croghan.

The second principal ground of the plaintiff's complaint respected a judgment obtained by the representatives of one W. M'Ilvaine, against G. Croghan, which was purchased by B. Gratz, during the life-time of G. Croghan, and was by him assigned to S. Gratz, one of the defendants, who, under one or more executions issued on that judgment, became the purchaser of certain lands belonging to G. Croghan. It appeared, that on the 30th of March, 1769, G. Croghan gave his bond to W. M'Ilvaine, for the sum of £400, which debt by the will of M'Ilvaine, became on his death vested in his widow, who afterwards intermarried with J. Clark. A judgment was obtained upon the bond against **486\*** G. Croghan, in the name of W. \*Humphreys, executor of M'Ilvaine, in the Court of

Common Pleas in Westmoreland county, Pennsylvania, at the October term, 1774, upon which a *fi. fa.* issued, returnable to the April term of the same court, in 1775. On the 8th of March preceding the return day of the *fi. fa.*, Bernard Gratz purchased this judgment from Clark, and received an assignment of it, for which he gave his own bond for £300, and interest. About this time G. Croghan was considerably embarrassed, and several suits were depending against him. Bernard Gratz, having failed to pay his bond, was sued by Clark, and in 1794 a judgment was recovered against him for £89 6s. 10d., the balance then due upon the bond, which sum was afterwards paid by M. Gratz. The judgment of Humphreys against G. Croghan was kept alive from time to time, until 1786, and in that year, on the death of Humphreys, J. Bloomfield was appointed administrator *de bonis non* with the will annexed of Humphreys, and revived the judgment, and it was kept in full force until it was finally levied on certain lands of G. Croghan. In the year 1800, B. Gratz assigned this judgment to his nephew, S. Gratz, one of the defendants, partly in consideration of natural affection, and partly in consideration of the above sum of £89 6s. 10d. paid towards the discharge of the bond of B. Gratz, by his (Simon's) father, M. Gratz. S. Gratz, having thus become the beneficial owner of the judgment, proceeded to issue execution thereon, at different times, between September, 1801, and November, 1804, caused the same to be levied on sundry tracts of land \*of G. [**487** Croghan, in Westmoreland and Huntington counties, of five of which he, being the highest bidder at the sale, became the purchaser. The tracts thus sold, contained upwards of 2,000 acres, and were sold for little more than \$1,000. The title to some part of this land is still in controversy. Shortly after the assignment of the judgment to B. Gratz, on the 16th of May, 1775, G. Croghan, by two deeds of that date, conveyed to B. Gratz, for a valuable consideration therein expressed, about 45,000 acres of land. A declaration of trust was executed by B. Gratz on the 2d of June, 1775, by which he acknowledged that these conveyances were in trust to enable him to sell the same, and with the proceeds to discharge certain enumerated debts of G. Croghan, and among them the debt due on the M'Ilvaine bond, and to account for the residue to G. Croghan.

The bill charged, that the assignment of this judgment was procured by B. and M. Gratz, or both of them, after the death of G. Croghan, and that nothing was due upon the judgment; or if anything was due, it was paid upon the assignment out of moneys belonging to the estate of G. Croghan. But the evidence disproved these charges, and showed, that the assignment was made to B. Gratz in the life-time of G. Croghan, and that the judgment never was paid or satisfied by G. Croghan, or out of his estate.

The defendants, in their answer, denied, to their best knowledge and belief, all the material charges of the bill; and upon replication, the cause was heard in the court below upon the bill, answer, evidence, \*and exhibits; [**488** and a decree was pronounced dismissing the bill as to all the charges, except that respecting the lands lying on Tenederah River; and as to this, a decree was pronounced in favor of the

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plaintiff for all the profits made upon a sale of those lands by M. Gratz. From this decree, both parties appealed to this court.

*Mr. Webster and Mr. D. B. Ogden*, for the plaintiff, argued, (1) That not only ought M. Gratz to be considered as a trustee of the Tenederah lands, but a decree ought to have been given for the value of the lands at the date of the decree, instead of the amount for which the lands were sold by him. They insisted that the original existence of the trust was fully proved by the evidence, and being thus clearly established, the burden of proof was on the defendants to show how and by what means it had been discharged. M. Gratz being a trustee to sell, he could not buy.<sup>1</sup> This is the universal, inflexible rule of a court of equity; and even if the trust is to pay a debt due to a trustee himself, still he is a trustee for the surplus, subject to the same prohibition; and in this case, never having sold the land in execution of the trust, he must now be regarded as still holding it, and ought to be accountable for its value at the present time, and not at the time of the pretended sale. If he now held the land, the court would compel him to account for its **489\*** present value, \*or to reconvey it; but he does hold it in equity, and no act of his ought to prejudice the *cestui que trust*. The lapse of time is nothing, unless it appear that he knew the purchase by the trustee, and must, therefore, be presumed to have acquiesced.<sup>2</sup> But here no such knowledge is proved, and, therefore, no such acquiescence can be presumed. (2) They insisted that S. Gratz had no right to purchase the lands sold at the sheriff's sale under the M'Ilvaine judgment; but under the circumstances of the case ought to be considered as holding them in trust for the plaintiff. This being a proceeding without any notice to the party interested, cannot be sustained. The notice given by the *scire facias* was only to B. Gratz, the executor of G. Croghan; that is, the owner of the judgment revived it by notice to himself. It is a settled principle that an executor cannot purchase the property of his testator;<sup>3</sup> and the purchaser of an equity takes it subject to all claims. Besides, this is a judgment which the law would presume to be satisfied from length of time; which is attempted to be executed by the judgment creditor who has in his own hands the funds with which it was to be satisfied, and thus attempts to convert a legal right into an instrument of injustice, which forms a strong ground for equitable relief.<sup>4</sup>

*Mr. Pinkney and Mr. Sergeant*, contra, contended, (1) That the present plaintiff had no right, alone, to call the defendants to account **490\*** for the alleged trust \*as to the Tenederah lands, nor jointly with other parties as the administrator *de bonis non*, with the will annexed, of G. Croghan. Equitable estates descend as well as legal estates. Mrs. Prevost, the heir of Croghan, died while the supposed trust existed, leaving several children, besides the plaintiff,

who ought also to have been made parties, if he is to be considered as suing as a parcener. The sale of the trust estate indeed extinguishes the right of the heirs to the land, but it entitles them to the money for which it was sold, which now represents and stands in place of the land. Nor has Croghan's will any effect upon the matter. The will empowers a majority of his executors (of whom B. Gratz, during his life, was always to be one) to sell such of his lands as they should think fit, for the payment of his debts. It does not devise to the executors to be sold, but gives them a naked authority to sell and convey. Even admitting that the Tenederah lands fell within the authority, the executors could only have sold the equitable estate of Croghan, which on his death descended to his heir. But this supposes that very equitable estate, for the existence of which we contend. But the executors did not sell that equitable estate. M. Gratz, though one of those executors, did not sell under the will. He sold, not the equitable interest merely, but the whole estate, and threw the equitable claimants under Croghan, upon the surplus of the proceeds which he could not appropriate. To sell under the will, he must have had the sanction of the other executors, which he had not; and the plaintiff, as administrator *de bonis non*, \*could not have authorized it, be- [**491** cause he did not become administrator until M. Gratz had rendered a sale by his orders or consent impossible. The will, therefore, did not reach the case, and cannot now in any degree control it. Nor does the interest which creditors may have in the proceeds make it personal estate in Croghan, or subject it to the control of the administrator *de bonis non*. (2) The counsel argued that there was no sufficient proof of the existence of any such trust as that alleged respecting the Tenederah lands, but that M. Gratz became the absolute owner of the lands, with the knowledge and consent of Croghan. Fraud is never to be presumed, especially after such a lapse of time; and even if the trust ever existed, equity will rather presume it to be satisfied, than indulge a presumption of fraud, where the parties are dead, and the evidence respecting the transaction is lost.<sup>5</sup> Even if there was here a trust to sell, it was a trust to sell for a fixed price, created by a person of full age, and full knowledge of the circumstances, for the benefit only of the trustee and himself. The reason of the rule, that a trustee cannot purchase, is, that the trustee might be tempted from his duty, and buy at an inadequate price. Where the power is general, or, where other persons are interested in the execution of the trust, it may be conceived to be a salutary rule, though sometimes operating severely. But where the trustee is a creditor, \*where the price is fixed, and no one [**492** else is interested, it would be difficult to assign any good reason why the trustee might not be the purchaser. (3) As to the M'Ilvaine judgment, they principally relied upon the same grounds which are stated in the opinion of the court below, quoted *infra* in a note to the opinion of this court in the present case.

1.—10 Ves. 423; 1 Ves., Sen., 9; 2 Bro. Ch. Rep. 400; 2 Johns. Ch. Rep. 252; 5 Ves. 794; 4 Ves. 497; 6 Ves. 631.

2.—12 Ves.

3.—2 Johns. Rep. Ch. 252.

4.—3 Ves., Jun., 170.

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5.—12 Ves. 261, 374; 2 Ves. 581; 3 P. Wms. 266; 2 Atk. 67; 3 Atk. 105; 3 Bro. Ch. Rep. 640; 2 Scho. & Lefr. 41, 71.



*Mr. Justice STORY* delivered the opinion of the court, and after stating the proceedings in the court below, proceeded as follows:

The first point upon which the cause was argued, respects the tract of land on the Tenederah River. It appears from the evidence that this tract of land, containing 9,050 acres, was conveyed by Col. Croghan to Michael Gratz, by a deed bearing date on the 2d of March, 1770, for the consideration expressed in the deed of £1,800. The deed is upon its face absolute, and contains the covenants of general warranty, and for the title of the grantor, which are usual in absolute deeds; but are unnecessary in deeds of trust. At the time of the execution of the deed, Col. Croghan was in the state of New York, and Michael Gratz was at Philadelphia. The land was, after the death of Col. Croghan, and in the year 1795, sold by Michael Gratz to a Mr. Lawrence, in New York, for a large sum of money. The plaintiff contends that this conveyance made by Col. Croghan to Michael Gratz, though in form absolute, was in reality a conveyance upon a secret trust, to be sold for the benefit of the grantor; and in this view of the case, he contends farther, that he is entitled to be allowed the full value of the lands at the time the present suit was brought, upon the ground of a fraudulent or improper breach of trust by the grantee, or at all events, to the full amount of the profits made upon the sale in 1795, with interest up to the time of the decree.

The attention of the court will, therefore, be directed, in the first place, to the consideration of the question, whether this was a conveyance in trust, and if so, of what nature that trust was; and, in the next place, whether that trust was ever lawfully discharged or extinguished. If there be still a subsisting trust, there can be no doubt that the plaintiff is entitled to some relief.

It appears from the evidence that Col. Croghan, and Bernard and Michael Gratz, were intimately acquainted with each other, and a variety of accounts was settled between them, from the year 1769, to a short period before the death of Col. Croghan. During all this period, Col. Croghan appears to have had the most unbounded confidence in them; and particularly by his will, made in June 1782, a short time before his decease, he named them among his executors, and gave to Michael Gratz, in consideration of services rendered to him, five thousand acres of land, and to his daughter, Rachel Gratz, one thousand acres of land on Charter Creek, with an election to take the same number of acres in lieu thereof, in any other lands belonging to the testator. The situation of the parties, therefore, was one in which secret trusts might, probably, exist from the pecuniary embarrassments in which **493** Col. Croghan appears to have been involved, as well as from his extensive land speculations. And, in point of fact, some portions of his property were conveyed to one or both of the Messrs. Gratz, upon express and open trusts.

Still, however, the burthen of proof to establish the trust in controversy, lies on the plaintiff. The circumstances on which he relies are, in our judgment, exceedingly strong in his favor; and sufficient to repel any presumption

against the trust drawn from the absolute terms of the deed. In an account which was settled at Pittsburg, in May, 1775, between Bernard and Michael Gratz, and Col. Croghan, is the following item of credit:

" August, 1774 By cash received of Howard, for 9,000 acres of land at Teuederah, sold him for £850 15s., New York currency, is here,	-	£797 12 6
Interest on £797 12s. 6d. from August, 1774, to May, 1775, is eight months, at 6 per cent.	-	31 18 1
		<hr/> £829 10 7

There is no question of the identity of the land here stated to be sold to Howard, with the tract conveyed to Michael Gratz by the deed, in 1770. If the conveyance to Michael Gratz had been originally made for a valuable consideration then paid, it seems utterly impossible to account for the allowance of this credit upon any sale at a subsequent period. It seems to us, therefore, that the only **495** rational explanation of this transaction is, that the conveyance to Michael Gratz, though absolute in form, was, in reality, a trust for the benefit of Col. Croghan. What the exact nature of this trust was, it is, perhaps, not very easy now to ascertain with perfect certainty. It might have been a trust to sell the lands for the benefit of Col. Croghan, and to apply the proceeds in part payment of the debts due from him to Bernard and Michael Gratz; or, it might have been a sale of the lands directly to Michael Gratz, in part payment of the same debt, at a price thereafter to be agreed upon, and fixed by the parties; and, in the meantime, there would arise a resulting trust, in favor of Col. Croghan, by operation at law.

Time, which buries in obscurity all human transactions, has achieved its accustomed effects upon this. The antiquity of the transaction, the death of all the original parties, and the unavoidable difficulties as to evidence, attending all cases where there are secret trusts and implicit confidences between the parties, renders it, perhaps, impossible to assert, with perfect satisfaction, which of the two conclusions above suggested, presents the real state of the case. Taking the time of the credit only, it would certainly seem to indicate that the trust was, unequivocally, a trust to sell the land. But there are some other circumstances which afford considerable support to the other conclusion. Upon the back of an account between B. & M. Gratz, and Col. Croghan, which appears to have been rendered to the latter, in December, 1769, there is a memorandum **496** in the handwriting of Col. Croghan, in which he enumerated the debts then due by him to B. & M. Gratz, amounting to £1,220 1s. 2d., and then adds the following words: "Paid of the above £144 York currency, besides the deed for the land, on the Tenederah River, 9,000 acres patented." This memorandum must have been made after the conveyance of the land to M. Gratz, and demonstrates that the parties intended it to be a part payment of the debt due to B. & M. Gratz, and not a trust for any other purpose. The circumstance too, that the word "paid" is used, strongly

Wheat. 6.

points to a real sale to M. Gratz, rather than a conveyance for sale to any third person. And if the sale was to be to M. Gratz, at a price thereafter to be fixed between the parties, the transaction could not be inconsistent with the terms of the credit, in the account of 1775. It will be recollected that M. Gratz resided at Philadelphia, and the conveyance was executed by Col. Croghan at Albany. There is no evidence that the consideration stated in the deed of £1,800, or any other consideration was ever agreed upon between the parties; and the circumstance that no sum is expressed in the memorandum of Col. Croghan, shows, that at the period when it was made, no fixed price for the land had been ascertained between the parties. If, then, it remained to be fixed by the parties, whenever that value was agreed upon, and settled in account, the resulting trust in Col. Croghan would be completely extinguished. It is quite possible, and certainly consistent with the circumstances in proof, that B. & M. Gratz might not have been acquainted **497\*** with the \*real value of the land, or might be unwilling to take it at any other value than what, upon a sale, they might find could be realized. From the situation of Col. Croghan, his knowledge of the lands, and his extensive engagements in land speculations, ignorance of its value can scarcely be imputed to him. If, therefore, M. Gratz afterwards sold it to Howard, and Col. Croghan was satisfied with the price, there is nothing unnatural in stating the credit in the manner in which it stands in the account in 1775. It would agree with such facts, and would by no means repel the presumption, that the land was not originally intended to be sold to M. Gratz. It would evidence no more than that the parties were willing that the sale so made should be considered the standard of the value; and that M. Gratz should, upon his original purchase, be charged with the same price for which he sold. Upon this view of the case, the resulting trust would be extinguished by the consent of the parties, and no want of good faith could be fairly imputed to either.

But it is said that there is no proof that any such purchase was ever made by Howard; and the trust being once established, the burthen of proof is shifted upon the other party, to show its extinguishment; and if this be not shown, the trust travels along with the property and its proceeds down to the present time.

It is certainly true, that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of **498\*** time ought not \*upon principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem that the length of time, during which the fraud has been successfully concealed and practiced, is rather an aggravation of the offense, and calls more loudly upon a court of equity to grant ample and decisive relief. But length of time necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates by way of presumption, in favor of innocence, and against imputation of fraud. It would be unreasonable, after a great length of time, to require exact proof of all the minute circumstances of any transaction, or to

expect a satisfactory explanation of every difficulty, real or apparent, with which it may be incumbered. The most that can fairly be expected in such cases, if the parties are living, from the frailty of memory, and human infirmity, is, that the material facts can be given with certainty to a common intent; and, if the parties are dead, and the cases rest in confidence, and in parol agreements, the most that we can hope is to arrive at probable conjectures, and to substitute general presumptions of law, for exact knowledge. Fraud, or breach of trust, ought not lightly to be imputed to the living; for, the legal presumption is the other way; and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evidence of fraud be clear, beyond a reasonable doubt.

Now, disguise the present case as much as we may, \*and soften the harshness of [**499** the imputation as much as we please, it cannot escape our attention, that if the plaintiff's case be made out, there was a meditated breach of trust, and a deliberate fraud practiced by M. Gratz, or Bernard Gratz, with the assent of M. Gratz, upon Colonel Croghan. If the sale to Howard was merely fictitious, it was an imposition upon Colonel Croghan, designed to injure his interest, and violate his confidence. If the fraud were clearly made out, there would certainly be an end to all inquiry as to the motives which could lead to so dishonorable a deed between such intimate friends. But the fraud is not clearly made out; it is inferred from circumstances in themselves equivocal, and from the absence of proofs, which it is supposed must exist, if the sale were real, and could now be produced.

In the view which the court is disposed to take of this case, it must consider that Howard was a real, and not a fictitious person. It is then asked, why are not the facts proved who Howard was, where he lived, and the execution of the deed to him? It is to be recollected that this proof is called for, about forty years after the original transaction; when all the parties, and all who were intimately acquainted with the facts, are dead. It is called for, too, from persons, some of whom were unborn, and some very young at the period to which they refer. They cannot be supposed to know, and they absolutely deny, all knowledge of the facts. What reason is there to suppose that Colonel Croghan did not know who Howard was? He had a deep interest in \*the value of the [**500** property, and could not be presumed to be indifferent to such inquiries, as every considerate man would be likely to make, in such a case. And after this lapse of time, it is fair to presume, that he did know the purchaser, and was satisfied with the purchase. But it is said that no deed is produced. Now, it does not necessarily follow, that if a sale was made to Howard, that the contract was consummated by an actual conveyance of the land. If M. Gratz was the *bona fide* owner of the land, he might sell it to Howard by an executory contract, and take a bond or other security for the purchase money, and from a failure to comply with the contract, M. Gratz might afterwards have refused to give a deed to Howard. And in this



case, if in the intermediate time the settlement was made with Colonel Croghan, the credit must have been allowed in that account as it stands, and having been once allowed, M. Gratz could not, on a rescission of the sale, have been entitled to countermand that credit. He would have been bound to take the land at the sum which he had elected to allow for it, and for which he had sold it. On the other hand, supposing a deed actually to have passed to Howard, the latter may have become dissatisfied with his bargain, or have failed to pay the consideration money, and have yielded it back to Gratz, and dissolved the purchase. But this circumstance could not have varied the situation of Gratz in respect to the settlement with Colonel Croghan. All that was important, or useful, or necessary, as between them, upon the supposition that the trust was merely a **501\*** sulting trust, until the price was fixed, was, that the price should have been satisfactorily ascertained and agreed to between them. In this view of the transaction, there could be no ground to impute fraud to M. Gratz; nor could his conduct involve a violation of trust. In the absence of all contrary evidence, is it not just, is it not reasonable, to presume such to have been the reality of the case? That there is no evidence to the contrary, may be safely affirmed.

In addition to this, it may be asked, whether M. Gratz had any adequate motive for practicing a deception in this case. Men do not usually act under circumstances such as are imputed to M. Gratz, unless from some strong inducement of interest. It cannot be presumed that any man of fair character, such as M. Gratz is proved to have been, could perpetrate a fraud or deception without some motive that should overbalance all the ordinary influence of prudence and honor. If there be anything beyond all doubt established in this case, it is, that the value of the land, as fixed in the account of 1775, was its full value. It is proved by public sales of adjoining tracts, at the very period when Howard is asserted to have purchased the land; and so far from there being any chance of an immediate rise in value, the state of the country, on the very eve of the revolutionary war, forbade the indulgence of every such hope, and must have dissolved every dream of speculation. As far, then, as we can investigate motives, by referring to the general principles of human action, there does not seem to have been any motive for disguise or concealment on the part of Michael **502\*** Gratz towards Colonel Croghan. The reasonable conclusion, therefore, would certainly be, that no such disguise or concealment was practiced.

There is one circumstance also which has been thought to have thrown some cloud over this part of the case, that upon the opinion already indicated, would admit of a favorable exposition. It is this: In the possession of M. Gratz, a counterpart of the account of 1775 is found, in which the word *Howard* is crossed out with a pen, but so that it is perfectly legible, and the name of Michael Gratz, is, in his own handwriting, written over it. The writing seems to be of great antiquity, and supposing that there was a real sale to Howard, which was afterwards abandoned, it is not

unnatural that M. Gratz should, after the event, have communicated the fact to Colonel Croghan, and with his consent, altered the account, so as to conform to it. Or, the interlineation might have been made in the account, after the failure of the contract with Howard, in order to show against which of the firm of B. & M. Gratz this sum ought to be charged, in the adjustment of their partnership concerns. It adds some force to these considerations, that Colonel Croghan continued, during the residue of his life, to entertain the same friendship and confidence in M. Gratz; and this, at least, demonstrated his belief that the Tenederah lands had not been unjustly sacrificed by him.

If we look to the subsequent conduct of M. Gratz, in relation to the Tenederah lands, his great expenses in making improvements on it, after the year 1786, and his diligent attention to it, it leads to the conclusion that he **[\*503]** always considered himself as the real *bona fide* owner. His possession of it must have been known to the parents of the plaintiff, whose mother was the heir of Colonel Croghan; and it is proved, that his father had the most unreserved and frequent access to the papers of Colonel Croghan; and that he actually resided several years in Philadelphia, with the express view of examining the estate, and finally abandoned all hopes of deriving any benefit from the fragments that were left of it. The very account now produced by the plaintiff, by which this trust is brought to light, was delivered over to him by the representatives of M. Gratz, among the other papers of Colonel Croghan; and yet, if there had been anything false or foul in the transaction, it seems almost incredible that M. Gratz, into whose possession it came as early as 1782, should have suffered it to remain as a monument of his own indiscretion, and an evidence of his want of good faith.

If, on the other hand, the trust is to be considered as a trust to sell, and apply the proceeds to the payment of the debt due to B. & M. Gratz, most of the considerations already stated will apply with equal force. If the sale was real, and Howard did not comply with the terms of sale, Col. Croghan having knowledge of the fact, might have been well satisfied to let M. Gratz hold the land, at the price thus fixed by the sale. To him, it must have been wholly immaterial who was the purchaser, if the full value was obtained; and that it was obtained, in Col. Croghan's own judgment, seems undeniable. The only **[\*504]** question is, whether such knowledge can be inferred; and after such a length of time, under all the circumstances of this case, we are clearly of opinion that it ought to be inferred. Col. Croghan had it in his power to make inquiries on the subject; if he did, and was satisfied, his acquiescence was conclusive; if he did not, he considered that the sale, as between himself and Gratz, was consummated when the price was fixed, and was willing that the trust should be deemed extinguished forever. If, after the lapse of forty years, and the death of all the original parties, we were to come to a different conclusion, it would be pressing doubtful circumstances with uncommon rigor against unblemished characters; where the confidence reposed was so intimate, that the whole evi-



dence could not be presumed to be before us. We should indulge in opinions which might be erroneous, and might, in an attempt to redeem the plaintiff from a conjectured fraud, inflict upon others the most gross injustice. We think, therefore, that the true and safe course is to abide by the rule of law, which, after a lapse of time, will presume payment of a debt, surrender of a deed, and extinguishment of a trust, where circumstances may reasonably justify it. The doctrine in *Hillary v. Waller* (12 Vez., 261, 266), on this subject, meets our entire approbation. It is there said, that general presumptions are raised by the law, upon subjects of which there is no record or written instrument, not because there are the means of belief or disbelief, but because mankind, judging of matters of antiquity from the infirmity and necessity\*] of their situation must, for the preservation of their property and rights, have recourse to some general principle, to take the place of individual and specific belief, which can hold only as to matters within our own time, upon which a conclusion can be formed from particular and individual knowledge. In our judgment, the trust in the Tenederah lands, such as it was, must be now presumed to have been extinguished by the parties, in the lifetime of Col. Croghan. There is no ground, then, for relieving the plaintiff, as to this part of his claim.

The remaining point in this case respects the M'Ilvaine bond and judgment. On the 30th of March, 1769, Col. Croghan gave his bond to Wm. M'Ilvaine, for the sum of £400, which debt, by the will of M'Ilvaine, became, on his death, vested in his widow, who afterwards intermarried with John Clark. A judgment was obtained upon this bond against Col. Croghan, in the name of Wm. Humphreys, executor of M'Ilvaine, in the Court of Common Pleas, in Westmoreland County, in Pennsylvania, at the October term, 1774, upon which a *fi. fa.* issued, returnable to the April term of the same court, in 1775. On the 8th of March preceding the return day of the *fi. fa.*, Bernard Gratz purchased this judgment from Clark, and received an assignment of it, for which he gave his own bond for £300 and interest. About this period, Col. Croghan appears to have been considerably embarrassed in his pecuniary affairs, and several suits were depending against him. Bernard Gratz having failed to pay his bond, was sued by Clark, and in

1794 a judgment \*was recovered against [\*506 him for £89 6s. 10d., the balance then due upon the bond, which sum was afterwards paid by M. Gratz. The judgment of Humphreys against Col. Croghan, was kept alive from time to time, until 1786, and in that year, on the death of Humphreys, Joseph Bloomfield was appointed administrator *de bonis non*, with the will annexed, of Humphreys, and revived the judgment; and it is kept in full force until it was finally levied on certain lands of Col. Croghan, as hereafter stated. Some time in the year 1800, Bernard Gratz assigned this judgment to his nephew, Simon Gratz, one of the defendants, partly in consideration of natural affection, and partly in consideration of the above sum of £89 6s. 10d. paid towards the discharge of the bond of Bernard Gratz, by his (Simon's) father, Michael Gratz. Simon Gratz having thus become the beneficial owner of the judgment, proceeded to issue executions on the same, and at different times between September, 1801, and November, 1804, caused the same executions to be levied on sundry tracts of land of Col. Croghan, in Westmoreland and Huntington counties, of five of which he, being the highest bidder at the sale, became the purchaser. The tracts so sold, contained upwards of 2,000 acres, and were sold for little more than \$1,000. The title to some part of the land so sold, appears to be yet in controversy.

Shortly after the assignment of the M'Ilvaine judgment to Bernard Gratz, on the 16th of May, 1775, Col. Croghan (probably having knowledge of the assignment, though the fact does not appear), \*by two deeds of that [\*507 date, conveyed to B. Gratz, for a valuable consideration expressed therein, about 45,000 acres of land. A declaration of trust was executed by Bernard Gratz, on the 2d of June, 1775, by which he acknowledged that these conveyances were in trust to enable Bernard Gratz to sell the same, and with the proceeds to discharge certain enumerated debts of Col. Croghan, and among them, the debt due on the M'Ilvaine bond, and to account for the residue with Col. Croghan.

The subject of the M'Ilvaine judgment was very minutely considered in the court below, by the learned judge who decided the cause, and the principle grounds on which the plaintiff relied for a decree were so fully answered there, that a complete review of them does not seem to be necessary in this court.<sup>1</sup> It is ob-

1.—The following is that part of the opinion of Mr. Justice Washington in the court below, here alluded to:

"Upon these facts, it is contended by the complainant's counsel, that B. Gratz ought to be considered by this court, as having purchased the above judgment with the trust funds, and, consequently, for the benefit of G. Croghan; and that even if it was purchased with his own money, still, being a trustee for Croghan, the purchase should be considered as having been made for his benefit, entitling B. Gratz to claim no more than the sum which he actually paid, and to retain the same out of G. Croghan's estate, the whole of which is charged with the payment of his debts. That Simon Gratz, being an assignee of this judgment, with notice of the trust, and without a valuable consideration paid for the same, can stand in no better situation than the assignor did, and ought, therefore, to be treated as a trustee for the estate of G. Croghan, of the lands which he purchased under the executions issued on that judgment, and

be entitled to claim merely the sum actually paid by B. Gratz, with interest.

It is to be observed, in the first place, that there is not the slightest evidence on which to ground a presumption, that this judgment was purchased with trust funds. B. Gratz gave his own bond for the £300, at which time he and M. Gratz were considerably the creditors of G. Croghan; and it further appears by the exhibits in the cause, that the accounts between these parties were regularly settled from time to time, leaving at each settlement a balance against G. Croghan.

Neither did any funds arise from the trust property, no part of the same having at any time been sold by the trustee.

As to the argument predicated upon the admission that the purchase was made upon the credit and with the funds of B. Gratz, I hold it to be altogether untenable. B. Gratz became the purchaser some months before the date of the conveyances to him, of the 45,000 acres of land, and I am yet to learn upon what principle of equity it is,



**508**]\* servable, that the bill charges that \*the assignment of this judgment was secretly procured by Bernard or Michael Gratz, or both of them, after the death of Col. Croghan, and that **509**]\* nothing \*was due upon the judgment; or if anything was due, it was paid upon the assignment out of moneys belonging to the **510**]\* tate of Col. Croghan. The bill \*asserts no other ground for relief on this subject. The proof in the cause completely establishes the material charges in the bill to be false. The **511**]\* assignment \*was made to Bernard Gratz, in the life-time of Col. Croghan; the judgment never was paid or satisfied by Col. Croghan, or out of his estate; and no fraud is pretended in the bill to have taken place in the levy of the judgment on Col. Croghan's lands, independently of the legal inference to be deduced from the facts charged in the bill. If Bernard Gratz was not, at the time, in the situation of a trustee of Col. Croghan, there is no pretense to say, that he might not rightfully and lawfully purchase the judgment. And there are very strong reasons to believe, that it was purchased with the knowledge, and for the relief of Col. Croghan. It was somewhat insisted upon in the court below, that by a power of attorney of the 10th of July, 1772, Col. Croghan constituted Bernard and Michael Gratz trustees of all his lands, with unlimited power to sell them and pay off his debts. But this ground has not been insisted upon here, and, indeed, for the best reasons. There is the strongest pre-

sumptive evidence, that this power was never acted upon, or was revoked, and held a nullity before the time of the assignment in question.

The ground that has been principally relied upon here, is, that Bernard Gratz having taken the two trust deeds in 1775, already referred to, in trust for the payment of this very debt out of the proceeds of the sale of the lands conveyed by those deeds, could not proceed to satisfy the judgment out of any other lands, without notice to Col. Croghan, or his representatives. But there is not the least evidence in the cause to show, that any of the lands \*conveyed by [**512** either of these deeds ever turned out productive. And there are the strongest presumptions in the case, and it seems, indeed, to be on all sides conceded, that either the title to these lands wholly failed, or became altogether unsalable. There is no reason to suppose that these facts lay more peculiarly in the knowledge of one party than the other; and if the trust became utterly frustrated and inert, there could not be any necessity of giving a formal notice, that Bernard Gratz must look to other property, and particularly to the property in Westmoreland county, upon which alone, it is understood by the laws of Pennsylvania, the lien of the judgment attached.

There is no proof that any assets ever came to the hands of Bernard Gratz or Michael Gratz, out of which this judgment was, or could be satisfied. Bernard Gratz was alone interested in it; and it was kept alive from time to time,

that a creditor, who after he is so, becomes a trustee for his debtor, does by that act impair or affect rights which he had antecedently acquired against him. I admit the soundness of the doctrine laid down by the complainant's counsel, that if a trustee, executor, or agent, buy in debts due by his *cestui que trust*, testator, or principal, for less than their nominal amount, the benefit gained thereby belongs not to him, but to the person for whom he acted. A court of equity will not permit a person, acting as a trustee, to create in himself an interest opposite to that of his *cestui que trust* or principal. But this doctrine is inapplicable to the case of a fair *bona fide* creditor, who became so, prior to the assumption of his fiduciary character. In such a case he is entitled to claim the full amount of what was due from his *cestui que trust*, &c., and the latter has no right to inquire how much the former paid for it; so, too, the trustee, &c., may pursue all legal remedies for enforcing payment of the debt, which would have been open to him if he had not become a trustee.

It is said, however, that the declaration of trust of the 2d of July, 1775, contains a promise to discharge this very debt out of the trust property, as soon as the same could be disposed of. But it was not disposed of, and there are the strongest reasons for believing that it was altogether unsalable.

Independent of the doubts which clouded the title, it would seem sufficient to observe, that B. Gratz had the strongest temptations to sell, and even to sacrifice this property, if it had been possible to dispose of it upon any terms.

It is further contended, that the power of attorney given by G. Croghan to B. & M. Gratz, dated the 10th of July, 1772, constituted them trustees of all his lands, with unlimited power to sell them, and to pay off his debts. It is in this part of the case that I experience the difficulty of deciding satisfactorily to myself, in consequence of the antiquity of these transactions, and the death of all those who might have explained them. What became of this power of attorney, and why it was never acted upon, are questions which no evidence in the cause enables me to resolve. There are, however, strong reasons for presuming, that the powers vested in these agents were found unproductive of any useful results; and, that the instrument which bestowed them was afterwards delivered back to G. Croghan, or remaining with the

Gratzs, was considered by all the parties as a blank paper. This conjecture is strongly countenanced by the fact that this paper, as well as the deeds of May, 1775, was found amongst the papers of G. Croghan, after his death. These very deeds furnish themselves the most persuasive evidence in support of this presumption. For, if the general power to sell the whole of G. Croghan's lands, continued in force up to the year 1775, there could have been no necessity for giving to one of those agents an authority to sell a part of them. The fact that no part of those lands was sold by the agents, or by Croghan himself, without a complaint having been uttered by the latter, that appears, is nearly conclusive to prove that they were unsalable.

Another point insisted upon by the complainant's counsel under this head is, that G. Croghan was not in reality a debtor to M'Irvine, inasmuch as there was found amongst Croghan's papers, a bond of M'Irvine to him, dated the 5th of March, 1769, with condition that M'Irvine should by a certain day reconvey to Croghan certain lands lying in Virginia, which Croghan had conveyed to M'Irvine, in trust for the payment of a particular debt, or in case it should not be in his power to make such conveyance, then to pay to Croghan the sum of £400. It was contended, that this bond being found uncanceled amongst the papers of the obligee, proves that neither of the conditions had been performed.

The short, but conclusive answer to this argument is, that the condition of this bond was to be performed in the year 1770, and that if it was broken by the failure of M'Irvine to make the reconveyance, M'Irvine became in that year a debtor to G. Croghan, in the sum of £400, the equivalent; yet Croghan suffered judgment to pass against him, and execution to issue in the year 1775, after which he lived about seven years, without having brought a suit on the bond, or asserted, in any manner whatever, a right to the money. If, after a lapse of so many years, and under these strong circumstances, the court is not bound to presume against the existence of this debt, I know of no instance in which such a presumption ought to be made. If in truth the debt was really due, the charge of neglect is fairly imputable to Croghan, but not to his executors. Upon the whole, I am of opinion, upon this point, that the complainant is entitled to no relief." 1 Peters, Jun., Rep. 372.



until the levies in question were made. It will be recollected also, that even if Michael Gratz were disposed to connive, after the death of his brother, in the levies of his son Simon, William Powell, who was another executor, had no such motive. And, it is not shown that, by any law or usage in Pennsylvania, any notice is required to be given to any other persons than the personal representatives of the deceased, of the execution of any such judgment on lands, so that laches could be fairly imputed to the executors for neglect to give notice to the heirs of Col. Croghan of the sale. The very length of time during which this judgment remained unsatisfied, is evidence **513\*** of the desperate state <sup>of</sup> Col. Croghan's affairs; and the record abounds with corroborations of the great embarrassments attending all his concerns, and of apparent insolvency at the time of his decease. No evidence has been submitted to us to establish that the levies on the lands, under the judgment, were fraudulently conducted by the sheriff, or that they did not sell for the full value of the title, such as it was, which Col. Croghan had in them. It appears that the title, as to some part of them, is still in controversy. And Simon Gratz, the judgment creditor, had as much right, if the sale was *bona fide* conducted, to become the purchaser, if he was the highest bidder, as any other person.

Upon the whole, the majority of the court entirely concurs in the opinion of the Circuit Court upon this part of the case. But, as to the decree respecting the proceeds of the Tenederah lands, we are all of opinion that it ought to be reversed.

If the court had felt any doubts as to the merits, it would have been proper to have given serious consideration to the very able argument made at the bar, respecting the defect of proper parties to the bill. But, as upon the merits, the court is decidedly against the plaintiff, it seemed useless to send back the cause upon this objection, if it should be found tenable, when, after all, the case furnished no substantial ground for relief in equity.<sup>1</sup>

DECREE.—These causes, being cross appeals, **514\*** came on to be heard at the same time, and were argued by counsel. On consideration whereof, it is ordered and decreed, that the decree of the Circuit Court for the District of Pennsylvania in the premises, be, and the same is hereby reversed. And this court proceeding to pass such decree as the said Circuit Court should have passed, it is further ordered and decreed, that the complainant's bill, as to all the matters contained therein, be, and the same is hereby dismissed; and that a mandate issue to the said Circuit Court, to dismiss the same accordingly, without costs.

Rev'g.—Pet. C. C. 364.

Cited—11 Wheat. 381 (n); 9 Pet. 417; 1 How. 194; 4 How. 555, 561; 5 How. 276; 2 Wall. 92; 18 Wall. 506; 1 Wood. & M. 148; 2 McLean. 396; 2 Cliff. 155; 3 Cliff. 621; 4 Cliff. 559; 4 Mason, 153; 1 Curt. 219; 3 Sumn. 486.

1.—*Vide* 1 Peters., Jun., Rep. 364, S. C. Wheat. 6.

[LOCAL LAW.]

BOWIE v. HENDERSON ET AL.

The third section of the act of Congress, of March 30th, 1803, for the relief of insolvent debtors in the District of Columbia, does not create any express or implied exception to the operation of the statute of limitations, by making the insolvent a trustee for his creditors, in respect to his future property, or by making any demand, included in the schedule of his debts, a debt of record.

The including of a demand in the schedule of the insolvent's debts, is sufficient evidence to sustain an issue on a replication of a new promise to the plea of the statute of limitations, if the period of limitation has not elapsed after the date of the schedule.

**A**PPEAL from the Circuit Court of the District of Columbia.

\*This suit was instituted by the ap-<sup>[515]</sup>pellant against the respondents, on the chancery side of the Circuit Court of the District of Columbia, for the county of Alexandria, under the local law giving a process in chancery in the nature of a foreign attachment.

The bill charged a debt due on bills of exchange, from the defendant, Henderson, to the complainant; that the debtor was an absentee; that he had funds in the hands of the defendant Auld; and prayed a condemnation of those funds, to answer the complainant's demand. The defendant, Henderson, pleaded the statute of limitations, *non assumpsit infra quinque annos*. To this plea the complainant filed the following replication: And the said W. Bowie saith, that he ought not to be precluded from having and maintaining his bill aforesaid, by anything alleged by the defendant, Henderson, in his plea aforesaid; because he saith, that the said A. Henderson, on the 8th of May, 1806, in the county of Alexandria, before N. F., one of the judges of the district of Columbia, did take the benefit of the act for the relief of insolvent debtors within the district of Columbia, and did then and there give a schedule of his estate, and a list of his creditors; and in the said list of his creditors so given in, he, the said Henderson, did state, that the said complainant was a creditor of his to the amount of \$4,586.39—which said list of creditors so given in, he, the said Henderson, did state, was entered of record in the clerk's office of the court of the county of Alexandria, as by reference to the records of the said court will fully and at large appear, and which said debt <sup>so</sup> **[516]** given in, is the debt for which the complainant has instituted his suit aforesaid. And the said complainant saith, that the moneys and effects which the said complainant seeks, in his bill aforesaid, to subject to the payment of his debt aforesaid, were obtained and acquired by the said defendant, Henderson, long subsequent to his taking the oath of insolvency aforesaid. And the said complainant saith, that as soon as he, the said complainant, obtained any knowledge of the said defendant, Henderson, having obtained the funds aforesaid, and within the period of six months after he obtained a knowledge thereof, he, the said complainant, did institute his aforesaid bill in chancery, to subject the funds to the payment of his said debt, all which, &c. The defendant demurred to this replication, and the court below, on hearing, adjudged the demurrer good.



The question in this case turned upon the construction of the third section of the act of Congress, for the relief of insolvent debtors within the district of Columbia, passed March 3d, 1803, which is in these words:

"*And be it further enacted*, That upon the petitioning debtor's executing a deed or deeds to the said trustee, conveying all his property, real, personal, and mixed, and all his claims, rights, and credits, agreeably to the oath or affirmation of the said debtor, and on delivering all his said property which he shall have in his possession, together with his books, papers, and evidences of debts of every kind, to the said trustee, and the said trustee's certifying the same to the said judge in writing, it shall **517\*** be lawful \*for the said judge to make an order to the marshal, jailer, or keeper of the prison, in which said debtor is then confined, commanding that the said debtor shall be thenceforth discharged from his imprisonment; and he shall be immediately discharged, and the said order shall be a sufficient warrant therefor. Provided, That no person who has been guilty of a breach of the laws, and who has been imprisoned for or on account of the same, shall be discharged from imprisonment. And provided, likewise, That any property which the debtor may afterwards acquire (except the necessary wearing apparel and bedding for his family, and his tools, if a mechanic or manufacturer), shall be liable to the payment of his debts, anything herein to the contrary notwithstanding.

This cause was argued by *Mr. Swann* and *Mr. Jones* for the appellant, and by *Mr. Taylor* for the respondents. The former insisted, that the above section of the insolvent act created an exception to the general operation of the statute of limitations in favor of those demands on which the insolvent's person was discharged under that section. They argued that the insolvent, after his discharge, was to be considered, in respect to his future property, as a trustee for his creditors, and that the statute of limitations does not run against a trust; and, also, that this debt was to be considered as excepted out of the statute of limitations, because it was made a debt of record by being included in the list of creditors under the insolvent act.

**518\*** *\*Mr. Chief Justice MARSHALL* delivered the opinion of the court, and after stating the case, proceeded as follows:

It is perfectly clear that no such exception is contained in the statute of limitations, or in the act of Congress concerning insolvent debtors. If it is to be created at all, it must be by implication. It is contended in the first place, that the insolvent debtor, after his discharge, is to be considered, in respect to his future property, as a trustee for his creditors; and the statute of limitation does not run against a trust. If he is a trustee for his creditors, is he a trustee for those creditors only who were such at the time he obtained the benefit of the act? or, is he a trustee for those who afterwards become his creditors? It will not be pretended that he is exclusively a trustee for the former; and if he be a trustee for the benefit of all his creditors, then this suit should have been brought for the benefit of all, and not for the benefit of a single creditor. The

proviso of the section respecting the liability of the future property of the insolvent, has been supposed to aid the argument that he is a trustee. But we are all of a different opinion. The previous part of the section having exempted his person from imprisonment, the object of the proviso was to make all his future effects liable, and to retain all the remedies against it, in the same manner as if his person had not been discharged. The act, therefore, did not intend to create any new liability, or any new trust.

It is farther insisted, that this is to be considered as an exception out of the statute of limitations, because \*it is a debt of [**519** record. But a debt of record, in the sense of the common law, is a debt or contract created of record; such as a statute staple, or statute merchant, and not one whose previous existence is only admitted of record. The effect of recording this debt was merely an admission of its existence, and not a change of its nature. It would have been sufficient evidence, if five years had not elapsed after recording, to have sustained an issue on a replication of a new promise to the plea of the statute of limitations. But more than five years having elapsed, it could have no application in this case. It is the opinion of the court, that the demurrer to the replication is sustained, and that judgment ought to be given for the defendant.

*Deeree affirmed.*

Cited—2 Cranch, C. C. 121; 12 Bank. Reg. 542, 546

[PRACTICE.]

SPRING ET AL.

v.

THE SOUTH CAROLINA INSURANCE COMPANY.

In an equity cause, the *res* in litigation may be sold by order of the Circuit Court, and the proceeds invested in stocks, notwithstanding the pendency of an appeal to this court.

*MR. HUNT*, for the respondents, moved to docket and dismiss the appeal in this case, which was a suit in chancery, commenced in the Circuit Court of South Carolina, no transcript of the record having \*been [**520** lodged by the appellants with the clerk of this court, within the first six days of the term, according to the rule.

*Mr. Wheaton*, for the appellants, opposed the motion, upon the ground that no certificate was produced from the clerk of the court below, stating that an appeal had been taken, according to the rule.

The court denied the motion, but stated that as the object of the respondents was to have the proceeds of the property in litigation, which had been sold by order of the court below, invested in stocks, such investment might be made by the court below, notwithstanding the pendency of the appeal in this court.

*Motion denied.*<sup>1</sup>

1.—*Vide* new rule of court of the present term. *Ante*, Rule XXXII.

Wheat. 6.

[INSTANCE COURT.]

THE UNITED STATES  
v.  
SIX PACKAGES OF GOODS.  
TOLER, Claimant.

Under the 67th section of the collection act of the 2d of March, 1799, c. 128, where goods were entered by an agent of the owner on his behalf, and the entry included only a part of the goods which [521\*] the \*packages contained, and the owner subsequently made a further, or post entry of the residue of the goods; and the packages being opened several days afterwards and examined by the collector in the presence of two merchants, and their contents found to agree with the two entries taken together, but to differ materially from the first entry; held, that the collector was not precluded from making a seizure of the goods after the second entry, for a variance between the contents of the packages and the first entry, and that such seizure must be followed by confiscation, unless it should appear that such difference proceeded from accident and mistake, and not from an intention to defraud the revenue.

**A**PPEAL from the Circuit Court for the Southern District of New York.

This was a libel of information filed in the court below against certain goods imported from London in the ship *Isabella*, at the port of New York, as forfeited under the 67th section of the collection act of the 2d of March, 1799, c. 128.

The cause was argued by the *Attorney-General* and *Mr. Pinkney* for the United States, and by *Mr. D. B. Ogden* and *Mr. Wheaton* for the claimant.

*Mr. Justice LIVINGSTON* delivered the opinion of the court:

This is a libel under the 67th section of the collection law, passed the 2d of March, 1799.

This section provides, that it shall be lawful for the collector, naval officer, or other officers of the customs, after entry made of any goods, wares, or merchandise, on suspicion of fraud, to open and examine, in the presence of two or more reputable merchants, any package or packages thereof, and if, upon examination, [522\*] they shall be found to agree with \*the entries, the officer making such seizure and examination shall cause the same to be repacked, and delivered to the owner or claimant forthwith; and the expense of such examination shall be paid by the said collector or other officer, and allowed in the settlement of their accounts; but if any of the packages so examined shall be found to differ in their contents from the entry, then the goods, wares or merchandise contained in such package or packages, shall be forfeited. Provided, that the said forfeiture shall not be incurred, if it shall be made appear to the satisfaction of the collector and naval officer of the district where the same shall happen, if there be a naval officer, and if there be no naval officer, to the satisfaction of the collector or of the court in which a prosecution for the forfeiture shall be had, that such difference arose from accident or mistake, and not from an intention to defraud the revenue.

These goods being claimed by *Hugh K. Toler*, of the city of New York, merchant, were condemned by the District Court of the United States, for the Southern District of New Wheat. 6. U. S., Book 5.

York, which sentence being reversed by the Circuit Court for that district, an appeal from the last sentence has been taken to this court.

Before we examine the facts of the case, or whether they establish a fraud, without which the prosecution under this section cannot be sustained, it will be necessary to dispose of a question of law, which has been made by the counsel for the claimant.

It is conceded on all hands, that on the 3d of November, 1810, the six packages which are libeled \*were entered at the [523 custom-house by *Thomas Ash*, on behalf of the claimant, and that the entry covered only a part of the goods which the packages contained. That two days after, *Toler* himself completed the entry of the residue of the goods which were in these packages, and which had not been previously entered by *Ash*. Several days after, the packages were opened and examined by the collector, in presence of two merchants, and their contents were found not to differ, but to agree with the two entries taken together; but to differ very materially from the first entry made by *Ash*; upon which the collector made a seizure of them. On these facts about which there is no dispute, it is denied that the collector had any right to seize, inasmuch as, when the inspection took place, there was no difference between the goods found in the packages, and those mentioned in the invoices. It is said, that the collector, if he suspected a fraud, ought to have made a seizure before the second entry, in which case the difference which would have existed between the goods on which a duty was secured, and those in the packages, would have justified such an act, but that by waiting until a second entry was made, the fraud, if any committed, was purged. In support of this position, it is said, that the collection law provides for a post entry of this kind, and that the very oath which is taken when an entry is made, imposes on the party who makes it, the duty, in case he shall afterwards discover any other goods in a package than those first entered by him, of immediately informing the collector, and making a further entry thereof.

\*This provision, and the form of the [524 oath, suppose no more than that a deficient or defective entry may be made innocently, and under a mistake, without any certain knowledge at the time, of the contents of the packages entered. For, if the party making an entry, knows at the time of other goods, such other goods cannot be entered afterwards, and the oath usual on such occasions cannot be taken, without admitting that a perjury had been committed at the time of the first entry. The court is therefore of opinion, that, although the seizure was not made until after the second entry, the collector had a right to seize for any variance between the contents of the packages, and the first entry, and that such seizure will be valid, and must be followed by sentence of condemnation, unless it shall turn out that such difference proceeded from accident or mistake, and not from an intention to defraud the revenue. Whether the case of the claimant be entitled to this favorable interpretation, the court will now proceed to inquire.

A great deal of testimony, which was not



produced in the Circuit Court, and which might easily have been (as all the witnesses resided in the city of New York), has been taken since the appeal; and it is on this testimony, as well as on that which was there taken, that the sentence of that court must now be reviewed.

It is in truth, and indeed, admitted by the claimant, that a very imperfect entry of the goods contained in these packages was made on Saturday, the third day of November, 1810, by Thomas Ash, who had been employed by Toler **525**\*) to enter the same; and that \*the residence of the goods therein contained was not entered by the claimant until the fifth day of the same month. To escape from the consequences of the first entries not being complete, and to repel the imputation of its originating in fraud, the plaintiff has endeavored to prove that the letter covering the invoices of the goods contained in the second entry, was not received by him when the first entry was made. To establish this fact, his clerk, Mr. Crane, has been examined as a witness, and admitting that he has told the truth, there would be some reason to believe that such were the fact; but there are many circumstances which now appear in this cause which compel us to withhold from Mr. Crane the credit which might otherwise be due to him. The usual course of business, as testified to by several very respectable merchants, stand opposed to his relation, that invoices of only part of the goods contained in those packages were inclosed in a letter to H. K. Toler & Co., and invoices of the other goods in a letter to J. K. Jaffray, which had been forwarded to that gentleman at Albany. It appears from all the testimony, that if a package, consigned to one person, contains goods belonging to different persons, it is customary—and some of the witnesses say indispensable—to send to the consignee of the package, invoices of all the goods which it contains, or to refer, in the main invoice of the consignee, to the invoice of the other goods; and that the withholding such invoices or information, would be considered as strong evidence of an intention to defraud the revenue. Another circumstance which \*detracts much from the credit of this witness is, that it is more than probable, that at the time of this consignment, a copartnership subsisted between the claimant and the Jaffrays of London. This appears not only from an advertisement of a dissolution of such copartnership, which has been published since the decree of the Circuit Court, in one of the New York papers, but from other testimony in the cause, and from no contrary proof being furnished by Mr. Toler. Now, if such partnership really existed, which cannot well be disbelieved, it is most extraordinary, indeed, that all the invoices of the goods in that package should not have been sent to the partner residing permanently in the city of New York, but that an invoice of part of them should be transmitted to him, and of another, and of the most valuable part, to a partner who might or might not have reached this country when the Isabella arrived. If merchants, who must be presumed to know how to manage their business, will act in a manner so contrary to the general practice of commercial men, they must expect, and can-

not complain, if such deviation from established usage create suspicions unfavorable to the integrity of the particular transaction. It would have added something to the value of the testimony of Mr. Crane, if the name of the merchant at Albany, to whose care the letter of Mr. Jaffray had been transmitted, or if the letter itself, with the post-marks, had been produced. The importance of the testimony of Mr. Ash, as delivered before the Circuit Court, is much weakened by that of Judge Van **527**\*) Ness, who has also been examined since the appeal; for, instead of being simply told at the custom-house, when he asked for a permit, that he must call again, it appears he stated, on his examination in the District Court, that when he applied for a permit on the third of November, he was told at the custom-house, that "they wished to examine the goods before they were delivered;" and that although he did not see Mr. Toler until Monday, he communicated to his clerk, Mr. Crane, what had passed, who doubtless gave the same information to his principal, which will account for the solicitude which he discovered so early on Monday morning to enter the goods which had been omitted in the entry of Mr. Ash. There are other circumstances in this case, that are not here noticed, which render the explanation given by Mr. Toler, to say the least, extremely questionable.

The court cannot dismiss this cause without expressing its surprise, that more than ten years have elapsed since the filing of the libel in the District Court. As all the witnesses who have been examined since the appeal, reside in the city in which the cause was tried, they might, and ought, to have been examined in that court, and if their testimony had there been reduced to writing, and used in the Circuit Court, a final decision might have been had many years ago, and before the insolvencies which it is suggested have happened, and have rendered the further prosecution of these proceedings of little or no importance to the parties.

\*The decree of the Circuit Court is **528**\*) revoked, and the sentence of condemnation pronounced by the District Court affirmed.

[CHANCERY.]

BRASHIER v. GRATZ ET AL.

The general rule is, that time is not of the essence of a contract of sale; and a failure on the part of the purchaser, or vendor, to perform his contract, on the stipulated day, does not, of itself, deprive him of his right to a specific performance, when he is able to comply with his part of the engagement.

But circumstances may be so changed, that the object of the party can no longer be accomplished, and he cannot be placed in the same situation as if the contract had been performed in due time. In such a case, a court of equity will leave the parties to their remedy at law.

Part performance will, under some circumstances, induce the court to relieve.

But where a considerable length of time has elapsed, where the party demanding a specific performance has failed to perform his part of the contract, and the demand is made after a great change in the title and the value of the land, and there is

Wheat. 6.

a want of reciprocity in the obligations of the respective parties, a court of equity will not interfere.

**A**PPEAL from the Circuit Court of Kentucky.

This cause was argued by *Mr. B. Hardin*<sup>1</sup> for the appellant, and by *Mr. Sergeant* for the respondents.<sup>2</sup>

**529\*]** *Mr. Chief Justice MARSHALL* delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court for the District of Kentucky, dismissing a bill brought by the appellant against the heirs of Michael Gratz for the specific performance of a contract.

Michael Gratz, who resided in Philadelphia, had purchased from John Craig, of Kentucky, a tract of land containing, by the survey, one thousand acres, for which no patent had then issued. Subsequent to this purchase, the patent issued in the name of Craig, who sold a part of the land to Keyser, and a suit had been brought in the federal court of Kentucky by Gratz, against Craig and Keyser, to compel a conveyance of the land. Michael Gratz had, in the meantime, sold eight hundred and twenty-four acres, part of his tract, to Robert Barr.

While the suit against Craig and Keyser was depending, Walter Brashier, the plaintiff, who resides in Kentucky, came to Philadelphia on business, and on the second day of March, in the year 1807, purchased the residue of the land from Gratz. Brashier had married the daughter of Robert Barr.

The residue of the land was estimated by the parties at 302 acres, for which Brashier agreed to give the sum of \$6,795 in his negotiable notes, payable in six, twelve, and eighteen months. From this sum was, however, deducted \$250, "allowed to the said Walter Brashier, towards the costs and expenses of prosecuting the suits now depending, for the recovery of the lands hereby contracted for, **530\*]** which is accepted \*by the said Walter, as a full satisfaction for all costs, trouble and expense which he may be at, in prosecuting the said suits, and which he hereby agrees and undertakes to manage at his own costs and expense. And it is hereby agreed that a correct and accurate survey shall be made, at the expense of the said Michael, of all the said residue of the above-mentioned tract of land, lying within the limits of the original survey thereof, not sold to the said Robert Barr; and if, upon such survey, it shall be found, that the said residue doth not contain the quantity of 302

acres, then, for every one deficient, the said Michael Gratz, his heirs, executors, or administrators, shall pay or allow to the said Walter Brashier, his executors, administrators or assigns, the sum of twenty-two dollars and a half; and if any part of the said residue shall be lost, in all, or any of the said suits now depending, or that may be instituted hereafter, for any part of the said residue, the said Michael Gratz, his heirs, executors or administrators, shall only be liable to refund to him, the said Walter Brashier, his executors, administrators, or assigns, the sum of \$11.25, for each and every acre so lost. It being hereby declared, that the said Walter Brashier has purchased the title of the said Michael Gratz, at his own risk and hazard, and so that he shall have no recourse against the said Michael Gratz, for want of, or for any defect in the title to the said residue, or any part thereof, save only the price of \$11.25 per acre, for every acre which shall be lost as aforesaid. And the said M. G., for himself, his heirs, executors and administrators, \*doth covenant and agree, that he or [**531** they shall and will, at any time after payment of the notes aforesaid, when thereunto required, by a good and sufficient deed, conveyance, or assurance in the law, convey and assure unto the use of him, the said Walter Brashier, his heirs and assigns forever, all his, the said Michael Gratz's estate, right, title and interest, of and in all the said residue of the above-mentioned tract of land.

Mr. Brashier executed his notes in conformity with this contract, and returned to Kentucky, where he requested his brother-in-law, Thomas T. Barr, to attend to the prosecution of the suits then depending. Mr. Barr resided near the place where the court was held, and Mr. Brashier at the distance of sixty or seventy miles. Mr. Barr immediately employed Mr. Bledsoe, a lawyer of eminence, to assist Mr. Hughes, who had been engaged by Mr. Gratz, and some time afterwards spoke to Mr. Wickliffe, but did not pay him a fee. No progress, however, seems to have been made in these suits, and the plaintiff failed to pay the fees of the officers of the court, which were demanded and received from Michael Gratz, in the year 1811, and afterwards from his representatives.

The notes for the purchase money were protested for non-payment, and have not been paid.

In 1811, Mr. Brashier came to Philadelphia, when Gratz offered to convey the land on his paying his notes. Mr. Brashier being unable to pay them, Gratz offered to rescind the contract, which Brashier declining to do, the question was referred \*to arbitrators, who [**532** were of opinion that the contract was still binding. About this time, Brashier, who had been for some time much embarrassed, appears to have become notoriously insolvent. In the

1.—He cited 1 Fonbl. Eq. 227; 9 Ves. 415, 2 P. Wms. 243; 4 Bro. Ch. Rep. 329, 469, 391; 1 Ves., Jun., 221; 1 Atk. 12.

2.—Who cited Sugd. Vend. 246; 5 Ves. 720, note; 1 Ves., Jun., 450; 9 Cranch, 456; 8 Cranch, 471.

NOTE.—For cases relative to specific performance, see note to Pratt v. Carroll, 8 Cranch, 471, and note to Hepburn v. Dunlop, 1 Wheat. 179, and note to Morgan v. Morgan, 2 Wheat. 290, and note to Colson v. Thompson, 2 Wheat. 336.

In equity, time may be dispensed with if it be not the essence of the contract. Hepburn v. Auld, 5 Cranch, 262.

Where the time of payment is made a substantial circumstance, it enters into the essence of the contract. Wheat. 6.

tract, and it must be observed. Hollingsworth v. Fry, 4 Dall. 345.

Mere excess of price over what appeared to be the just value at the time, not a bar to specific performance. A vendor cannot have the aid of a court of equity to enforce specific performance, if the vendee will pay the penalty stipulated in his contract. Cathcart v. Robinson, 5 Peters, 264.

A court of equity will not force a doubtful title on a purchaser. Watts v. Waddle, 6 Peters, 389.



autumn of 1811, Gratz departed this life, and in July, 1812, his heirs again offered to convey, on payment of the notes which Brashier had given for the purchase money. Payment not being made, the heirs of Gratz took the management of the suits again into their own hands, which were prosecuted with vigor, and in 1813, were finally determined by a decree in their favor. About this time the land rose suddenly to about \$80 or \$100 per acre. After the decision of the cause, and after this rise in the value of the land, Brashier, in November, 1813, entered into an agreement with Lewis Saunders, by which he was to convey to Saunders half the land purchased of Gratz, in consideration of Saunders paying, or tendering to the heirs of Gratz, the full amount of the notes he had given for the purchase. Saunders immediately offered his contract to the heirs of Gratz, and requested them, if they were willing to take it, and to indemnify him, to acknowledge a tender of the money, which the contract bound him to tender. They avowed their opinion, that the contract of Michael Gratz with Brashier was of no validity, but consented to take the contract with Saunders, and acknowledged the tender. When in possession of this acknowledgement, Brashier instituted his suit in the court of Kentucky for a specific performance of the contract of the 2d of March, 1807. The defendants removed this suit into the Circuit Court of the United States, where they filed their answer, insisting, that the court ought not to decree a specific performance, because the plaintiff had totally failed to perform his part of the contract until there was such a change of circumstances as materially to affect the rights of the parties. The Circuit Court dismissed the bill, and from that decree the plaintiff has appealed to this court.

The appellant insists, that in equity, time is not of the essence of the contract; that it is in part performed; and that his failure to pay the purchase money until December, 1813, when the tender was made, is justified by the circumstances of the case.

The rule, that time is not of the essence of a contract, has certainly been recognized in courts of equity; and there can be no doubt, that a failure on the part of a purchaser or vendor, to perform his contract on the stipulated day, does not, of itself, deprive him of his right to demand a specific performance at a subsequent day, when he shall be able to comply with his part of the engagement. It may be in the power of the court to direct compensation for the breach of contract in point of time, and in such case the object of the parties is effectuated by carrying it into execution. But the rule is not universal. Circumstances may be so changed, that the object of the party can be no longer accomplished; that he who is injured by the failure of the other contracting party, cannot be placed in the situation in which he would have stood had the contract been performed. Under such circumstances, it would be iniquitous to decree a specific performance, and the court of equity will leave the parties to their remedy at law.

It is true, that he who has been ready to perform, may at any time file his bill in chancery, requiring the other party to perform his contract or to rescind it; and the court will rescind

the contract if he who has failed cannot, or will not, perform it. But this is not always necessary, and would not be always an adequate remedy.

If, then, a bill for a specific performance be brought by a party who is himself in fault, the court will consider all the circumstances of the case, and decree according to those circumstances.

A consideration always entitled to great weight, is, that the contract, though not fully executed, has been in part performed. The plaintiff claims the benefit of this principle, and alleges, that by prosecuting and managing, at his own expense, the suits depending in Kentucky, he has performed that part of the agreement.

If this allegation be supported by the fact, it will undoubtedly have great influence in the decision of the cause.

The evidence is, that the plaintiff, soon after his return to Kentucky, employed a gentleman of the bar, in addition to the counsel previously engaged by Mr. Gratz, and paid him his fee. It is also in evidence, that finding the business did not advance, he spoke to other counsel; but his application was not accompanied with a fee, and was not much regarded. It appears that a survey was necessary, and that the deposition of a Mr. William Morton was indispensable to the successful termination of the cause. Yet the survey was not made, and the deposition of Mr. Morton, though its importance had been communicated to Brashier, was not taken. The fees to the officers of the court were not paid, and Mr. Gratz was required to pay them. From March, 1807, when the contract was made, to the autumn of 1811, when Mr. Gratz died, the suit did not advance. The clerk informs us, that during this time, no other step was taken in the cause than to move for leave to amend the bill and to continue it. The embarrassment of Mr. Brashier's affairs, and his insolvency, added to this experience of his neglect of the cause, were but little calculated to inspire confidence in its future progress, or in his future attention to it. In 1812, the heirs of Mr. Gratz took the management of the business in their own hands. The deposition of Mr. Morton was taken, the survey was made, and, in 1813, a decree was obtained in their favor.

We think this cannot be considered as such a performance of his undertaking, "to manage the suits at his own expense," as to entitle him to call on the vendor for an execution of the contract.

It has also been contended, that by the agreement between the parties, Mr. Gratz was bound to survey the land, and that this was a preliminary step to be taken by him before he could justly require Mr. Brashier to pay his notes for the purchase money.

Although this could not, at law, be pleaded to notes importing an absolute promise to pay money, it will readily be admitted, that if the understanding of the parties had been, that Mr. Gratz should make the survey, and that it should precede the payment of the notes, such understanding would account for the non-payment of the notes, and would place the demand for a specific performance of the contract on very strong ground.

But the agreement does not indicate the expectation, that Mr. Gratz should make the survey, although the expense of it would be chargeable to him, and as it might be of advantage to Mr. Brashier, and could be of none to Mr. Gratz, as Mr. Brashier was a resident of Kentucky, and Mr. Gratz of Philadelphia, the expectation was not unreasonable, that Mr. Brashier would cause it to be made. He might be expected to move in this business, and to require Mr. Gratz to attend to it. His not having done so, is a proof that he did not suppose the survey to be of any consequence, because he did not intend to pay so much of the purchase money as the survey would show he ought to pay.

But the article of agreement, far from showing that the survey was to precede the payment of the notes, contain expressions indicating the intention, that their payment was not to depend on the survey. The party stipulate, that for every acre which the survey shall show the tract to contain less than 302 acres, Gratz "shall pay or allow" to Brashier the sum of \$22.50. That is, shall "pay" him if the notes shall have been received, shall "allow" to him if the deficiency shall appear before payment of the notes.

Had Mr. Brashier been able and willing to pay his notes as they became due, he had sufficient motives \*for surveying the land. He had reason to believe, that there would be a deficiency. On his return from Philadelphia, in 1807, Mr. Barr, who lived upon the land, and was acquainted with its boundaries, told him that there could not possibly be the quantity he had purchased. He knew, too, that the land had been actually surveyed in October, 1807, by a son of Mr. Gratz, and had reason to believe, that this survey must have disclosed a deficiency. His omission to make any inquiries of Mr. Gratz, or to make a survey, or to demand one, show that his conduct respecting his notes did not depend on a survey.

We do not think, then, that Mr. Brashier is justified in withholding the payment of the purchase money by the fact that the quantity of land was not ascertained; nor does the evidence support the opinion that this fact had any influence on his conduct.

The plaintiff also attempts to justify the non-payment of the purchase money by the inability of Mr. Gratz to make him a title. But this excuse entirely fails him. He knew perfectly the state of the title, and the articles of agreement show that he knew it. They expressly declare that "the said Walter Brashier has purchased the title of the said Michael Gratz, at his own risk and hazard;" and that if any part of the land be lost, the said Michael "shall only be liable to refund to him the sum of \$11.25 for each acre that may be lost." The contract states that suits were depending for the land, which suits Brashier undertook to manage; and all the testimony in the cause shows **538\*** that he knew those \*suits were brought for the legal title. With this full knowledge, he purchases the title of Gratz, and stipulates that, after the payment of the purchase money, Gratz shall convey, not the land, or a good and sure title to it, but "all his, the said Michael Gratz's estate, right, title and interest, of and in all the said residue of the above-mentioned tract of land."

It is then an essential ingredient in this contract, that the purchase money shall be paid without waiting for the termination of the cause. Brashier takes the whole risk upon himself, except as to half the price of every acre which may be lost; and he is not to retain even that portion of the purchase; but it is to be "refunded" to him whenever the loss shall take place. He had then no right to withhold the payment of the purchase money until the suits should be determined; and any attempt to do so was a violation of the letter and the spirit of his contract. The state of the title furnishes no sort of apology for this violation. Gratz was able to make the conveyance which he had contracted to make, and which Brashier had contracted to receive; and his want of the legal title furnished no excuse for the non-payment of the purchase money.

The situation of the parties, and the circumstances in which the property was placed, deserve serious consideration. The contract was made while a suit for the title was depending, and there is a reason to suppose that this circumstance had some influence on the price of the article. We perceive that if any part of the land should be lost, one-half the purchase money should be lost by Brashier. **[\*539]** While the suits were depending, and the purchase money unpaid, Brashier became insolvent. Consequently, should the land be recovered, it would be the property of Brashier at the stipulated price; should it be lost, Brashier could not pay that portion of the price which he was to pay in the event of loss. Under such circumstances, had a suit in chancery been brought to have the contract rescinded, unless he would pay the purchase money, no court could have hesitated to decree according to the prayer of the bill. No court could allow one party to hold the other bound, while the obligation was not reciprocal; or to hold himself prepared to avail himself of all favorable contingencies, without being affected by those which were unfavorable.

Mr. Brashier, then, if he did not execute his part of the contract with punctuality, ought to have executed it before a great change of circumstances took place; before the doubts which hung over the title, and under which he had purchased, were dissipated. That he did not do so, and was unable to do so, that in the event of an unfavorable termination of the suits he would be totally unable to comply with his contract, weakens very much the claim to a specific performance, which he sets up after the removal of the difficulties which attended the title.

Another circumstance which ought to have great weight, is the change in the value of the land. It was purchased at \$22.50 per acre. Mr. Brashier failed to comply, and was unable to comply with his engagements. More than five years \*after the last payment had **[\*540]** become due, the land suddenly rises to the price of \$80 per acre. Then he tenders the purchase money, and demands a specific performance. Had the land fallen in value, he could not have paid the purchase money. This total want of reciprocity gives increased influence to the objections to a specific performance, which are furnished by this great alteration in the value of the article.



Both parties have sought to avail themselves of the transaction with Mr. Saunders, by whom the purchase money was tendered in December, 1813. The defendants say that Brashier was still unable to comply with his contract, and that the tender was made in consequence of an arrangement by which Saunders was to advance the whole purchase money, and to receive half the land. But it was unimportant to them, whose money was tendered, or how it was obtained. Of this circumstance, therefore, they cannot avail themselves.

The plaintiff insists that the contract between the defendants and Saunders was a fraud on him, because he had a right to consider Saunders as his friend and agent. But the tender of the purchase money was the only service he was to expect from Saunders, and this service has been performed. He is precisely in the same situation as if the contract between Saunders and the defendants had never been made.

It has been also contended, that the concealment of the survey made by Joseph Graiz, in October, 1807, and the demand of the whole **541\*** amount of his \*notes, after a knowledge of the deficiency in the quantity of land, were fraudulent on the part of the defendants.

Mr. Brashier knew that the survey had been made, and had reason to believe that it disclosed a deficiency in the quantity of land. He has sustained no injury by the omission to make a full communication to him. It is certainly true, that after the knowledge of this deficiency, Mr. Gratz in his life-time, and his heirs since his decease, ought not to have demanded the full amount of his notes. The court, therefore, allows them no advantage from their repeated offers to convey, on receiving the whole amount of the notes; but considers the case as if no such offers had ever been made.

This, then, is a demand for a specific performance, after a considerable lapse of time, made by a person who has failed totally to perform his part of the contract; and it is made after a great change, both in the title, and in the value, of that which was the subject of the contract; and by a person who could not have been compelled to execute his part of it, had circumstances taken an unfavorable direction.

In such a case, we are of opinion, that a court of equity ought to leave the parties to their remedy at law.

*Decree affirmed.*

Cited—14 Pet. 175; 2 Wood. & M. 203, 384; 3 Wood. & M. 472, 474; 2 Brock. 247, 249; 1 McLean, 401.

**542\***

[\*PRACTICE.]

## THE UNITED STATES v. DANIEL.

A division of the judges of the Circuit Court, on a motion for a new trial, in a civil or a criminal case, is not such a division of opinion as is to be certified to this court for its decision, under the 6th section of the judiciary act of 1802, c. 291. [xxi.]

**THIS** was an indictment in the Circuit Court of South Carolina against Lewis Daniel, charging him with having knowledge of the actual commission of the crime of willful mur-

der, committed on the high sea, by John Furlong; and with unlawfully, wickedly, and maliciously, concealing the same, &c.

The indictment set forth, at large, the indictment and conviction of John Furlong, for willful murder on the high seas, and then charged Lewis Daniel with the knowledge and concealment of that murder, and with not having disclosed the same, in the words of the act of Congress. The prisoner was tried on the plea of not guilty. It was proved that some of the persons present on board, when the principal felony was committed, had in conversation stated the fact of the murder to the defendant, who advised them to escape, promised secrecy, offered them the means of escape, and actually assisted one of them in escaping; but there was no evidence that the defendant knew of any fact which would have constituted legal evidence on the trial of the principal felon. The judge charged the jury, that the concealment, under the circumstances, was sufficient to convict the defendant, and the jury found a verdict \*of guilty. The defendant then [**\*543**] moved in arrest of judgment, and for a new trial, on the following grounds: That a person is not liable to be indicted and convicted under the 5th section of the act of April, 1790, c. 36, for the punishment of certain crimes against the United States, unless he has such knowledge of the felony as will enable him to testify in court, at the trial of the principal felon, and particularly that in this case the evidence did not prove the defendant guilty of misprision of murder, according to the terms of the said act. The motion was also supported by an alleged misdirection of the court to the jury. The judges being divided in opinion on this motion, it was ordered to be certified to this court.

*Mr. Hunt*, for the prisoner, (1) argued, that, to constitute the offense of misprision of felony, under the 5th section of the crimes act of 1790, c. 36, the accused must be proved to have had such a direct and positive knowledge of the actual commission of the felony, as would be legal evidence on the trial of the principal felon. Here the offense is, what in law is termed negative misprision.<sup>1</sup> All the definitions of misprision imply such a personal knowledge of the fact as would be legal evidence.<sup>2</sup> But here there was no such knowledge; and if the court, upon the review of the whole case, is satisfied that the \*defend- [**\*544**] ant has not been found guilty of any legal offense, the judgment will be arrested.<sup>3</sup> In order to bring a case within the intention of a statute, its language must include the case; it is not sufficient that it is within the reason or mischief, or that the crime is of equal atrocity, and of an analogous character.<sup>4</sup> The prisoner could not have been a witness against the principal felon. The law never credits the bare assertion of anyone, however high his rank or pure his morals, but always requires the sanction of an oath; and it also requires his personal attendance in court, that he may be examined

1.—4 Bl. Com., c. 9; 3 Inst. 140.

2.—4 Jac. Law Dict. 295; Staundf. P. C. L. 1, c. 19; Hawk. P. C., c. 20, s. 4; 1 Hale's P. C. 375; Terms de la Ley, 291, 3 Inst. 36; 1 Chitty's Crim. Law, 2.

3.—1 East's P. C. 146; 1 Chitty's Crim. Law, 663; 1 Hargr. St. Tri. 290.

4.—Wiltberger v. United States, 5 Wheat. Rep. 96.

Wheat. 6.

and cross-examined by the different parties. The few instances in which this rule has been departed from, and in which hearsay evidence has been admitted, will be found on examination to be such as from their very nature are incapable of positive and direct proof. (2) This court has decided, that the refusal of the Circuit Court to grant a new trial, is not matter for which a writ of error lies. But in those cases the judges of the court below were unanimous in refusing the new trial; here a division of opinions is certified, and this court is bound to decide by the express words of the judiciary act of 1802, c. 291.

The *Attorney-General*, contra, (1) insisted that there was no ground for arresting the judgment, or \*granting a new trial. The evidence brought the case completely within the crimes act of 1790, c. 36. The object of the act was the prompt detection and punishment of the crimes enumerated. The degree of knowledge required to bring a party within the misprision described, is such as is sufficient to justify an arrest; and well-founded suspicion is sufficient for that purpose.<sup>1</sup> (2) The motion in the court below, in arrest of judgment, combined with a motion for a new trial, is novel and unprecedented. But this combination cannot vary the legal character of these two motions, which is entirely distinct. A motion in arrest of judgment must be confined to objections which arise upon the face of the record itself, and which make the proceedings apparently erroneous; therefore, no defect in evidence, or improper proceedings at the trial, can be urged as a ground for arresting the judgment.<sup>2</sup> The exceptions in arrest of judgment are to the indictment.<sup>3</sup> On the other hand, a motion for a new trial is for causes other than defects in the pleadings; and the circumstance that the verdict was obtained because the pleadings were defective, will not be permitted to operate on this motion.<sup>4</sup> On inspection of the record in this case, it will be found that the only grounds assigned in support of the joint motion are such as are entirely inapplicable to the motion for a new trial. These grounds are **546\*** the misdirection of \*the judge, and that the verdict was obtained on insufficient evidence. The court will, therefore, throw out of view the motion to arrest the judgment, and consider this as a motion for a new trial, on which the judges of the court below were divided in opinion. And if so, there is no question before this court; since it has repeatedly decided, that the granting or refusal of a new trial, is mere matter of discretion in the court below; and hence, the refusal of a new trial, even though the grounds on which the motion was founded are spread on the record, is no sufficient cause for a writ of error from this court.<sup>5</sup> In a civil case, if the court below be divided on such a motion, the motion falls. Nor is it otherwise in a criminal case. This court has no appellate criminal jurisdiction. It is only by virtue of the 6th section of the judiciary act of 1802, that a criminal case can

ever be brought to this court. That section was not, however, made exclusively for criminal cases. The provision is general; and it is only by reason of its generality that a question in a criminal case can ever reach this court. But being general, it must have the same construction in all cases. If, then, in a civil case, a division of the judges on the mere discretionary question of a new trial, would bring no question here; neither will it in a criminal case.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court:

\*The indictment in this case is certainly sufficient to sustain a judgment according to the verdict, and all the other proceedings are regular. There is therefore no cause for arresting the judgment.

The motion for a new trial has never before been brought to this court on a division of opinion in the Circuit Court. It had been decided, that a writ of error could not be sustained to any opinion on such motion, and the reasons for that decision seemed entitled to great weight, when urged against determining such a motion in this court, in a case where the judges at the circuits were divided on it. When we considered the motives which must have operated with the legislature for introducing this clause into the judiciary act of 1802, we were satisfied that it could not be intended to apply to motions for a new trial.

Previous to the passage of that act, the circuit courts were composed of three judges, and the judges of the Supreme Court changed their circuits. If all the judges were present, no division of opinion could take place. If only one judge of the Supreme Court should attend, and a division should take place, the cause was continued till the next term, when a different judge would attend. Should the same division continue, there would then be the opinion of two judges against one; and the law provided, that in such case that opinion should be the judgment of the court. But the act of 1802 made the judges of the Supreme Court stationary, so that the same judge constantly attends the same circuit. This great improvement of the pre-existing system, **548** was attended with this difficulty. The court being always composed of the same two judges, any division of opinion would remain, and the question would continue unsettled. To remedy this inconvenience, the clause under consideration was introduced. Its application to motions for a new trial seems unnecessary. Such a motion is not a part of the proceedings of the cause. It is an application to the discretion of the court, founded on evidence which the court has heard, and which may make an impression not always to be communicated by a statement of that evidence. A division of opinion is a rejection of the motion, and the verdict stands. There is nothing, then, in the reason of the provision which would apply it to this case.

Although the words of the act direct generally, "that whenever any question shall occur before a circuit court, upon which the opinion of the judges shall be opposed, the point upon which the disagreement shall happen shall" be certified, &c., yet it is apparent that the ques-

1.—Chitty's Crim. Law, 10, 27; 4 Bl. Com. 290.

2.—1 Chitty's Crim. Law, 539.

3.—4 Bl. Com. 375.

4.—1 Chitty, 535.

5.—Wheat. Dig. Dec. tit. Practice XV. (A.)



tion must be one which arises in a cause depending before the court relative to a proceeding belonging to the cause. The first proviso is, "That nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, farther proceedings can be had without prejudice to the merits."

It was also contended, that under the second proviso, Lewis Daniel ought to be discharged. That proviso is in these words: "And provided also that imprisonment shall not be allowed, nor punishment in any case be inflicted, 549\*] where the judges of the said \*court are divided in opinion upon the question touching the said imprisonment or punishment."

A motion for a new trial is not "the question touching the said imprisonment or punishment." That question must arise on the law, as applicable to the case; and is not, it would seem, to be referred to this court. The proviso, if applicable to such a case as this, would direct the Circuit Court not to certify their division of opinion to this court, but, in consequence of that division, to enter a judgment for the defendant. This court can only decide the question referred to it, and certify its opinion upon that question to the Circuit Court, who will then determine what judgment it is proper to render.

**CERTIFICATE.**—This cause came on to be heard on the transcript of the record, and on the points on which the judges in the Circuit Court were divided in opinion, and was argued by counsel. On consideration whereof, this court is of opinion, that there is no error in the record and proceedings of the Circuit Court, for which judgment ought to be arrested. And this court is farther of opinion, that a division of the judges of the Circuit Court, on a motion for a new trial, is not one of those divisions of opinion which is to be certified to this court for its decision, under the act, entitled, "an act to amend the judicial system of the United States."

*All which is ordered to be certified to the United States Court for the sixth Circuit and District of South Carolina.*

Cited.—5 Pet. 206; 8 Pet. 303; 10 Pet. 289; 4 How. 15; 5 How. 224; 7 How. 191; 3 Wall. 255; 4 Wall. 111; 7 Wall. 531; 2 Sumn. 61; 2 Wood. & M. 3; 2 Ware (Da.) 386; 4 Wash. 333; Bald. 406.

550\*] [\*CHANCERY. LOCAL LAW.]

KERR ET AL. v. WATTS.

The decision of this court, in *Massie v. Watts*, 6 Cranch, 148, revised and confirmed.

Who are necessary parties in equity.

The rule applied in equity to the relief of *bona fide* purchasers without notice, is not applicable to the case of purchasers of military land warrants under the laws of Virginia.

Such purchasers are considered as affected with notice by the record of the entry, and also of the survey; and subsequent purchasers are considered as acquiring the interest of the person making the

entry; so that purchasers under conflicting entries are considered as purchasing under distinct rights, in which case the rule, as to innocent purchasers, does not apply.

The principle, that only parties, or privies, or purchasers *pendente lite*, are bound by a decree in equity, how applied to this case.

The surveys actually made on the military land warrants of Virginia, have not the force of judicial acts, or of acts done by the deputations of officers as general agents of the continental officers.

**A** PPEAL from the Circuit Court of Ohio.

Ferdinando O'Neal was owner of a Virginia military warrant for 4,000 acres of land, dated the 17th of July, 1783, and employed Nathaniel Massie, a deputy-surveyor, to locate it, and to survey and return the plats.

John Watts purchased the right of O'Neal, and on the 7th of January, 1801, paid Massie £50 in full satisfaction for locating and surveying the warrant.

On the 3d of August, 1787, Massie made an entry on part of O'Neal's warrant for 1,000 acres. On \*the same day an entry had [\*551 been made for 1,000 acres for Robert Powell, which was purchased by Massie.

On the 27th of January, 1795, Massie made an entry in his own name for 2,366 acres, and the bill, filed in the court below by the respondent, Watts, against the appellants, Kerr and others, charges, that on the 26th of April, 1796, Massie fraudulently made a survey for O'Neal, for 530 acres, purporting to be made upon his said entry of 1,000 acres; but, in fact, on different land, having fraudulently appropriated to himself the land covered by O'Neal's entry, by surveys made on Powell's and his own entries, having purchased Powell's warrant and entry before the surveys were made.

The bill further states, that Massie had obtained grants upon his survey.

Watts commenced a suit in chancery against Massie in the State Court of Kentucky, claiming a conveyance of the legal title, and proceeded to a final hearing upon the merits, in the Circuit Court of Kentucky, to which it had been removed; which last court, in the November term, 1807, made an interlocutory decree, in favor of Watts, and directed the proper surveyor to lay off the several entries in the manner pointed out in that decree, and to report to the court in order to a final decree in the premises.

The cause was finally decided by a decree directing Massie to convey the 1,000 acres to Watts according to certain metes and bounds reported, and to deliver possession, &c.; and upon performance of \*the decree by [\*552 Massie, Watts was directed to transfer to him 1,000 acres of O'Neal's warrant.

Massie appealed to this court, where the decree of the Circuit Court was affirmed, at February term, 1810.<sup>1</sup>

Massie refused to convey or deliver possession when demanded; and in the meantime part of the property recovered had been laid out into lots of the town of Chillicothe, and the bill charges the appellants, and others, who were made defendants in the present suit, with having in possession, respectively, part of the complainant's property, and claiming to hold the same by titles derived under Massie.

1.—6 Cranch, 148.

NOTE.—As to necessary parties to a bill in equity, see note to *Morgan v. Morgan*, 2 Wheat. 260, and note to *Marshall v. Beverly*, 5 Wheat. 313.

The record of the proceedings in Kentucky, and in the Supreme Court, were referred to, and made part of the bill in this case.

The entries before mentioned are as follows:

"No. 503: Captain Robert Powell enters 1,000 acres of land, &c. Beginning at the upper corner on the Scioto of Major Thomas Massie's entry, No. 480, running up the river 520 poles, when reduced to a straight line, thence from the beginning with Massie's line, so far that a line parallel to the general course of the river shall include the quantity."

"No. 509: Captain Ferdinand O'Neal enters 1,000 acres, &c. Beginning at the upper corner on the Scioto of Robert Powell's entry, 503, running up the river 500 poles, when reduced to a straight line, and from the beginning with Powell's line, so far that a line parallel with the general course of the river will include the quantity."

**553\***] "No. 2462: Nathaniel Massie enters 2,366 acres, &c., on the bank of Scioto, corner to Robert Powell's survey, No. 503, thence with his line south 43 east 293 poles; south 80 east to the upper back corner of Thomas Massie's survey, No. 480, thence with his line south 10 west, to Paint Creek, thence up the creek to the corner of Thomas Lawes' survey, thence with his line, and from the beginning up the Scioto to the lower corner of Daniel Stull's survey, thence with his line so far that a line south 10 west will include the quantity."

But these entries depended on one which preceded them on the entry-book, made by Thomas Massie, as follows:

"No. 480: 1787, August 3d. Thomas Massie enters 1,400 acres, &c. Beginning at the junction of Paint Creek with the Scioto, running up the Scioto 520 poles when reduced to a straight line, thence off at right angles, with the general course of the river so far that a line parallel thereto will include the quantity."

This court, in the case referred to, decided, that Thomas Massie's survey ought to commence at the mouth of Paint Creek; and that the upper corner on the river should be placed at the termination of a right line at the distance of 520 poles, and the survey extended out at right angles with the general course of a right line supposed from the beginning to the upper corner; and that, from the upper corner of Thomas Massie's survey, a point on the river, at the distance of 520 poles on a right line **554\***] should be \*ascertained for the upper corner of Powell's, and that the real course of a right line from Thomas Massie's corner to Powell's upper corner, should be considered as a base from which Powell's survey should be extended by lines at right angles therewith, except only so far as the lower line might interfere with Thomas Massie's property.

The survey of O'Neal to depend upon the same principles in relation to the survey of Powell.

The object of the present suit was to carry into execution against the defendants, who have acquired Massie's title, the decree against him in Kentucky, affirmed in this court.

The court below, by their decree, gave relief against each, for the specific property claimed by the answer of each, construing the entries according to the principles of the former decision, except in varying the complainant's survey, by a decision that a piece of land called an island in the river, was part of the main shore when the entries were made, and included as a part of the bank.

The defendants all submitted to the decree, except Kerr, Doolittle, Joseph Kirkpatrick, Sen., Joseph Kirkpatrick, Jun., and the heirs of James Johnston, who appealed to this court.

The *Attorney-General* and *Mr. Scott*, for the appellants, argued, (1) that the survey made for Powell ought to be established, because made under the superintendence of officers to whom the state of Virginia had deputed the sovereign and exclusive authority to regulate such surveys, similar to the \*powers of [**555** commissioners to adjust pre-emption rights; and that their determination was conclusive, being an inseparable condition annexed to the grant from the state.<sup>1</sup> The existence and power of these agents has been recognized by the court.<sup>2</sup> (2.) The appellant, Kerr, is an innocent purchaser without notice, who holds the legal estate with superior equity, and therefore cannot be disturbed by the alleged equity of Watts. The cause having been set down for hearing on the bill and answers, his answer is conclusive evidence as to every fact which it states;<sup>3</sup> and it does state that at the filing of the bill he had the legal title; and that before either party purchased, the entries had been surveyed and become matters of record. A survey returned and recorded is notice.<sup>4</sup> He is not affected by the supposed fraud of Massie, in making Powell's survey. Massie was only one of several mesne purchasers of Powell's rights; and if Powell, the original holder, was innocent, a subsequent purchaser under him has a right to the shield of his innocence, even though such purchaser had notice.<sup>5</sup> Nor is the appellant a *lite pendente* purchaser, because the former suit was brought in Kentucky, out of the jurisdiction where the land lies.<sup>6</sup> The rule is borrowed from the common \*law; and its analogies must, therefore, be pursued. A verdict and judgment at law, or a decree in equity, affecting the title to land, are local in their nature. The *lis pendens* must be on the question of title directly, and not incidentally. The principle is confined to those who attempt to originate a title *pendente lite*; and is never extended to those who had acquired a title previously, and who ought, therefore, to have been made parties to the *lis pendens*. Its policy is to prevent the parties from alienating, and thus evading the justice of the court. Even if the appellant had no legal title, but had only the better right to call for it, he could not be affected in equity by the pendency of the former suit.<sup>7</sup> Nor is he bound as privy to the former decree. No person can be bound as such, who ought to have been made a party; as to all who ought to have been parties, such a decree is

1.—2 Ventr. 365; 3 Ch. Cas. 135.

2.—Wallace v. Anderson, 5 Wheat. Rep. 291.

3.—Wheat. Dig. Dec. tit. Chancery, pl. 142; Leeds v. Mar. Ins. Co., 2 Wheat. Rep. 380.

Wheat. 6.

4.—3 Binney's Rep. 118.

5.—2 Atk. 242; 11 Ves. 478; Sugd. Vend. 438.

6.—2 P. Wms. 482.

7.—2 Vern. 599.



considered as a fraud.<sup>1</sup> Those only are privies, who acquire this interest subsequent to the institution of the suit, by the decree in which they are sought to be affected. Besides, the question here is substantially different from that which arose in the former case. There it was as to the responsibility of an agent to his principal, for an alleged fraud. Here it is as to the dispossession of a *bona fide* purchaser.

*Mr. Doddridge* and *Mr. Hardin*, contra, stated that they should not examine the correctness of the \*decision in the former case, nor the question whether the appellants were bound by the decree against *Massie*, under whom they claim; since, whether they were bound by it as a *res judicata* or not, the court would not change the application of the former adjudication, unless the appellants showed themselves to be purchasers for a valuable consideration without notice, or unless the respondent had been guilty of some gross negligence. The defense of being a purchaser without notice, can never be set up by or against one claiming under a different original title. It is admitted to be the general rule, that where the cause is set down for a hearing on the bill and answer, the answer of the defendant is conclusive; but where the answer proceeds upon the ground of making the defendant an innocent purchaser, and the records, &c., made part of the bill, show that he cannot be such, there the law charging him with notice from the registry, forms an exception to the rule. The title of the respondent is an imperfect legal title; and his claim being a matter of record, cannot be treated as a latent equity, for negligence in prosecuting which he shall lose his property. In the system of land laws which has been established in this country, land titles commence by a record, and the very first step confers an inchoate legal title.

*Mr. Justice Johnson* delivered the opinion of the court:

This cause has its origin in the case decided in this court between *Watts* and *Massie*, in the year 1810.

**558\*** That suit came up from the Kentucky District, and was prosecuted there because *Massie*, the defendant, then resided in that state, and either was, or was supposed to be, actually seized of the land in question.

Since that decision, it has been ascertained that the present defendants are in possession of the land, or the greater part of it; and *Massie* also having changed his residence to Ohio, this suit has become necessary, both to enforce the former decree against him, and to obtain relief against the actual possessors of the land.

In the course of discussion, the court has been called on to review its decision in *Watts* and *Massie*, and it has patiently heard, and deliberately considered, the able and well-conducted argument on this subject. But, after the maturest reflection, it adheres to the opinion that, whether the case be viewed with reference to the time, intent, and meaning of the calls, to analogy to decided cases, or convenience in the voluntary adoption of a principle of the most general application, that laid down in the case

of *Watts* and *Massie*, for running the lines of the land called for, cannot be deviated from. So far, therefore, as *Massie* himself, and his privies in estate, are concerned, *Watts* is now entitled to the full benefit of that decision.

But there are various other defendants, and several grounds of defense assumed in this case, which are unaffected by the decision referred to.

It is contended, in the first place, that there is a radical defect of parties. That the representatives \*of *O'Neal* and *Scott*, [**559** through whom the complainant claims, and those of *Powell* and *Thomas Massie*, supposed to be hostile to his interests, ought to have been made parties.

On this point there may be given one general answer. No one need be made a party complainant in whom there exists no interest, and no one party defendant from whom nothing is demanded. *Watts* rests his case upon the averment that all the interests once vested in *O'Neal* and the *Scotts*, now centre in himself, and, provided he can recover the land now in possession of those actually made defendants, he is contented afterwards to meet the just claims of any others who are not made defendants. No rights will be affected by his recovery, but those of the actual defendants, and those claiming through them. As to the supposed interference of the lines ordered to be surveyed, with those of *Thomas Massie*, or *Powell*, the former is merely hypothetical by way of reference, or imaginary; and the latter is only asserted on the ground that *Massie* had acquired all the interest in *Powell's* survey that *Powell* ever had. There was therefore nothing to demand of *Powell*, as the case is exhibited by the record. It must be subject to these modifications, that the *obiter dictum* of the court, in the case of *Simms* and *Guthrie*, is to be understood.

It is next contended, in behalf of *Kerr*, and several other defendants, that they claim through purchasers who were *bona fide* purchasers without notice, for a valuable consideration. And at first view it would seem, that the principles so often applied to the relief \*of innocent purchasers, are applicable [**560** to the case of these defendants, wherever the facts sustain the defense. But it will not do at this day, to apply this principle to the case of purchasers of military land-warrants, derived under the laws of Virginia. In all the courts in which such cases have come under review, the purchasers have been considered as affected by the record notice of the entry, and also of the survey, such as it legally ought to be made, as incident to, or bound up in the entry. It is altogether a system *sui generis*, and subsequent purchasers are considered as acquiring the interest of the entor, and not necessarily that of the state. So that purchasers under conflicting entries are considered as purchasing under distinct rights, in which case the principle here contended for does not apply; since the ignorance of a purchaser of a defective title, cannot make that title good, as against an independent and better right. These principles may safely be laid hold of, to support a doctrine which, however severe occasionally in its operation, was perhaps indispensable to the protection of the interests acquired under military land-war-

2.—1 Binney's Rep. 217; 2 Binney, 40, 455; 3 Binney, 114.



rants, when we take into consideration the facility with which such interests might otherwise, in all cases, have been defeated by early transfers.

It is further contended, that the defendants are not bound by the decree in the case of *Watts* and *Massie* because neither parties, nor privies, nor *pendente lite* purchasers.

That those who come not into this court, in any one of those characters, are not subject to **561** the direct and binding efficacy of an adjudication, is unquestionable. But it is not very material as to the principal question in this case, whether the parties are to be affected by the former adjudication directly, or by the declared adherence of this court to the doctrines established in that case. The consequence to the parties on the merits of the case is the same.

But in one view it is material, and that is with regard to the proof of the exhibits, through which Watts, the complainant, deduces his title through the Scotts from O'Neal. As Massie, in the former case (the record of which is made a proof of this), acquiesced in this deduction of Watts' title, we are of opinion that it is, as to him and his privies in estate, a point conceded. As to parties and privies, the principle cannot be contested; and as to *pendente lite* purchasers, it is not necessary to determine the question, since the only defendants who have appealed from the decision below, to wit, Kerr, the Kirkpatrick, Doolittle, and the Johnstons, claim under purchases made long anterior to this scrip, in Kentucky.

Those defendants certainly were entitled to a plenary defense, and where they have, by their answers, put the complainant upon proof of his allegations, as to his deduction of title, the question arises, whether it appears from the record that the deduction of title was legally proved.

There can be no doubt that this question passed *sub silentio* in the court below, but it does not appear from anything on the record that the point was waived; and we are not at **562** liberty to look beyond the record for the evidence on which the deduction of title was sustained.

Although we entertain no doubt, that exhibits may, on the trial, be proved by parol testimony, yet a note on the minutes, or on the exhibit, became indispensable to transmit the fact to this court; and as the case furnishes no such memorandum, we must consider the assignments through which Watts derived his title from O'Neal, as not having been established by evidence. Such was the decision of this court in the case of *Drummond v. M'Gruder*.

But Kerr is the only one of these appellants who has expressly put the complainant on proof of his title. The rest of the appellants having passed over this subject without any notice in their answer, the question is, whether they waived their right to call for evidence to prove these exhibits. We are of opinion they have not, and that the complainant is always bound to prove his title, unless it be admitted by the answer.

There are two principles of a more general nature, of which all the appellants claim the benefit, and which, as the cause must go back, will require consideration.

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It is contended, that Nathaniel Massie was the acknowledged agent of both O'Neal and Watts, and that the complainant is precluded by his acts done in that capacity. This argument is resorted to, as well to fasten on Watts the survey made in his behalf above the town of Chillicothe, as a relinquishment of all claim to a location at the place now contended for in his behalf. But in neither of these views can this court apply this principle in favor of the defendants; for, it follows from the principles established for surveying O'Neal's entry, that the survey made by Massie on O'Neal's entry, was illegal and void; and, certainly, when employed in locating the entries made in favor of Powell and himself, Massie was not acting as the agent of O'Neal or Watts, but as the agent of Powell, or, in fact, in his own behalf. The survey, on which this argument rests, was at best but partial; and it is conclusive against it to observe, that the powers of Massie, as agent of Watts, were limited to the entry and mechanical acts of the survey. The recording of that survey, and all those solemn acts which give it legal validity, it does not appear that his powers extended to. Watts never recognized that survey, or assumed the obligatory effects of it by any act of his own, and in fact, in the event (though not a material circumstance to the result we come to), it has since been ascertained that it was not only made off Watts' entry, but on land appropriated by another.

But it has been contended, also, that all these surveys actually made on the military land-warrants of Virginia, derive the authenticity and force of judicial acts, or of acts done by the general agents of the continental officers respectively, from the superintending and controlling powers vested in the deputations of officers, as the law denominates them, appointed by themselves to superintend the appropriation of the military reserves set apart for their use. It is to be presumed, it is contended, that every survey made by their authorized surveyors, was made under their control and direction. **564** This court does not feel itself authorized to raise any such presumption. The powers actually exercised by those commissioners, were limited to very few objects. The surveying of entries at a very early period, became a judicial subject. And the commissioners, or rather deputations of officers, never assumed a right to adjust the conflicting interests of individuals upon the locating and surveying of such entries. To appoint surveyors, to superintend and direct the drawing of lots for precedence among the locators, to direct the survey for officers and soldiers not present or not represented, and to determine when the good lands between the Cumberland and Tennessee should be exhausted, comprehended all the powers with which they were vested. As individual agents capable of binding their principals, they appear in one case, and only one, which was, when the officer or soldier was absent and unrepresented. And so to judicial powers, there is no provision of the act that vests them with a semblance of such a power, unless it be to judge of the right of priority as determined by lot. But here, also, they appear more properly in the character of ministerial officers discharging a duty without the least latitude of judg-



ment or discretion. Their powers in nothing resemble that of the courts of commissioners established through the back counties of Virginia. As to the subjects submitted to the boards so constituted (of which military warrants were no part), those boards were expressly vested with judicial power. But the powers of the deputations of officers were purely ministerial. \*And if it be admitted, that they might have exercised the power of defining the principles on which surveys should have been made, yet it is certainly incumbent on him who would avail himself of that power, to show that it was exercised, and to bring himself within the rules prescribed by their authority.

*Decree reversed as to these appellants, and sent back for further proceedings.*

Cited—10 Wheat. 188 (n); 15 Pet. 109; 2 Paine, 541; Bald. 217.

[CHANCERY.]

LEEDS ET AL.

v.

THE MARINE INSURANCE COMPANY.

Application of the law of set-off and lien in equity, under peculiar circumstances.

**A**PPEAL from the Circuit Court for the District of Columbia.

This was a suit in equity, commenced in the court below by the respondents against the appellants, in which the injunction obtained on the filing of the bill was made perpetual. The facts are stated in the opinion of the court.

This cause was argued by *Mr. Swann* and *Mr. Jones* for the appellant, and by the *Attorney-General* and *Mr. Lee* for the respondents.

**566\*** *Mr. Justice JOHNSON* delivered the opinion of the court:

This case involves a great many questions both of law and fact, but we will consider it as it is affected by those circumstances, concerning which there is no dispute.

Leeds and Straas being engaged in commercial enterprises, Straas employed Hodgson to effect insurance on the *Sophia* and her cargo. A note of Hodgson, with Patton and Dykes as indorsers, is taken for the premium. Another adventure on the brig *Hope*, grows out of the first on the *Sophia*; and the same agent, at the request of the same principal, effects insurance upon this also, with the same company. The *Sophia* arrives in safety, but though one of the indorsers is unquestionably sufficient, the premium note remains unpaid. The *Hope* is lost, and Hodgson professedly suing for the use of Straas and Leeds, has recovered judgment against the underwriters for the amount of the policy. From this amount the premium note connected with that policy was discounted, but that growing out of the insurance on the *Sophia* was not pleaded, notwithstanding the identity of the legal plaintiff in that action, with the debtor to the company in the transaction on the *Sophia*.

The note taken for the insurance on the *Sophia*, is now set up against the policy on the *Hope*, in a different form. This bill is filed to compel the parties in interest, Hodgson, Leeds and Straas, to discount it from the judgment against the underwriters.

The equity of this demand is now to be tested.

\*The right to the discount considered [**567** with reference to the identity of parties, was clearly a legal one. And had not the company been enjoined in the chancery of Virginia, during the pendency of the suit upon the policy, they must have lost all claim to the interposition of this court, by failing to assert their legal rights in the court to which they properly belonged. But the chancery of Virginia might have considered the company in contempt, had they set up in discount a claim then pending, and then enjoined in the courts of that state, and, therefore, we may now be justified in considering the legal rights of the company, against the policy on the *Hope*, as derived through the premium note on the *Sophia*, under all the advantages that it would have possessed, if pleaded as a set-off to the action at law.

The bill, it is true, does not explicitly rest on this, as the ground of its equity, but the facts are so set out, and may be properly considered as making up the case.

What was the state of right as it stood at law? Hodgson, as holder of the policy which he had effected, was, to the amount of his commissions, advances, or even liability incurred in the transaction, a privileged creditor, and that possession could not be violated until he was indemnified or compensated. If he be considered as the legal plaintiff in the action on the policy, and, in fact, the legal owner of the money recovered for the use of others, the law would not suffer him to be deprived by transactions between Straas and Leeds, to which he never assented, of any \*legal advantage [**568** derived from possession of that money.

Suppose, to come up to the very case before us, the company had pleaded this note as a set-off to the suit on the policy, and Hodgson, the legal plaintiff, had tendered a replication admitting the plea, in what manner could the company or himself have been deprived of the benefit of its being thus disposed of? That Hodgson was entitled to indemnity from Straas at least, against this note, is unquestionable; and he would, as against Straas, have, under any circumstances, been entitled to retain a sufficient sum to cover his liability. Then how could he, by the act of Straas, either by assigning away his interest, or by impeding by an injunction, that act in a third person, which would have secured him in its consequences, be deprived of the benefit of compelling the admission of this set-off? The case in equity, as it now stands, is precisely that which would have arisen at law, upon the state of things supposed. For, Hodgson, in his answer to this bill, admits this set-off, and solicits the court to enforce the admission of it by Leeds, who, in the right of Straas, is thus endeavoring to deprive him of his legal right to indemnity. The case in no part contests the reality of this state of facts, but the defendant, Leeds, in every part of it, rests his defense upon the ground that Straas has succeeded in defeating the claims of Hodgson, and deprived the company of the

benefit incident to the assertion of those claims; first, by tying the hands of the company in a court of chancery, in a suit in which he finally **569\*** failed, and then by a transfer of a \*chat-tel interest, the evidence of which, or the contract itself, was in the hands of Hodgson, and legally subject to his control, until the money due on it was reduced into possession.

It is true, that had this set-off been pleaded at law to Hodgson's suit upon the policy, and the equitable interest of others been set up against such plea, or against Hodgson's admission of it, the Court of Common Pleas must, according to modern practice, have heard the parties on affidavit, before it determined to admit Hodgson's replication on its files. But, supposing the case to have been presented on affidavit, such as it now appears to this court, that court would not have taken upon itself to deprive the legal plaintiff of a legal advantage, in favor of an assignee of a chose in action, where the equity of the case was so strong in favor of the legal plaintiff.

It is obvious, that the principal difficulties in this case arise from the inverted and peculiar state of the parties. Hodgson (and with him his indorser), who is really the party to be relieved, appears in the character of defendant, and the question presents itself, why should the underwriters be at liberty to quit their hold upon their note for indemnity, and come upon the judgment holder on the policy for satisfaction in the first instance?

But to this several answers present themselves.

Why, if the underwriters had several remedies, should they, by the act of the opposite party, be deprived of any one of them? Why, **570\*** if they might \*legally have availed themselves of their remedy by discount, should they now be deprived of it because they were prevented, unconsciously by their antagonist, from asserting it in its proper place? And why, if they can in this way certainly save their money, should they be put to the risk and labor of prosecuting a recovery upon their note?

But the case affords another answer of a more general nature. Notwithstanding Hodgson's insolvency, his claims upon this policy remain unpaid, if it be only for the purpose of shielding his indorsers; and notwithstanding his appearance here as a co-defendant, it is obvious, that dismissing this bill must give rise to new suits between the persons liable to pay this note, and the assignee of Straas's interest under the policy. This consideration affords the additional reason, that entertaining this suit terminates litigation, and the reverse would be the consequence of dismissing this bill. If having been deprived by his antagonist of his remedy at law, is a sufficient ground for entertaining the suit of the complainant, it is certainly no objection to it, that relief is at the same time extended to one who, though nominally a co-defendant, is essentially a co-plaintiff, and might have been made such.

Had he been made such, the case would have presented fewer difficulties. If Straas himself could not have demanded of Hodgson this policy, or the money recovered on it, without securing him against the premium note, neither can his assignee. Even the courts of law have **571\*** recognized the lien of a broker \*on a Wheat. 6.

chose in action for a general balance of account, and much more so ought a court of equity in the application of a principle so peculiarly its own, as that which gives effect to a transfer by assignment of a chose in action not in its nature negotiable.

The parties in this case sue only to be restored to their legal advantages; as that cannot be done specifically, they certainly have a claim on this court to secure to them all the beneficial consequences that would have resulted from them. And as Straas's interest in the Hope would have been amply sufficient to enable Hodgson to pay this premium note, had the money on the policy come into his hands, there is nothing unreasonable in making it, in the hands of the officer of this court, subject to be disposed of in the same manner.

Let it be distinctly understood, that the court does not, in this decision, countenance the idea that a separate debt may be set-off to a joint action. The debtor and creditor at law are the same. And upon Hodgson's reducing the money into possession, the same identity of parties would exist. For Leeds and Straas do not appear in the case at all, in the relation of copartners in trade, but Leeds himself represents them as holding distinct interests, although in the same subject. Leeds' defense rests altogether on Straas's assignment, not on their blended rights; nor does he pretend to ignorance of the offset now contended for, when he took the assignment, but only observes, with a view, it is presumed, to show he had no reason to believe it to be a subsisting debt, \*that it was at that time enjoined [**\*572** before the Chancellor of Virginia. This is setting up a wrong in Straas to support a right in his assignee.

*Decree affirmed.*

[PROMISSORY NOTES.]

## THE UNION BANK v. HYDE.

A protest of an inland bill or promissory note is not necessary, nor is it evidence of the facts stated in it.

The following undertaking of the indorser of a promissory note, "I do request that hereafter any notes that may fall due in the Union Bank, in which I am, or may be indorser, shall not be protested, as I will consider myself bound in the same manner as if the said notes had been or should be legally protested," held to be ambiguous as to whether it amounted to a waiver of demand and notice; and parol proof admitted to show that it was the understanding of the parties that the demand and notice required by law to charge the indorser, should be dispensed with.

**E**RROR to the Circuit Court for the District of Columbia.

This cause was argued by *Mr. Jones* for the plaintiff in error, and by *Mr. Swann* and *Mr. Key* for the defendant in error.

*Mr. Justice JOHNSON* delivered the opinion of the court:

This cause turns upon the construction of a written \*instrument, in these words: "I [**\*573** do request that hereafter any notes that may fall due in the Union Bank, on which I am, or



may be indorser, shall not be protested, as I will consider myself bound, in the same manner as if the said notes had been, or should be legally protested.

(Signed)

THOMAS HYDE."

Two constructions have been contended for: the one, literal, formal, vernacular; the other, resting on the spirit and meaning, as a mercantile and bank transaction.

The former has been sustained in the court below, and the correctness of that opinion is now to be examined.

The defendant, it appears, became indorser to one Foyles, and the note was discounted in the Union Bank; on its falling due, it is admitted that no demand was made on the drawer, or notice given to the indorser.

The case presents the right of the plaintiffs under two aspects: 1st. Upon the just construction of the written instrument. 2d. The practical exposition of it by the defendant himself; and it might also have presented a third—the specific waiver of demand and notice on the note in suit. By some assumed analogy, or mistaken notions of law, this practice of protesting inland bills has now become very generally prevalent; and since the inundation of the country with bank transactions, and the general resort to this mode of exposing the breaches of punctuality which occur upon **574** notes, a solemnity, cogency, and legal effect, have been given to such protests in public opinion, which certainly has no foundation in the law-merchant. The nullity of a protest on the legal obligations of the parties to an inland bill, is tested by the consideration, that independently of statutory provision (if any exists anywhere), or conventional understanding, the protest on an inland bill is no evidence in a court of justice of either of the incidents which convert the conditional undertaking of an indorser into an absolute assumption.

The protest belongs altogether to foreign mercantile transactions, upon which, on the contrary, it is an indispensable incident to making a drawer of a bill, or indorser of a note, liable. On foreign bills, it is the evidence of demand, and an indispensable step towards the legal notice of non-payment, in consequence of which the undertaking of the drawer or indorser becomes absolute. Hence, as to foreign transactions, it is justly predicated of a protest, that it has a legal or binding effect.

But the writing under consideration has reference, exclusively, to inland bills, and as to them, the protest has no legal or binding effect. The indorser became liable, only on demand and notice, and of these facts the protest is no evidence. How, then, shall the waiver of the protest be adjudged a waiver of demand and notice, or in effect convert his conditional into an absolute undertaking?

Had the defendant omitted one word from his undertaking, it would have been difficult to maintain an affirmative answer to this proposition. But what are we to understand him to intend, when he says, "I will consider myself bound in the same manner as if said notes had been, or should be legally protested?" Except as to foreign bills, a protest has no legal binding effect, and as to them, it is evidence of demand, and incident to legal notice. It either then had this meaning, or it had none.

This reasoning, it may be said, goes no farther than to a waiver of the demand, but what effect is to be given to the word bound? It must be to pay the debt, or it means nothing. But to cast on the indorser of a foreign bill an obligation to take it up, protest alone is not sufficient; he is still entitled to a reasonable notice in addition to the technical notice communicated by the protest. To bind him to pay the debt, all these incidents were indispensable, and may, therefore, be well supposed to have been in contemplation of the parties, when entering into this contract.

It is not unworthy of remark, that the writing under consideration asks a boon of the plaintiff, for which it tenders a consideration. It requests to be exempted from an expense, exposure, or mortification, on the one hand; and on the other, what is tendered in return? The intended object and conceived effect of the protest on the one hand, is to convert his undertaking into an unconditional assumption, and the natural return is to make his undertaking at once absolute, as the effectual means of obtaining the benefits solicited.

If this course of reasoning should not be held conclusive, it would at least be sufficient to prove the language of the undertaking **[\*576]** equivocal; and that the sense in which the parties used the words in which they express themselves, may fairly be sought in the practical exposition furnished by their own conduct, or the conventional use of language established by their own customs or received opinions.

On this point the evidence proves, that, by the understanding of both parties, this writing did dispense with demand and refusal, that the company on the one hand discontinued their practice of putting the notes indorsed by defendant in the usual course for rendering his assumption absolute, and the defendant, on the other, continued up to the last moment to acquiesce in this practice, by renewing his indorsements without ever requiring demand or notice. This was an unequivocal acquiescence in the sense given by the company to his undertaking, and he cannot be permitted to lie by, and lull the company into a state of security, of which he might, at any moment, avail himself, after making the most of the credit thus acquired.

*Judgment reversed, and venire facias de novo awarded.*

Cited—4 How. 282; 1 McLean, 334.

[\*LOCAL LAW.]

[\*577]

CLARK ET AL. v. GRAHAM.

A power to convey lands must possess the same requisites, and observe the same solemnities, as are necessary in a deed directly conveying the lands.

A title to lands can only be acquired and lost according to the laws of the state in which they are situate.

The laws of Ohio require all deeds of land to be executed in the presence of two witnesses, and a deed executed in the presence of one witness only is void.

A parol exchange of lands, or parol evidence, that a conveyance should operate as an exchange, will not convey any estate or interest in lands.

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MR. JUSTICE TODD delivered the opinion of the court in this cause, which was submitted without argument:

This is an action of ejectment brought in the Circuit Court for the District of Ohio. At the trial, the plaintiff proved a title sufficient in law, *prima facie*, to maintain the action. The controversy turned altogether upon the title set up by the defendants. That title was as follows: A letter of attorney, purporting to be executed by John Graham, bearing date the 23d of September, 1805, authorizing Nathaniel Massie to sell all his estate, &c., in all his lands in Ohio. This power was executed in the presence of two witnesses in Richmond, in Virginia, and was there acknowledged by Graham before a notary public.

**578\***] \*Nathaniel Massie, by a deed dated the 7th day of June, 1810, and executed by him in Ohio, in his own right, as well as attorney to John Graham, conveyed to one Jacob Smith, under whom the defendants claimed the land in controversy. This deed was executed in the presence of one witness only, and was duly acknowledged and recorded in the proper county in Ohio. The deed and letter of attorney so executed and acknowledged, were offered in evidence by the defendants, and were rejected by the court, upon the ground that they were not sufficient to convey lands according to the laws of Ohio. The defendants also offered in evidence a deed from Jacob Smith and wife, to the said Graham, dated the 7th of March, 1811, duly witnessed, acknowledged, and recorded, conveying a certain tract of land in Ohio, and offered farther to prove, that the tract of land so conveyed was given in exchange for and in consideration of the lands conveyed by the deed first mentioned to Smith. This evidence, also, was rejected by the court. A bill of exceptions was taken to these proceedings by the defendants; and the jury found a verdict for the plaintiff, upon which a judgment was entered for the plaintiff, and the present writ of error is brought by the defendants to revise that judgment.

The principal question before this court, is, whether the deed so executed by Massie was sufficient to convey lands by the laws of Ohio. If not, it was properly rejected; if otherwise, the judgment should be reversed. Two objec-

tions have been taken to the \*execution [**\*579** of this deed; first, that the power of attorney was not duly acknowledged, as every deed is required to be in Ohio in order to convey lands; and if so, then the subsequent conveyance is void, for it is a general principle, that a power to convey lands must possess the same requisites, and observe the same solemnities, as are necessary in a deed directly conveying the lands. On this objection, which is apparently well founded, it is unnecessary to dwell, as another objection is fatal; that is, the deed of Massie was executed in the presence of one witness only, whereas the law of Ohio requires all deeds for land to be executed in the presence of two witnesses. It is perfectly clear, that no title to lands can be acquired or passed, unless according to the laws of the state in which they are situate. The act of Ohio regulating the conveyance of lands, passed on the 14th of February, 1805, provides, "that all deeds for the conveyance of lands, tenements, and hereditaments, situate, lying, and being within this state, shall be signed and sealed by the grantor in the presence of two witnesses, who shall subscribe the said deed or conveyance, attesting the acknowledgment of the signing and sealing thereof; and if executed within this state, shall be acknowledged by the party or parties, or proven by the subscribing witnesses, before a judge of the Court of Common Pleas, or a justice of the peace in any county in this state." Although there are no negative words in this clause, declaring all deeds for the conveyance of lands executed in any other manner to be void, yet this must be necessarily inferred from the \*clause in the absence of all words [**\*580** indicating a different legislative intent, and in point of fact such is understood to be the uniform construction of the act in the courts of Ohio. The deed, then, in this case, not being executed according to the laws of the state, the evidence was properly rejected by the Circuit Court.

The remaining point, as to the rejection of the evidence of the deed from Smith to Graham, and the proof to show that it was given in exchange for the land in controversy, has not been much relied on in this court. It is, indeed, too plain for argument, that if a deed imperfectly executed would not convey any

NOTE.—An agent cannot bind his principal by deed, unless he has authority by deed to do so. The only exception to the rule that the authority to execute a deed must be by deed, is where the agent or attorney affixes the seal of the principal in his presence and by his direction.

Co. Litt. 52. a.; Harrison v. Jackson, 7 Term R. 209; 5 Mass. R. 40; 1 Comyn's Dig. tit. Attor., c. 1, c. 5; Ball v. Dunsterville, 4 Term R. 313; Mackay v. Bloodgood, 9 John. R. 285; Liverm. on Agency, 35; 2 Kent's Comm. 478; 7 Cow. 453; Stergity v. Eggington, 1 Holt, 141; Banorgue v. Hovey, 5 Mass. 14; Hanford v. McNair, 9 Wend. 54; Blood v. Goodrich, 9 Wend. 68; Combe's Case, 9 Co. Rep. 75, 77; Paley on Agency, by Lloyd, 157, 158; Damon v. Granby, 2 Pick. 345; Reed v. Van Ostrand, 1 Wend. 424; Blood v. Goodrich, 12 Wend. 525; Cooper v. Rankin, 5 Binn. 613; Gordon v. Bulkley, 14 Serg. & R. 331; Hunter v. Parker, 7 Mees. & W. 322, 343; Wills v. Evans, 20 Wend. 251; McNaughton v. Partridge, 11 Ohio R. (Stanton) 223; Cummings v. Cassily, 5 B. Munr. 75; Hibblewhite v. McMorine, 6 Mees. & W. 200, 214, 215; Skinner v. Dayton, 19 John. 512; Cady v. Shepherd, 11 Pick. 400; Story on Agency, s. 49-51.

The title to land can be acquired and lost only in the manner prescribed by the law of the place  
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where such land is situate. Morris v. Marmor, 7 Pet. 554, 564; Society, &c., v. Wheeler, 2 Gall. 105, 138; U. S. v. Crosby, 7 Cranch, 115; Oakey v. Bennett, 11 How. 33; 14 Vesey, 537, 541; Johnson v. McIntosh, 8 Wheat. 543. Title by devise can be acquired only under a will duly proved and recorded according to the law of the state in which the lands lie. McCormick v. Sullivant, 10 Wheat. 192; Darby v. Mayer, 10 Wheat. 465.

Title to lands in Ohio cannot be devised by will, except under and in accordance with the laws of Ohio. Kerr v. Moon, 9 Wheat. 565.

This court has uniformly adopted the decisions of the state tribunals, respectively, in the construction of their statutes. This has been done in all cases where the decision of a state court has become a rule of property. Green v. Neal, 6 Peters, 291; Elmendorf v. Taylor, 10 Wheat. 152.

A power to sell, so far as it gives directions as to persons, time and mode of execution, must be strictly pursued. Waldron v. Chastaney, 2 Blatchf. 62; Williams v. Peyton, 4 Wheat. 77; Rule v. Parker, 1 Cooke, 365.

As to the mode of the execution of powers, see note to Williams v. Peyton, 4 Wheat. 77.



estate or interest in the land, a parol exchange, or parol proof of an intention to convey the same in exchange, cannot be permitted to have any such effect.

*Judgment affirmed with costs.*

Cited—6 Otto, 298, 635.

[LOCAL LAW.]

PRESTON'S HEIRS *v.* BOWMAR.

It is a universal rule, that course and distance yield to natural and ascertained objects.

But where these objects are wanting, and the course and distance cannot be reconciled, there is no universal rule that obliges us to prefer the one to the other.

Cases may exist in which the one or the other may be preferred according to the circumstances.

In a case of doubtful construction, the claim of the party in actual possession ought to be maintained, especially where it has been upheld by the decisions of the state tribunals.

581\*] **E**RROR to the Circuit Court of Kentucky.

This was an ejectment brought in the court below, in which the lessor of the plaintiff claimed title under a patent, describing the survey as "beginning at an ash in the middle of a line of Glenn's land, and with it north 20 degrees, east 800 poles, crossing three branches to a hoop wood and sugar tree corner to Moffat's land, and with a line thereof north 70 degrees, west 100 poles, crossing the creek to a sugar tree south 33 degrees, west 820 poles, crossing three forks of the creek to two sugar trees, south 70 degrees, east 300 poles, to the beginning." The question arising upon the construction of this patent, is stated in the opinion of the court.

This cause was argued by *Mr. B. Hardin* for the plaintiff, and by *Mr. Talbot* for the defendant.

*Mr. Justice STORY* delivered the opinion of the court:

Whatever might be our opinion (and we wish to be understood as expressing none) if the question in this case were entirely new, it cannot be affirmed, that there has been such a clear mistake of construction as that justice and law require us to depart from the decision of the local tribunals. The question here is, whether the third and fourth lines of this patent (following the order of the lines as they are given in the patent) are to be continued upon the courses called for by the patent until they intersect, or whether the fourth line is to be extended from the beginning to the distance called for by 582\*] the patent, and then the closing line is to be drawn, so as to strike the termination of the second and fourth lines at the patent distances. In the former case, the fourth line will be longer than the distance called for by the patent; in the latter, the third line will vary from the course called for by the patent. The counsel have stated, that the question resolves itself into this, whether the course shall yield to distance, or distance to the course. It may be laid down as an universal rule, that course and distance yield to natural and ascer-

tained objects. But where these are wanting, and the course and distance cannot be reconciled, there is no universal rule that obliges us to prefer the one or the other. Cases may exist in which the one or the other may be preferred upon a minute examination of all the circumstances. In the present case, whichever construction is adopted, the plaintiffs will hold a larger portion of land than their patent calls for. We must consider that the construction of the patent is somewhat doubtful. That it is susceptible of two constructions, each of which has some reasons to support it. If it be doubtful, it would seem reasonable not to press the broadest construction against a party who is now in actual possession under a perfectly good legal title. That possession ought not to be ousted without a clear title in the other party, especially where it has been upheld by the state tribunals. This very case, between the same parties, has been already adjudicated in the Court of Appeals of Kentucky, and that court, upon full deliberation, decided \*in favor [\*583 of the defendant.<sup>1</sup> It would be a great mischief for the same title to be in perpetual litigation from the conflict of opinion between the courts of the state and the federal courts; and we, therefore, acquiesce in the opinion of the Court of Appeals, upon the ground that the point is one of local law, has been fully considered in that court, and is a construction which cannot be pronounced unreasonable, or founded in clear mistake.

*Judgment affirmed.*

Aff'g. 2 Bibb. 493.

Cited—9 How. 469; 5 Wall. 836; 23 Wall. 62; 2 Story, 291.

[CONSTRUCTION OF STATUTE.]

OTIS *v.* WALTER.

Under the embargo act of the 25th April, 1808, c. 170 [lxvi.], if a vessel, not actually arriving at her port of original destination, excites an honest suspicion in the mind of the collector, that her demand of a permit to land the cargo was merely colorable, this is not a termination of the voyage so as to preclude the right of detention.

Under what circumstances the collector has a right to land the cargo of the vessel thus detained.

**T**HIS cause was argued by the *Attorney-General* for the plaintiff in error, and by *Mr. Webster* and *Mr. Wheaton* for the defendant in error.<sup>2</sup>

\**Mr. Justice LIVINGSTON* delivered [\*584 the opinion of the court:

This is an action of trover brought by the defendant in error, against the plaintiff and others, in the Court of Common Pleas, held at Boston, within and for the county of Suffolk, to recover the value of eighty-six barrels of flour, and sundry other articles, in which judgment was recovered against the plaintiff in error, from which judgment there was an ap-

1.—Preston's heirs *v.* Bowmar, 2 Bibb. Rep. 493.

2.—They cited *Otis v. Bacon*, 7 Cranch, 596; *Crowell v. M'Faddon*, 8 Cranch, 98; *Slocum v. Mayberry*, 2 Wheat. Rep. 11.

peal to the Supreme Judicial Court, which is the highest court of law in the commonwealth of Massachusetts, in which judgment was rendered against the plaintiffs in error, for the sum of \$2,488.75 and costs of suit, and in favor of the other defendants. On the judgment, the defendant below, William Otis, has prosecuted a writ of error to this court, under the 25th section of the judiciary act of the United States; and we are now to decide whether there was any error in the direction given by the judge before whom this action was tried, and which appears on the bill of exceptions attached to the record in this cause.

The property in question had been seized by William Otis, a deputy-collector of the customs for the port and district of Barnstable, in the commonwealth of Massachusetts, under the 11th section of an act in addition to the act entitled, "An act laying an embargo on all ships and vessels in the ports and harbors of the United States;" and the several acts supplementary thereto, and for other purposes, passed the 25th April, 1808. On the bill of exceptions, the following facts appear: On the part **585\*** of the \*plaintiff, Lynde Walter, it was proved, that the goods mentioned in the declaration were his property; that they were put on board of the sloop Ten Sisters, at Ipswich, in Massachusetts, bound for the port of Yarmouth; that it was agreed or understood between Walter and Hallett, who was master of the sloop, that the latter was to carry said goods to Barnstable, or to a place called Bass River, in Yarmouth, with orders to sell the same, provided he could obtain a certain price fixed by Walter, otherwise to deliver them to Freeman Baker, of Yarmouth; that said sloop, on the 19th November, 1808, cleared out at Ipswich to proceed to the port of Yarmouth as expressed in the clearance obtained from the collector at that place; that said sloop proceeded round Cape Cod to Hyannis, in the town and district of Barnstable, and the master applied to William Otis, a deputy-collector for that port and district, for a permit to land the cargo, which he refused to give, but ordered him not to discharge anything from the sloop, until he should have a permit so to do. That in a day or two afterwards, Otis came on board the sloop with four men, and seized sloop and cargo, and putting a pilot and crew on board, he sent her to Falmouth, in the district of Barnstable, where Otis had the cargo discharged and stored, in, and under a dwelling-house in Falmouth; the master forbidding Otis to meddle with the sloop or cargo. The master also exhibited to Otis his manifest, and swore to the correctness of the same.

On the part of Otis, it was proved, that he was deputy-collector for Barnstable; that on the **586\*** 29th November, \*1808, he duly reported to the President of the United States, the detention of this sloop and her cargo, under and by virtue of the act above mentioned, which detention was confirmed and approved by the President, on the 8th of December, 1808. That the sloop, when seized, lay at anchor about half a mile from the shore or beach, which is in the town and port of Barnstable, near the centre thereof, six miles distant from Bass River, on which Freeman Baker's house and store are situated, and about five miles from

the harbor of Yarmouth. That Freeman Baker's landing is situated above a quarter of a mile from the mouth of Bass River, on said river, in the town of Yarmouth, about six miles and an half by water, from where the sloop was seized, and lies to the eastward of Point Gammon. Hyannis, where the vessel was seized, is westward of Point Gammon, and in the towu of Barnstable. That the sloop when seized, had not arrived at the harbor of Yarmouth, but was lying in the port or harbor of Barnstable, about three miles from the harbor of Yarmouth, which lies east north-east from the port of Barnstable, and the sloop on her way from Ipswich to the place where she was seized, passed the place from which she was cleared, because the weather would not permit the master to get her either into the harbors of Bass River, or Gage wharf, and because he lived near Hyannis, and wished to see his family, and to lay his vessel in a safe place, and to land certain articles of bedding, &c., from the vessel, as it was his intention to strip the vessel when she arrived at Yarmouth. After the master arrived in \*Hyannis [**587** Bay, it was his intention to land his cargo at Gage wharf, which is in the town of Yarmouth, about three rods distant from the line of Barnstable, and about six miles and a half from the place where the sloop was anchored when seized. Between Yarmouth harbor or Bass River harbor, and Hyannis, or Barnstable harbor, where the vessel was seized, is a long point of land, called Point Gammon, extending several miles into the sea, and the distance by the nearest course of the ship channel, or deep water, from Bass River to Hyannis, is ten miles, and in going from Ipswich to Hyannis, the sloop passed Bass River harbor, or Yarmouth harbor and Point Gammon. The cargo, when stored by the collector, was some of it in bad and perishable condition, and was put in better order by coopering, &c., before being stored.

On this evidence the jury were charged, that under the clearance, the captain had a right to go to any part of Yarmouth with his vessel, notwithstanding it might have been the intention of him and the owner, that she should go to Bass River in that town; that if she had been carried beyond Bass River by force of the winds, and contrary to the master's intention, and came to anchor in Hyannis Bay, within the limits of the towu of Barnstable, for that cause, still, if the jury believed that, in consequence of this state of things, the captain had concluded to give up his intention of going to Bass River, and in lieu thereof, to carry his vessel to Gage's wharf, which is within the town of Yarmouth, on the same side of Point Gammon as Barnstable, and to all substantial \*pur- [**588** poses, the same harbor; and for this purpose, was waiting only for a proper opportunity to take the vessel into that wharf, they might justly and fairly determine that the voyage was terminated at the time Otis took possession of the vessel.

Whether this part of the charge were correct, will depend on the true construction of the 11th section of the act of Congress, under which this seizure was made, and which has already been referred to. Its language is, "that the collectors of the customs be, and they are



hereby respectively authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever, in their opinion, the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the President of the United States be had thereupon.

Of the ostensible destination of the Ten Sisters, at the time of her leaving Ipswich, there can be no doubt. This, from the manifest and clearance, was Yarmouth or Bass River. What better evidence, then, could Otis have of this fact, than that which he acquired from an inspection of these papers. If, then, such was her ostensible destination at the time of her sailing from Ipswich, and she had not arrived at Yarmouth or Bass River at the time of seizure, it would seem that he would have a right, under the provisions of this section, to detain the Ten Sisters, if in his opinion an intention existed of violating the embargo laws. It is not pretended, that this was not his real opinion, or that, for an honest exercise of such an opinion, he ought to be punished. There **589\*** is a confidence placed in the discretion of a collector, in cases of this kind, which may be abused, but which ought to protect him from loss when there is no reason to believe, as there is not in this case, that the detention proceeded from sinister motives, and not from a conscientious desire of discharging his duty. To subject a collector, or any public officer, to such an imputation, when acting under a discretion thus reposed in him, the circumstances ought to be such as almost to preclude the possibility of his having acted but from some unworthy or dishonorable motive. The court is much mistaken, if the facts in this case are such as to lead to this conclusion. The only question, then, is, whether the circumstances were such at the time of seizure, as to confer on the collector, or his deputy, the right of acting under the influence of an opinion, that such illegal intention existed. But it is supposed that the Ten Sisters had substantially terminated her voyage, or that being driven beyond Point Gammon into Hyannis Bay, she might lawfully terminate her voyage, and land her cargo at Barnstable. If a permit had been obtained to land her cargo at Barnstable, this argument would be entitled to much consideration; but when the master of a vessel, bound by her papers to one port, applies for a permit to land her cargo at another place, he cannot, in that way, deprive the collector of considering the vessel as still *in itinere*, to her original port of destination, and if he suspects such application to be a mere pretense to conceal some illicit object, he has as good a right to make the **590\*** seizure as if a permit had not been applied for. In the case of *Otis v. Bacon*, 7 Cranch, 596, a permit to land the cargo had been granted before any seizure took place, which was considered by the court as evidence of the termination of the voyage, and that she could not, thereafter, be considered as actually or ostensibly bound to any other port. Nor can the exhibition of the manifest, or swearing to its contents, be considered as equivalent to a permit to land the goods. It might, on the contrary, furnish evidence, as it did here, of an ostensible destination from one port of the United States to another, where she had not yet

arrived, and in which case the collector had authority to act; nor was he bound to believe, merely from that circumstance, or from the then situation of the vessel, that such destination was abandoned. On a former trial of this cause, no clearance was produced, and the only testimony on this subject came out on the examination of the master, who declared that the vessel was bound to Yarmouth or Barnstable. Upon the whole, this court is of opinion, that the learned judge who tried the cause committed an error in telling the jury that they might fairly and justly determine the voyage was terminated at the time of seizure, if they believed the captain had given up his intention of going to Bass River, and had determined to land his cargo at Gage's wharf, which, though within the boundary of Yarmouth, is in fact in the harbor of Barnstable, and that he was waiting only for a proper opportunity to take the vessel into that wharf. Now, this was placing the termination of the voyage, not on the fact of its having **\*actually ended**, but on an **[\*591]** intention of the master, of which it was impossible the collector could know anything with certainty, who was to judge of his right and duty to make the seizure only from the papers of the vessel, and the situation in which she was found, which is admitted to have been short of her destined port. But if a secret intention of the master be permitted to be set up as a ground of decision, and this, too, contrary to the written evidence in the cause, on which alone a public officer can act with safety, he would always be exposed to risks which might deter him from acting altogether. The jury, therefore, should have been left to decide from the other evidence in the cause, independent of any secret, or even declared, intention in the mind of the master, whether the ostensible voyage was terminated or not; and it seems difficult to conceive how their decision could have been otherwise than favorable to Otis. In this part of the charge, therefore, the court is of opinion, there is error.

Another part of the court's construction to the jury is also complained of; it is, that in which the Chief Justice remarks, that the collector has no authority, without the consent of the master, or person having the care of the cargo, to unlade it from the vessel and store it. It is not known what influence this opinion had on the jury; but in the unqualified terms in which the collector's right to unlade the cargo is denied, this court does not concur. We have already decided, that with the consent of the master, or agent of the owner, the cargo may be landed, but it was not intended to say, that in no other case **\*could such landing** **[\*592]** and storing be justifiable. If it appear that the collector, during the detention of the vessel, shall, *bona fide*, think it will tend to the security and preservation of the property to unlade it, and will do it at his own expense, it is not perceived why he may not do so, but at the peril of such an act being regarded, *per se*, as a conversion of the property. At any rate, this consequence ought not to follow, unless it shall appear that the property was lost or injured in consequence of such landing. That not appearing to have been the case here, it is not necessary to say what effect such a circumstance could have had in this suit. All that it

is intended to say here, is, that a landing for the purposes, and under the circumstances which appear on this record, is not of necessity, or in itself, a conversion.

*Judgment reversed, and a venire facias de novo awarded.*<sup>1</sup>

Cited—11 Wheat. 192.

593\*] [\*LOCAL LAW.]

GOSZLER

v.

THE CORPORATION OF GEORGETOWN.

The power given to the corporation of Georgetown, by the act of Maryland, of November, 1797, c. 56, to graduate the streets of that city, is a continuing power, and the corporation may from time to time alter the graduation so made.

The ordinance of May, 1799, by which the corporation of Georgetown first exercised the power of graduating the streets, is not in the nature of a compact, and may be altered by the corporation.

THIS cause was argued by *Mr. Key* for the appellant, and by *Mr. Jones* for the respondent.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the county of Washington, in the District of Columbia, on the following case:

In the year 1797, the legislature of Maryland, among certain additional powers given to the corporation of Georgetown, enacted, that they "shall have full power and authority to make such by-laws and ordinances for the graduation and leveling of the streets, lanes and alleys within the jurisdiction of the same town, as they may judge necessary for the benefit thereof." (Act of Nov., 1797, c. 56, sec. vi., p. 35.)

In pursuance of this authority, the corporation 594\*] tion \*passed an ordinance in May, 1799, for the graduation of certain streets—the first section of which appoints commissioners, and authorizes them "to make the level and graduation of the streets;" and the second is in these words:

"And be it ordained, that the said level and graduation, when signed by the said commissioners or a majority of them, and returned to the clerk of this corporation, shall be forever thereafter considered as the true graduation of the streets so graduated, and be binding upon this corporation, and all other persons whatever, and be forever thereafter regarded in making improvements upon said streets."

The plaintiff in error owned lots upon one of these streets, and made improvements thereon, according to the graduation made and returned to the clerk of the corporation, under the directions of this ordinance. In September, 1816, the corporation passed another ordinance, directing the level and graduation of this street to be altered; and the commissioners appointed, being about to cut down the street by the plaintiff's house, were enjoined from proceeding

by a bill filed by the plaintiff against them and the corporation.

Upon the final hearing of this case, the Circuit Court dismissed the bill, being of opinion that the corporation had the power asserted in their answer, of altering the level and graduation of a street graduated under their former ordinance of May, 1799.

The counsel for the appellant contends, that the Circuit Court erred in dismissing his bill, because,

1st. The power to graduate streets as given by \*the legislature of Maryland, was not [\*595 a continuing power, but was completely executed by the ordinance of May, 1799, and has never been renewed.

2d. The ordinance of May, 1799, is in the nature of a compact, and is unalterable.

1. The language of the act certainly does not imply that the power it confers is exhausted in its first exercise. The power is not "to graduate and level the streets," or "to make a by-law for the graduation and leveling of the streets;" but "to make such by-laws and ordinances for the graduation and leveling of the streets, &c., within the jurisdiction of the same town, as they may judge necessary for the benefit thereof."

The act seems to contemplate a continuance of the power, and a repetition of the by-laws and ordinances, as the corporation "may judge necessary for the benefit of the town." It gives a power to legislate on the subject, and to pass more than one by-law and ordinance respecting it. Unless, then, there be in the nature of the operation something which forbids its repetition, the words of the act import no such prohibition.

There can be no doubt that the power of graduating and leveling the streets ought not to be capriciously exercised. Like all power, it is susceptible of abuse. But it is trusted to the inhabitants themselves, who elect the corporate body, and who may therefore be expected to consult the interests of the town.

Although this power may be oppressively repeated, the possession of it cannot be pronounced so improper \*or so dangerous [\*596 as to control, essentially, the words which confer it. The graduation and leveling of the streets, is not, necessarily, a single operation. There may be circumstances to produce a general desire to vary the graduation, to bring the streets more nearly on a level than was contemplated in the first ordinance; and, if this may occur, we cannot say that the legislature could not intend to give this power of varying the graduation, when the words they employ are adapted to the giving of it.

Two acts of Congress for amending the charter of Georgetown have been relied on. That passed in January, 1805, empowers the corporation "to open and extend, and regulate streets within the limits of the said town, provided they make to the person or persons who may be injured by such opening, extension, or regulation, just and adequate compensation, to be sustained by the verdict of an impartial jury, summoned," &c., "who shall proceed in like manner, as has been usual in other cases, where private property has been condemned for public use."

For the corporation, it has been contended,

1.—*Vide Ante*, Vol. II., p. 18.  
Wheat. 6.



that the word "regulate" implies some operation on the streets themselves, or is entirely senseless; and if it implies any such operation, it must comprehend their graduation.

The objection made by counsel to this argument, is, the improbability that the word "regulate" would be substituted for "graduate," if it were used in the same sense; and the words directing the duty of the jury. They are to "proceed in like manner as has been usual in other cases, where private property has **597**"] \*been condemned for public use." The word "regulate," then, it is said, is shown by this expression to be applicable only to those cases in which private property is condemned to public use, which is not done in graduating a street.

This construction is supposed to be strengthened by the act of 1809, which again empowers the corporation "to lay out, open, extend, and regulate streets, lanes and alleys," but confines the use of the jury for assessing damages to those sustained "by reason of opening or extending any street, lane or alley."

The opinion that the original power continues after its first exercise, renders it unnecessary to decide on the extent which may and ought to be given to the word "regulate."

2. The second point presents a question of some difficulty. One object of the ordinance probably was, to give as much validity to the graduation made by the commissioners as if it had been made under the direct superintendence of the corporate body. But it cannot be disguised, that a promise is held forth to all who should build on the graduated streets, that the graduation should be unalterable. The court, however, feels great difficulty in saying, that this ordinance can operate as a perpetual restraint on the corporation.

When a government enters into a contract, there is no doubt of its power to bind itself to any extent not prohibited by its constitution. A corporation can make such contracts only as are allowed by the acts of incorporation. The **598**"] power of this body to make \*a contract which should so operate as to bind its legislative capacities forever thereafter, and disable it from enacting a by-law, which the legislature enables it to enact, may well be questioned. We rather think that the corporation cannot abridge its own legislative power.

*Decree affirmed.*

Cited—11 Pet. 569; 10 How. 535; 16 How. 403; 7 Bank. Reg. 426; 2 Dill. 89; 7 Biss. 483.

#### [CONSTITUTIONAL LAW.]

#### M'CLUNG v. SILLIMAN.

A state court cannot issue a *mandamus* to an officer of the United States.

THIS cause was argued by *Mr. Harper* for the plaintiff in error, and by *Mr. Doddridge* for the defendant.

*Mr. Justice JOHNSON* delivered the opinion of the court:

This case presents no ordinary group of legal questions. They exhibit a striking specimen of the involutions which ingenuity may cast about legal rights, and an instance of the growing preteusions of some of the state courts over the exercise of the powers of the general government.

The plaintiff in error, who was also the plaintiff \*below, supposes himself enti- [**599** tled to a pre-emptive interest in a tract of land in the state of Ohio, and claims of the register of the land-office of the United States, the legal acts and documents upon which such rights are initiated. That officer refuses, under the idea that the right is already legally vested in another; and that he possesses, himself, no power over the subject in controversy. A *mandamus* is then moved for in the Circuit Court of the United States, and that court decides, that Congress has vested it with no such controlling power over the acts of the ministerial officers in the given case. The same application is then preferred to the state court for the county in which the subject in controversy is situated. The State Court sustains its own jurisdiction over the register of the land-office, but on a view of the merits of the claim, dismisses the motion.

From both these decisions appeals are made to this court, in form of a writ of error.

In the case of *M'Intire v. Wood*,<sup>1</sup> decided in this court, in 1813, the *mandamus* contended for was intended to perfect the same claim, and in point of fact the suit was between the same parties. The influence of that decision on these cases, is resisted, on the ground that it did not appear, in that case, that the controversy was between parties who, under the description of person, were entitled to maintain suits in the courts of the United States; whereas, the averments in the present cases, show that the parties litigant are citizens of different states, and, \*therefore, competent parties in the Cir- [**600** cuit Court. But we think it perfectly clear, from an examination of the decision alluded to, that it was wholly uninfluenced by any considerations drawn from the want of personal attributes of the parties. The case came up on a division of opinion, and the single question stated is, "whether that court had power to issue a writ of *mandamus* to the register of a land-office in Ohio, commanding him to issue a final certificate of purchase to the plaintiff for certain lands in the state."

Both the argument of counsel, and the opinion of the court, distinctly show, that the power to issue the *mandamus* in that case, was contended for as incident to the judicial powers of the United States. And the reply of the court is, that though, *argumenti gratia*, it be admitted that this controlling power over its ministerial officers would follow from vesting in its courts the whole judicial power of the United States, the argument fails here, since the legislature has only made a partial delegation of its judicial powers to the circuit courts; that if the inference be admitted as far as the judicial power of the court actually extends, still, cases arising under the laws of the United States are not, *per se*, among the cases comprised within the jurisdiction of the Circuit Court, under the

1.—7 Cranch, 504.

provisions of the 11th section; jurisdiction being in such cases reserved to the Supreme Court, under the 25th section, by way of appeal from the decisions of the state courts.

There is, then, no just inference to be drawn from the decision in the case of *M'Intire v. Wood*, in favor \*of a case in which the circuit courts of the United States are vested with jurisdiction under the 11th section. The idea is in opposition to the express words of the court, in response to the question stated, which are, "that the Circuit Court did not possess the power to issue the *mandamus* moved for."

It is now contended, that as the parties to this controversy are competent to sue under the 11th section, being citizens of different states, that this is a case within the provisions of the 14th section, and the Circuit Court was vested with power to issue this writ, under the description of a "writ not specially provided for by statute," but "necessary for the exercise of its jurisdiction." The case certainly does present one of those instances of equivocal language, in which the proposition, though true in the abstract, is in its application to the subject glaringly incorrect. It cannot be denied, that the exercise of this power is necessary to the exercise of jurisdiction in the court below; but why is it necessary? Not because that court possesses jurisdiction, but because it does not possess it. It must exercise this power, and compel the emanation of the legal document, or the execution of the legal act by the register of the land-office, or the party cannot sue.

The 14th section of the act under consideration, could only have been intended to vest the power now contended for, in cases where the jurisdiction already exists, and not where it is **602\*** to be courted or \*acquired, by means of the writ proposed to be sued out. Such was the case brought up from Louisiana, in which the judge refused to proceed to judgment, by which act, the plaintiff must have lost his remedy below, and this court have been deprived of its appellate control over the question of right.

The remaining questions bear a striking analogy to that already disposed of.

The State Court having decided in favor of its own jurisdiction over the register, the appellant, so far, had nothing to complain of. It is only where a state court decides against the claim set up under the laws of the United States, that appellate jurisdiction is given from the state decisions. But in the next step of his progress, he was not equally fortunate. The state court rejected his application on the merits of his claim, and appear to have decided that an entire section might be divided into fractions, by the river Muskingum, in a legal sense. Of this he now complains, and contends that the decision is contrary to the laws of the United States.

From this state of facts, the following embarrassment arises: The United States officer, the defendant, can have no inducement to contest a jurisdiction that has given judgment in his favor; and the plaintiff in error must sustain its jurisdiction, or relinquish all claim to the relief sought for through its agency. And thus this court, with its eyes open to the defect in the jurisdiction of the court below, is called upon to take cognizance of the merits of the question, Wheat. 6.

both parties being thus equally interested in sustaining the jurisdiction asserted by that court.

\*Let the course which this court [**\*603** ought to pursue, be tested by consequences. The alternative is to give judgment for or against the plaintiff. If it be given for him, this court must invoke that court to issue the writ demanded, or pursuing the alternative given by the 25th section, it must itself proceed to execute the judgment which that court ought to have given. Or, in other words, to issue the writ of *mandamus*, in a case to which it is obvious that neither the jurisdiction of that court, nor this, extends.

No argument can resist such an obvious *deductio in absurdum*.

It is not the first time that this court has encountered similar difficulties, in its advance to questions brought up from other tribunals. It has avoided them by deciding that it is not bound to encounter phantoms. The party who proposes to avail himself of a defective jurisdiction, has nothing to complain of, if he is left to take the consequences. His antagonist might have had cause to complain—he can have none. And, notwithstanding express evidence of the contrary, this court feels itself sanctioned, in referring the decision of the State Court, in this case, to the ground on which it ought to have been made, instead of that on which it appears to have been made. The question before an appellate court is, was the judgment correct, not the ground on which the judgment professes to proceed.

Whether a state court generally possesses a power to issue writs of *mandamus*, or what modifications of its powers may be imposed on it, by the laws which constitute it, it is correctly argued, that this court \*cannot be called [**\*604** upon to decide. But when the exercise of that power is extended to officers commissioned by the United States, it is immaterial under what law that authority be asserted, the controlling power of this court may be asserted on the subject, under the description of an exemption claimed by the officer over whom it is exercised.

It is not easy to conceive on what legal ground a state tribunal can, in any instance, exercise the power of issuing a *mandamus* to the register of a land-office. The United States have not thought proper to delegate that power to their own courts. But when in the cases of *Marbury v. Madison*, and that of *M'Intire v. Wood*, this court decided against the exercise of that power, the idea never presented itself to anyone, that it was not within the scope of the judicial powers of the United States, although not vested by law, in the courts of the general government. And no one will seriously contend, it is presumed, that it is among the reserved powers of the states, because not communicated by law to the courts of the United States.

There is but one shadow of a ground on which such a power can be contended for, which is, the general rights of legislation which the states possess over the soil within their respective territories. It is not now necessary to consider that power, as to the soil reserved to the United States, in the states respectively. The question in this case is, as to the power of



the state courts over the officers of the general government, employed in disposing of that land, under the laws passed for that purpose. And **605\***] here it is obvious that \*he is to be regarded either as an officer of that government, or as its private agent. In the one capacity or the other, his conduct can only be controlled by the power that created him; since, whatever doubts have from time to time been suggested, as to the supremacy of the United States, in its legislative, judicial, or executive powers, no one has ever contested its supreme right to dispose of its own property in its own way. And when we find it withholding from its own courts, the exercise of this controlling power over its ministerial officers, employed in the appropriation of its lands, the inference clearly is, that all violations of private right, resulting from the acts of such officers, should be the subject of actions for damages, or to recover the specific property (according to circumstances), in courts of competent jurisdiction. That is, that parties should be referred to the ordinary mode of obtaining justice, instead of resorting to the extraordinary and unprecedented mode of trying such questions on a motion for a *mandamus*.

JUDGMENT.—This cause came on to be heard on the transcript of the record of the Supreme Court of the state of Ohio, for Muskingum county, and was argued by counsel. On consideration whereof, it is adjudged and ordered, that the judgment of the said Supreme Court of the state of Ohio, be, and the same is hereby affirmed, with costs; it being the opinion of this court, that the said Supreme Court of the state of Ohio, had no authority to issue a *mandamus* in this case.

S. C. 3 Pet. 270; 2 Wheat. 369.

Cited—5 Pet. 202, 204, 206, 207, 210; 12 Pet. 615, 624, 649, 652, 720; 14 Pet. 601, 606; 3 Wall. 239; 6 Wall. 189, 198, 537; 13 Wall. 249; 19 Wall. 660; 12 Otto, 393; Bald. 403, 406; 5 Cranch, C. C. 172, 243, 247, 250, 255; 3 Blatchf. 169; 7 Blatchf. 433; 1 Paine, 456; 1 Bliss. 12; 7 Bank. Reg. 426; Gilp. 39; 3 Wood. & M. 328, 332; 3 Cliff. 61.

**606\***]

[\*LOCAL LAW.]

## THE MUTUAL ASSURANCE SOCIETY v.

FAXON ET AL.

Under the laws in relation to the Mutual Assurance Society of Virginia, property offered for insurance, on which the premium has not been paid, and which is sold without notice, is not liable for the premium in the hands of the vendee.

MR. JUSTICE JOHNSON delivered the opinion of the court:

This case first came up on a difference of opinion certified from the Circuit Court of Alexandria, but the writ of error was dismissed, because that court could not, in law, or the nature of things, certify such a difference to this court.

It has since passed to a final decree, and although the sum on the record is small, a special permission to appeal has been granted on cause

shown; it being a case affecting many others similarly situated.

The question is, whether property offered for insurance, in which the premium has not been paid, and which has been sold without notice, remains liable for the premium in the hands of the vendee.

The case of the *Mutual Assurance Society v. Executors of Watts*, decided in February, 1816,<sup>1</sup> in this court, is relied on as authority for maintaining the affirmative.

It is to be regretted, that the case referred to had \*not been more fully reported. As [\***607** it is not preceded by any statement of facts, abstracts of the history and laws of this society, or the arguments of counsel, the insulated, unexplained opinion of the court, as it is printed, must be ever unintelligible to all descriptions of readers, except those whose professional duties lead them to the study of the novel and extensive institution whose interests are involved in it.

But there is enough exhibited to show that it affords no precedent for the claim set up in this case. It is true, that the court occasionally uses the term *premium*, when speaking of the quota; but in every instance it will be found to be used when reasoning upon the quota as the purchase money, in part of the right of the insured to compensation, which, by analogy to other cases of insurance, is in that sense denominated a premium.

But there exists no analogy under the laws of the company between the liability of property insured for a premium and a quota.

The first is the sum paid down before the contract is entered into; the second, the occasional contribution exacted of individuals to make up the losses from time to time sustained. The 6th section of the act of December 22d, 1794, gives an express lien for the quota, and takes no notice of the premium, but as the rule for graduating the respective quotas. In the case alluded to, it was decided, that the lien thus created, had its origin in contract, although enforced by statute, and continued a mortgage on the premises, until vacated according to the provisions of the several laws which regulated the company.

\*But the very reasons upon which [\***608** that decision was placed, are fatal to the pretensions set up in this.

There is no express lien created in any of the laws of the company, and there are no provisions in any of those laws from which it could be inferred (if it were possible ever to infer a lien), but those which authorize a sale of land to satisfy the premium. But a right to sell the land is completely satisfied by subjecting it to such sale while in the hands of the first holder, and there are two of the by-laws of the company which expressly negative every pretense for carrying it any farther. The first is the 8th section, 4th article, of the act of January 29th, 1805, which requires immediate payment of the premium upon the acceptance of the declaration, and the second is, the 6th section of the 5th article, which declares, that insurance shall not commence until the premium be paid.

*Decree affirmed.*

1.—1 Wheat. Rep. 279.

Wheat 6.

## APPENDIX.

3\*]

[\*NOTE I.]

TO THE CASE OF THE AMIABLE ISABELLA, *ante*, p. 1.

*Articles of the Spanish Treaty of 1795, referred to in the Argument of the Case.*

Art. 15. It shall be lawful for all and singular the subjects of His Catholic Majesty, and the citizens, people, and inhabitants of the said United States, to sail with their ships, with all manner of liberty and security, no distinction being made who are the proprietors of the merchandises laden thereon, from any port to the places of those who now are, or hereafter shall be, at enmity with His Catholic Majesty or the United States. It shall be likewise lawful for the subjects and inhabitants aforesaid, to sail with the ships and merchandises aforementioned, and to trade with the same liberty and security from the places, ports, and havens, 4\*] \*of those who are enemies of both, or either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy aforementioned, to neutral places, but also from one place belonging to an enemy, to another place belonging to an enemy, whether they be under the jurisdiction of the same prince or under several; and it is hereby stipulated, that free ships shall also give freedom to goods, and that everything shall be deemed free and exempt which shall be found on board the ships belonging to the subjects of either of the contracting parties, although the whole lading, or any part thereof, should appertain to the enemies of either; contraband goods being always excepted. It is also agreed, that the same liberty be extended to persons who are on board a free ship, so that, although they be enemies to either party, they shall not be made prisoners or taken out of that free ship, unless they are soldiers, and in actual service of the enemies.

5\*] \*Art. 16. This liberty of navigation and commerce shall extend to all kinds of merchandises, excepting those only which are distinguished by the name of contraband; and under this name of contraband, or prohibited goods, shall be comprehended, arms, great guns, bombs with the fuses, and the other things belonging to them, cannon-ball, gunpowder, matches, pikes, swords, lances, spears, halberds, mortars, petards, grenades, saltpetre, muskets, musket-ball, bucklers, helmets, breastplates, coats of mail, and the like kinds of arms, proper for arming soldiers; musket-rests, belts, horses, with their furniture, and all other warlike instruments whatever. These merchandises which follow, Wheat. 6.

Art. 15. Se permitirá á todos y á cada uno de los subditos de S. M. Católica, y á los ciudadanos pueblos y habitantes de dichos Estados, que puedan navegar con sus embarcaciones con toda libertad y seguridad sin que haya la menor excepcion por este respeto, aunque los propietarios de las mercaderias cargadas en las referidas embarcaciones vengan del puerto que quieran, y las traygan destinadas á qualquiera plaza de una potencia actualmente enemiga ó que lo sea despues, asi de S. M. Católica como de los Estados Unidos. Se permitirá igualmente a los subditos y habitantes mencionados navegar con sus buques y mercaderias, y frequentar con igual libertad y seguridad las plazas y puertos de las potencias enemigas de las partes contratantes, ó de una de ellas sin oposicion ú obstaculo, y de comerciar no solo desde los puertos de dicho enemigo á un puerto neutro directamente, si no tambien desde uno enemigo á otro tal, bien se encuentre baxo su jurisdiccion; ó baxo la de muchos; y se estipula tambien por el presente tratado que los buques libres aseguraran igualmente la libertad de las mercaderias, y que se juzgarán libres todos los efectos que se hallasen á bordo de los buques que perteneciesen á los subditos de una de las partes contratantes, aun quando el cargamento por entero ó parte de el fuese de los enemigos de una de las dos, bien entendido sin embargo que el contrabando se exceptua siempre. Se ha convenido asi mismo que la propia libertad gozaran los sugetos que pudiesen encontrarse á bordo del buque libre, aun quando fuesen enemigos de una de las dos partes contratantes; y por lo tanto no se podrá hacerlos prisioneros ni separarlos de dichos buques á menos que no tengan la qualidad de militares, y esto hallandose en aquella sazón empleados en el servicio del enemigo.

Art. 16. Esta libertad de navegacion y de comercio debe extenderse á toda especie de mercaderias exceptuando solo las que se comprehenden baxo el nombre de contrabando, ó de mercaderias prohibidas, quales son las armas, cañones, bombas con sus mechas, y demas cosas pertenecientes á lo mismo, balas, polvora, mechas, picas, espadas, lanzas, dardos, alabardas, morteros, petardos, granadas, salitre, fusiles, balas, escudos, casquetes, corazas, cotas de malla, y otras armas de esta especie propias para armar á los soldados, portamosquetes, bandoleras, caballos con sus armas, y otros instrumentos de guerra sean los que fueren. Pero los generos y mercaderias que se nombrarán



shall not be reckoned among contraband or prohibited goods; that is to say, all sorts of cloths, and all other manufactures woven of any wool, flax, silk, cotton, or any other materials whatever; all kinds of wearing apparel, together with all species whereof they are used to be made; gold **6\***] and silver, as well coined \*as uncoined; tin, iron, latten, copper, brass, coals; as, also, wheat, barley and oats, and any other kind of corn and pulse; tobacco, and likewise all manner of spices, salted and smoked flesh, salted fish, cheese and butter, beer, oils, wines, sugars, and all sorts of salts; and, in general, all provisions which serve for the sustenance of life; furthermore, all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sail cloths, anchors, and any parts of anchors, also ships' masts, planks, and wood of all kind, and all other things proper either for building or repairing ships, and all other goods whatever, which have not been worked into the form of any instrument prepared for war, by land or by sea, shall not be reputed contraband; much less, such as have been already wrought and made up for any other use; all which shall be wholly reckoned among free goods; as likewise, all other merchandises and things which are not comprehended and particularly mentioned in the foregoing enumeration of contraband goods; so that they may be transported and carried in **7\***] the freest manner by the \*subjects of both parties, even to places belonging to an enemy, such towns or places being only excepted as are at that time besieged, blocked up, or invested. And, except the cases in which any ship of war, or squadron, shall, in consequence of storms or other accidents at sea, be under the necessity of taking the cargo of any trading vessel or vessels, in which case they may stop the said vessel or vessels, and furnish themselves with necessaries, giving a receipt, in order that the power to whom the said ship of war belongs, may pay for the articles so taken according to the price thereof, at the port to which they may appear to have been destined by the ship's papers; and the two contracting parties engage, that the vessels shall not be detained longer than may be absolutely necessary for their said ships to supply themselves with necessaries. That they will immediately pay the value of the receipts, and indemnify the proprietor for all losses which he may have sustained in consequence of such transaction.

Art. 17. To the end that all manner of dissensions and quarrels may be avoided and **8\***] \*prevented on one side and the other, it is agreed, that in case either of the parties hereto should be engaged in war, the ships and vessels belonging to the subjects or people of the other party, must be furnished with sea-letters or passports, expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of the said ship, that it may appear thereby, that the ship really and truly belongs to the subjects of one of the parties; which passport shall be made out and granted according to the form annexed to this treaty. They shall likewise be recalled every year, that is, if the ship happens to return home within the space of a year.

It is likewise agreed, that such ships being laden, are to be provided, not only with passports, as above mentioned, but also with cer-

ahora, no se comprenderán entre los de contrabando ó cosas prohibidas, á saber: toda especie de paños y qualesquiera otras telas de lana, lino, seda, algodón, ú otras qualesquiera materias, toda especie de vestidos con las telas de que se acostumbra hacer, el oro y la plata labrada en moneda ó no, el estaño, hierro, laton, cobre, bronce, carbon, del mismo modo que la cevada, el trigo, la avena, y qualquiera otro genero de legumbres. El tabaco y toda la especieria, carne salada y ahumada, pescado salado, queso y manteca, cerbeza, aceytes, vinos, azucar, y toda especie de sal, y en general todo genero de provisiones que sirven para el sustento de la vida. Ademas toda especie de algodon, cañamo, lino, alquitran, pez, cuerdas, cables, velas, telas para velas, ancoras, y partes de que se componen. Mastiles, tablas, maderas de todas especies, y qualesquiera otras cosas que sirvan para la construccion y reparacion de los buques, y otras qualesquiera materias que no tienen la forma de un instrumento preparado para la guerra por tierra ó por mar, no serán reputadas de contrabando, y menos las que están ya preparadas para otros usos. Todas las cosas que se acaban de nombrar deben ser comprendidas entre las mercaderias libres, lo mismo que todas las demas mercaderias y efectos que no estan comprendidos y nombrados expresamente en la enumeracion de los generos de contrabando, de manera que podran ser transportados y conducidos con la mayor libertad por los subditos de las dos partes contratantes á las plazas enemigas, exceptuando sin embargo las que se hallasen en la actualidad sitiadas, bloqueadas, ó embestidas, y los casos en que algun buque de guerra ó esquadra que por efecto de averia, ú otras causas se halle en necesidad de tomar los efectos que conduzca el buque ó buques de comercio, pues en tal caso podra detenerlos para aprovisionarse, y dar un recibo para que la potencia cuyo sea el buque que tome los efectos los pague segun el valor que tendrian en el puerto adonde se dirigiese el propietario, segun lo expresen sus cartas de navegacion: obligandose las dos partes contratantes á no detener los buques mas de lo que sea absolutamente necesario para aprovisionarse, pagar inmediatamente los recibos, y indemnizar todos los daños que sufra el propietario á consecuencia de semejante suceso.

Art. 17. A fin de evitar entre ambas partes toda especie de disputas y quejas, se ha convenido que en el caso de que una de las dos potencias se hallase empeñada en una guerra, los buques y bastimentos pertenecientes á los subditos ó pueblos de la otra, deberán llevar consigo patentes de mar ó pasaportes que expresen el nombre, la propiedad, y el porte del buque, como tambien el nombre y morada de su dueño y comandante de dicho buque, para que de este modo conste que pertenece real y verdaderamente á los subditos de una de las dos partes contratantes; y que dichos pasaportes deberán expedirse segun el modelo adjunto al presente tratado. Todos los años deberán renovarse estos pasaportes en el caso de que el buque vuelva á su pais en el espacio de un año.

Igualmente se ha convenido en que los buques mencionados arriba, si estuviesen cargados, deberan llevar no solo los pasaportes sino tam-

tificates, containing the several particulars of the cargo, the place whence the ship sailed, that so it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship sailed, in the 9\*] accustomed form; and if any \*one shall think it fit or advisable to express in the said certificates the person to whom the goods on board belong, he may freely do so; without which requisites they may be sent to one of the ports of the other contracting party, and adjudged by the competent tribunal, according to what is above set forth, that all the circumstances of this omission having been well examined, they shall be adjudged to be legal prizes, unless they shall give legal satisfaction of their property by testimony entirely equivalent.

Art. 18. If the ships of the said subjects, people, or inhabitants, of either of the parties, shall be met with, either sailing along the coasts or on the high seas, by any ship of war of the other, or by any privateer, the said ship of war or privateer, for the avoiding of any disorder, shall remain out of cannonshot, and may send their boats aboard the merchant ship, which they shall so meet with, and may enter her to the number of two or three men only, to whom the master or commander of such ship or vessel shall exhibit his passports, concerning the property 10\*] of the ship, made out according to the form inserted in this present treaty, and the ship, when she shall have showed such passport, shall be free and at liberty to pursue her voyage, so as it shall not be lawful to molest or give her chase in any manner, or force her to quit her intended course.

bien certificados que contengan el pormenor del cargamento, el lugar de donde ha salido el buque, y la declaracion de las mercaderias de contrabando que pudiesen hallarse á bordo; cuyos certificados deberan expedirse en la forma acostumbrada por los oficiales empleados en el lugar de donde el navio se hiciese a la vela, y si se juzgase util y prudente expresar en dichos pasaportes la persona propietaria de las mercaderias se podra hacer libremente, sin cuyos requisitos será conducido á uno de los puertos de la potencia respectiva, y juzgado por el tribunal competente, con arreglo á lo arriba dicho, para que exâminadas dien las circunstancias de su falta, sea condenado por de buena presa si no satisfaciese legalmente con los testimonios equivalentes en un, todo.

Art. 18. Quando un buque perteneciente á los dichos subditos, pueblos y habitantes de una de las dos partes fuese encontrado navegando á lo largo de la costa ó en plena mar por un buque de guerra de la otra ó por un corsario, dicho buque de guerra ó corsario, á fin de evitar todo desorden, se mantendrá fuera del tiro de cañon, y podrá enviar su chalupa á bordo del buque mercante, hacer entrar en el dos ó tres hombres á los quales enseñara el patron ó comandante del buque su pasaporte y demas documentos, que deberan ser conformes á lo prevenido en el presente tratado, y probara la propiedad del buque; y despues de haber exhibido semejante pasaporte y documentos, se les dejará seguir libremente su viage, sin que les sea lícito el molestarle ni procurar de modo algune darle caza, u obligarle á dejar el rumbo que seguia.

*The treaty with Spain of 1819 contains the following article :*

Art. 12. The treaty of limits and navigation, of 1795, remains confirmed in all, and each one of its articles, excepting the 2d, 3d, 4th, 21st, and the second clause of the 22d article, which, having been altered by this treaty, or having received their entire execution, are no longer valid.

With respect to the 15th article of the same treaty of friendship, limits, and navigation, of 1795, in which it is stipulated, that the flag shall cover the property, the two high contracting parties agree that this shall be so understood with respect to those powers who recognize this principle; but if either of the two contracting parties shall be at war with a third party, and 11\*] the other neutral, the flag of the \*neutral shall cover the property of enemies, whose government acknowledge this principle, and not of others.

Art. 12. El tratado de limites y navegacion de 1795, queda confirmado en todos y cada uno de sus articulos, excepto los articulos 2, 3, 4, 21, y la segunda clausula del 22, que habiendo sido alterados, por este tratado, ó cumplidos enteramente no pueden tener valor alguno.

Con respecto al articulo 15 del mismo tratado de amistad, limites y navegacion de 1795 en que se estipula, que la bandera cubre la propiedad, han convenido las dos altas partes contratantes en que esto se entienda así con respecto á aquellas potencias que reconozcan este principio; pero que, si una de las dos partes contratantes estuviere en guerra con una tercera, y la otra neutral, la bandera de esta neutral cubrirá la propiedad de los enemigos, cuyo gobierno reconozca este principio, y no de otros.

*Articles of the treaty with Algiers of 1795, referred to in the above case.*

Art. 3. The vessels of both nations shall pass each other without any impediment or molestation; and all goods, moneys, or passengers, of whatsoever nation, that may be on board of the vessels belonging to either party, shall be considered as inviolable, and shall be allowed to pass unmolested.

Art. 4. All ships of war belonging to this Wheat. 6.

regency, on meeting with merchant vessels belonging to citizens of the United States, shall be allowed to visit them with two persons only beside the rowers; these two only permitted to go on board said vessel, without obtaining express leave from the commander of said vessel, who shall compare the passport, and immediately permit said vessel to proceed on her voyage.



age unmolested. All ships of war belonging to the United States of North America, on meeting with an Algerine cruiser, and shall have seen her passport and certificate from the consul of the United States of North America, resident in this regency, shall be permitted to proceed on her cruise unmolested; no passport to be issued to any ships but such as are absolutely the property of citizens of the United States; and eighteen mouths shall be the term allowed for furnishing the ships of the United States with passports.

12\*]

[\*NOTE II.]

## TO THE CASE OF THE AMIABLE ISABELLA.

In some of the cases which were adjudged by the council of prizes at Paris, during the late European wars, several questions occurred respecting the form and effect of passports, analogous to those which were discussed in the case of *The Isabella*, in the text. Among the points, determined by that tribunal, in the case alluded to, were the following: (1) That a mere certificate that a ship was built at Stettin in a certain year, and was the property of Prussians, was not (properly speaking) a passport. (2) That the authority by which a passport shall be issued is regulated by the law and usage of the country where it is issued, and that it is unnecessary that it should be granted or signed by the supreme magistrate of the state, unless so required by the local usage. (3) That a passport is not valid for more than one voyage, without being renewed. (4) That under the treaty of 1778, between the United States and France, it was not necessary to express the name of the owner of the ship in the passport, but it was sufficient to state, generally, that it was French or American property. (5) That the signature of the public officer, and of the ship-owner, to the oath annexed to the passport provided by the French treaty of 1788, is essential to the validity of the passport. (6) That the passport provided by the treaties of 1778 and 1800, which is substantially the same in this respect, with the Spanish treaty of 1795 (except that the form of passport was actually annexed to the French treaties), is not conclusive evidence of the proprietary interest of the ship; but if shown by other papers found on board, or the depositions of the captured persons, to have been obtained by fraud and perjury, it will not give the protection intended by the treaty, but the case must be adjudged by the ordinary rules of the prize court.

13\*] \*In the case of *The Carolina Wilhelmina*, it appears that the ship had a certificate from the "First Inspector, Ordinary Inspector, and Controller of the Chamber of Imposts in Pomerania," that the ship was built at Stettin in 1796, and was the property of Prussians, which it was alleged by the captors was not sufficient to satisfy the requisitions of the French ordinances, which provide that the *congé* or passport of a neutral vessel shall express the name of the

master, that of the ship, her bulk and lading, and the place of her departure and destination, and shall be renewed every voyage. M. Portalis in his conclusions in this case, speaking of the document in question, says:

"Il est impossible de reconnaître dans cette acte la nature et les caractères d'un véritable passe-port.

"On objecte que, dans la Poméranie Prussienne, on est dans l'usage constant de naviguer sans autre précaution, et qu'il faut respecter les usages de chaque pays.

"Mais distinguons les cas. Je sais que dans la Baltique, mer close, *mare clausum*, on voyage sans passe-port; et on le peut sans danger. Faut-il en conclure que les navires qui sortent de cette mer pour aller ailleurs, peuvent se passer d'un congé ou passe-port proprement dit? La pratique de toutes les nations qui ont des ports sur la mer Baltique, suppose le contraire. Tous les navires Danois, Suédois, qui voyagent dans nos mers ou dans les mers générales, se munissent d'un vrai passe-port. Pour la Prusse, nous pouvons citer l'art. 2 d'un règlement de S. M. Prussienne du 18 Septembre, 1796, pour ses consuls généraux, consuls, agents et vice-consuls dans les ports étrangers. Il porte: 'Le consul doit veiller d'abord à ce que, conformément aux règlements qui, à différentes reprises, sont émanés dans nos chambres, les capitaines, &c., se présentent au consulat, y produisent leurs passe-ports, &c. Il s'assurera de l'authenticité des passe-ports qui lui ont été produits, et au besoin les visera gratis.' Or, l'obligation de produire des passe-ports présupposant nécessairement l'obligation d'en avoir, on doit conclure que les Capitaines Poméranien ne se conforment pas aux règlements de leur prince, lorsqu'ils naviguent sans passe-port hors de la Baltique."

\*After some further observations to the [\*14 same purpose, he proceeds: "Il n'est sans doute pas nécessaire que les formes accidentelles d'un acte soient les mêmes partout; il est au contraire certain que, partout elles peuvent être différentes. De là c'est un principe que la forme de tous les actes quelqueconque dépend des coutumes reçues dans les lieux où ces actes sont faits; *locus regit actum*. Il y a des maximes générales, parcequ'il y a une raison commune.

Mais les formes varient selon les lieux et les temps, parce qu'elles n'appartiennent point à la raison universelle, et qu'elles ne tiennent point à la raison universelle, et qu'elles ne tiennent qu'aux pratiques ou aux mœurs particulières de chaque peuple.

"Ainsi, dans certains pays, les passe-ports sont expédiés par le premier magistrat de l'Etat; dans d'autres, ils le sont par un magistrat moins élevé en dignité. Ici, on met plus de solennité dans la rédaction ou dans l'être extérieur de l'acte; ailleurs, on en met moins. Il suffit, dans tous les cas, que le passe-port expédié, le soit par l'autorité compétente et dans la forme usitée: car c'est une maxime du droit des gens, que ce qui est authentique dans un pays, l'est pour tous. La juridiction d'un Etat ne peut s'étendre au delà de son territoire; mais le caractère public qu'un Etat attache ou donne à la forme des actes qui se font en son nom par ses officiers, ne peut être méconnu nulle part: s'il en était autrement, toute communication réglée entre les peuples deviendrait impossible. De là, c'est une maxime incontestable, que tout acte authentique, et reconnu tel dans le pays où il a été rédigé, fait preuve parini nous dans les affaires politiques et civiles. On a senti qu'il était nécessaire, pour les relations qui existent dans les divers gouvernemens, de communiquer aux formes particulières des actes faits dans chaque pays, la force de la foi publique.

"Conséquemment, s'il apparaissait, dans les circonstances présentes, un véritable passe-port, et s'il ne s'agissait pas de confronter les formes accidentelles et extrinsèques de cette pièce avec les réglemens du pays dans lequel elle a été expédiée, toute difficulté serait levée, si l'acte se trouvait conforme à ces réglemens. Mais nous ne sommes pas dans une telle hypothèse. Il ne s'agit de savoir si la pièce présentée comme [15\*] \*passe-port, est revêtue des formes usitées en Prusse; il s'agit d'examiner si cette pièce est un vrai passe-port. La question n'est pas uniquement relative à la forme de l'acte; elle frappe tout entière sur le fond et la substance de l'acte même.

"Il est évident pour les hommes de tous les pays, qu'un simple certificat de construction et de propriété Prussienne, n'est point un passe-port: cela résulte de la nature et de l'essence même des choses. Si un tel certificat peut suffire pour voyager dans la Baltique, ce n'est pas parce qu'il équivaut à un passe-port, mais parce qu'on peut voyager dans la Baltique sans passe-port. Aussi nous trouvons à bord des navires Prussiens qui sortent de la Baltique, des passe-ports véritables et proprement dits, comme nous en trouvons sur tous les navires Danois et Suédois qui sortent de cette mer close pour naviguer ailleurs.

"Il serait du plus grand danger de transporter hors de la Baltique, des usages particuliers dont on pourrait si facilement abuser contre la sûreté des autres nations. Nous voyons que les puissances du Nord ont toujours respecté, à cet égard, le droit commun de tous les peuples, —qu'elles n'ont jamais négligé de donner des passe-ports à ceux de leurs sujets qui viennent dans nos mers, ou dans les mers générales; et que l'on ne peut imputer qu'à la négligence du capturé, le défaut de passe-port, qui a été un des principaux motifs de son arrestation."

He then proceeds to examine the *role d'équipage*. Wheat. 6.

page, which he pronounces to be defective, and adds: "En principe, il suffit que la propriété neutre soit prouvée, pour qu'il n'y ait pas lieu à la confiscation; et la propriété neutre peut être prouvée, indépendamment de certaines irrégularités de forme: mais il faut alors que les preuves de neutralité que l'on présente, soient assez concluantes pour suppléer à celles qui manquent.

"Dans les circonstances actuelles, on exhibe, par exemple, des pièces qui constatent que le navire dont il s'agit, est de construction Prussienne, et qu'il appartenait à des Prussiens, lorsque le point de propriété a été vérifié par l'inspecteur de la douane à Stettin; mais, postérieurement, une propriété originairement Prussienne a pu devenir ennemie. Quelle assurance \*avons nous que cela n'est pas? C'est au [\*16] capturé à prouver la propriété neutre par le passe-port, par le rôle d'équipage, et autres pièces de bord. Toutes les présomptions sont contre lui, s'il n'est point en règle.

"Des pièces nulles ne vicient pas les autres pièces; elles peuvent même quelquefois concourir à la preuve de la vérité; *ex acta nullo etiam elicitur veritas*; mais, selon les occurrences, le défaut absolu de certaines pièces, et la nature des vices que l'on remarque dans d'autres, ont une influence générale sur toute la cause.

"Le passe-port est la preuve spécifique que l'on n'est pas l'homme de l'ennemi, et que l'on voyage sous la protection d'une puissance neutre; il prouve que le pavillon n'est point un masque, que la propriété du navire n'est pas devenue ennemie, et que le capitaine continue de voyager sous les lois et la tutelle de son prince. Supprimez le passe-port: c'est en vain que vous prouveriez la neutralité originaire du navire et du capitaine; vous n'avez plus aucune preuve légale de la neutralité actuelle; et c'est pourtant à ce point qu'il faut se fixer." *Code des Prises par Dufrieche Foulaines, tom. 2 p. 929, et seq.*

In the case of *The Republican*, which ship was taken sailing under American colors, it was insisted by the captors, among other grounds of condemnation, (1) that the vessel having been transferred from the former proprietor to the present claimant, the bill of sale ought to be produced. (2) That the ship was not provided with a passport according to the 25th article of the treaty of 1778, between France and the United States, because the name of the owner was not specified in the passport, and the oath annexed.

To this it was answered by the claimant, (1.) that the vessel not being enemy built, and never having been enemy owned, it was unnecessary to produce the evidence of her transfer from one American citizen to another. (2.) That the treaty of 1778 did not require the name of the owner to be expressed in the passport, but that it was sufficient to state that the vessel was American property.

\*In his conclusions M. Portalis, pro- [\*17] ceeded as follows:

"Il est de principe que la propriété neutre du navire et de la cargaison doit être prouvée, et que cette preuve, est à la charge du capturé. C'est une autre vérité, que la preuve de la propriété neutre a été déterminée par les réglemens.

"Dans l'hypothèse présente, la neutralité du



navire, le Republicain, et de sa cargaison est elle constatée?

“Je ne m'arrêterai point à l'objection déduite de ce que le changement de propriété du navire, qui, dit-on, appartenait autrefois à des propriétaires actuels, n'est point prouvée par des actes authentiques. Je conviens, d'après le règlement de 1778, qu'une telle précaution ne serait nécessaire que dans le cas d'un navire originairement de construction ou de propriété ennemie.

“Je ne m'arrêterai pas non plus à la circonstance que le nom du propriétaire ou des propriétaires du navire n'est point spécifiquement désigné dans le passe-port. Le traité de 1778, passé entre la France et les Etats Unis d'Amérique, exige seulement que le navire soit reconnu propriété Américaine, sans une désignation particulière du nom du propriétaire.

“Mais je découvre dans le passe-port un vice qui m'a paru essentiel.

“Le capturé avoue, dans le mémoire manuscrit qui m'a été remis, que le capitaine, avant son départ, doit prêter serment, entre les mains des officiers de la marine, que le navire appartient à un ou plusieurs sujets des Etats Unis, sans autre désignation; il avoue encore que par la formule annexée au traité de 1778, cette affirmation assermentée doit être à la suite du passe-port.

“Or, j'ai vérifié qu'à la suite du passe-port dont le capturé était porteur, il n'existe qu'une déclaration d'affirmation, sans aucune signature ni de l'officier public devant lequel l'affirmation assermentée a dû être faite, ni de la partie même qui est censée avoir prêtée le serment. On ne s'est donc point conformé au traité de 1778.

“Un acte n'est rien s'il n'est signé; c'est la signature qui fait tout. Jusque là, je vois moins un acte qu'un simple projet, c'est à dire, une rédaction qui n'a été ni précédée ni suivie **18\***] d'aucun \*effet réel. Je suis donc autorisé à conclure que l'affirmation assermentée, prescrite par le traité de 1778, n'a point été faite.

“Le traité de 1778, dit-on, n'a point prescrit les formalités du passe-port à peine de nullité, mais seulement dans l'objet d'arrêter et de prévenir de part ou d'autre toutes dissensions et querelles.

“Le vice que j'ai découvert dans le passe-port du navire le Republicain, ne tient pas uniquement à la forme de l'acte; il tient à sa substance: car un acte non signé n'existe pas. Dans un cas pareil, la nullité n'a pas besoin d'être prononcée par la loi à titre de peine; elle est inhérente à la chose même.

“Vainement objecterait-on qu'un acte nul prouve toujours la bonne foi de celui qui en est porteur, puisqu'il prouve au moins le désir que l'on avait de se le procurer.

“Cela est vrai, quand l'acte n'est qu'irrégulier; mais la thèse change, s'il s'agit d'un acte imparfait et non consommé. Un tel acte n'ayant aucune existence, ne peut produire aucun effet.

“On prétend que la seule nullité du passe-port ne peut extraîner la confiscation si d'ailleurs la propriété neutre est constatée par les autres pièces.

“Je conviens du principe général; mais je crois que ce principe doit être appliqué avec discernement.

“Il n'est exactement et rigoureusement vrai,

que lorsqu'il n'est question que d'une nullité qui ne peut faire suspecter la foi de la personne. Dans la cause actuelle, le défaut de signature de l'officier public et de la partie, est de nature à faire présumer qu'on n'a osé affirmer à serment la neutralité du navire. Ce défaut n'influe pas seulement sur le plus ou sur le moins de solennité de l'acte; il emporte l'acte même, et il fait suspecter la bonne volonté de celui qui était tenu de le rapporter.”

He then proceeds to state the other defects in the proofs of proprietary interest, the destination of a ship to an enemy's port combined with the possession of false papers, and other circumstances of suspicion, and concludes for the condemnation of the ship and cargo. *Ib.* p. 927.

\*In the case of, *The Quintus*, a Swedish [**\*19** vessel, the grounds on which the captors insisted, are stated by M. Portalis as follows:

“On prétend que le passe-port, n'étant signé par le roi de Suède, n'est point authentique; qu'il n'indique point la destination précise du navire, puisqu'il est expédié pour aller dans la mer occidentale et plus loin; qu'enfin, dans la supposition ou un tel passe-port pourrait être légal, le capturé y aurait contrevenu par son retour à Alicante, où il était déjà venu une première fois dans le même voyage.

“Examinons ces objections. Nul doute que dans chaque pays, les passe-ports doivent être expédiés par l'autorité compétente; mais celui dont il s'agit, l'a été par le collège royal de commerce de Suède: il est expédié au nom du roi; mais nous ne voyons nulle part que la signature du roi fût requise. En général, dans les monarchies, le nom du roi est à la tête de tous les actes publics; mais la signature du roi n'est apposée qu'aux actes déterminés par les lois de chaque pays.

“Dire que le passe-port n'indiquait point une destination précise, c'est ne rien dire d'utile ou de concluant.

“Tous les voyages de mer ne se ressemblent pas. On distingue les voyages extraordinaires d'avec les voyages ordinaires; ceux de long cours d'avec la simple caravane; le petit cabotage du grand cabotage. Tous ceux qui ont écrit sur les affaires maritimes nous avertissent que les passe-ports diffèrent dans leur énonciation, selon les différentes espèces de voyages.

“Il est impossible, par exemple, qu'un passe-port pour un voyage de long cours et pour aller dans un lieu déterminé, soit conçu dans les mêmes termes qu'un passe-port pour la caravane; car la caravane, selon la définition de l'auteur du Traité des Assurances, “est une multiplicité de petits voyages qu'un capitaine fait dans le cours de sa navigation. Il se nolise pour un port, où, étant arrivé, il décharge la marchandise, exige le nolis, se nolise pour un autre endroit, où il aborde, fait les mêmes opérations, ainsi successivement d'un port à l'autre jusqu'à ce qu'il revienne au port d'où il était parti. Ces \*divers petits voyages, [**\*20** pris cumulativement, ne forment qu'un voyage unique et principal.

“Ou comprend que par la nature même des choses, un passe-port pour la caravane, ne peut désigner avec précision, un lieu plutôt qu'un autre; mais les règlements et les coutumes de chaque pays déterminent la caravane, et pour l'espace que l'on peut parcourir en faisant ces

sortes de voyages, et pour le tems pendant lequel on peut demeurer en mer avant de retourner au lieu du départ. Ainsi, l'on sait qu'en France, le petit cabotage comprend tous les ports depuis Bayonne jusqu'à Duinkerque inclusivement; que le grand cabotage s'étend à toute autre navigation plus éloignée, qui n'est pas déclarée voyage de long cours. On sait encore que, par nos réglemens Français, la grande caravane peut durer 2 ans sans que l'on ait besoin de se munir d'un nouveau congé. On sait, enfin que les congés ou passe-ports sont rédigés différemment, selon qu'il s'agit d'un voyage de long cours ou d'une simple caravane.

"Dans les circonstances de la cause, il ne s'agissait que d'une simple caravane; cela est convenu. Le passe-port devait donc être conforme à la nature du voyage que l'on entreprenait. De-là, nous lisons dans ce passe-port, *ad mare occidentale et ulterius, ad ordinationem*. Les mots, *ad mare occidentale et ulterius* sont indéfinis, parce-que, dans un passe-port pour une caravane, il est impossible de désigner un lieu déterminé. Mais on ajoute, *ad ordinationem*, pour annoncer qu'on ne peut pas abuser de la latitude donnée par le passe-port, et excéder le temps et l'espace fixés par l'usage ou par réglemens relativement à ces sortes de voyages.

"Aucune loi n'a prohibé aux neutres a caravane en tems de guerre; car la neutralité d'une nation, qui n'est pour cette nation que la continuation de l'état de paix, doit lui garantir tous les avantages attachés à cet état.

"Le capturé était donc muni d'un passe-port régulier, légal et conforme à l'espèce de voyage qu'il avait entrepris.

"A-t-il contrevenu à ce passe-port? On le prétend; mais on ne le prouve pas. Peu importe qu'après avoir été une première fois à Alicante, il y soit retourné ou qu'il en ait eu **21\*** l'intention. Dans la caravane, on peut aller, venir et retourner au même port, pourvu qu'on ne fasse pas dégénérer la caravane en voyage de long cours, ou que, sans cause légitime et constatée, on ne voyage pas au-delà du tems déterminé par les réglemens ou par la coutume.

"Or, ici la conduite du capitaine ne pouvait être suspecte, ni par rapport à la durée de son voyage. Donc point de contravention au passe-port. Il est donc évident que la prise est iuvallide." (*Ib.* p. 935.)

In the case of *The Molly*, taken under American colors, after the ratification of the treaty of 1800 between the United States and France; the ship was provided with the passport, as stipulated by the treaty, but which was falsified by other papers found on board, showing the property to be British.

In his conclusions, M. Durand, after stating the facts, proceeded as follows:

"La preuve résultant d'un acte public, tel qu'un passe-port, est fondée sur la confiance réciproque que se doivent les Gouvernemens amis; il a été nécessaire au maintien de l'har-

monie qui règne entre les nations, qu'on se contentât de part et d'autre des preuves fournies par des actes revêtus de signatures d'officiers publics préposés pour cet effet. Ces officiers publics de leur côté, ont été obligés, dans la plupart des cas, de s'en rapporter à la bonne foi de ceux qui s'adressent à eux pour obtenir leur attache, et sans doute leur confiance est quelquefois trompée. Il leur est difficile, pour ne pas dire impossible, de discerner les propriétés des administrés. Il faut donc qu'ils s'en rapportent à leur déclaration. Par exemple, à la suite du passe-port du Capit. Barrowdale, on trouve l'acte du serment qu'il a prêté, que le navire qu'il commande actuellement est un bâtiment des Etats-Unis d'Amérique, et qu'aucun citoyen ou sujet des Puissances présentement en guerre n'y a aucune part ou intérêt, soit directement soit indirectement. C'est sur la foi de cet exposé que le Gouvernement Américain le prend sous sa sauvegarde, et lui accorde sa protection. Ce gouvernement est trop loyal pour ne pas être indigné de la fraude et de l'imposture qu'on ne craint pas de mettre en usage pour surprendre un passe-port qui couvre la propriété Anglaise. Il le punirait, n'en doutons pas, s'il avait connaissance de la **\*22** surprise faite à sa bonne-foi.

"Plus il est facile d'abuser de la confiance qu'un Gouvernement est obligé d'accorder à ses négocians, plus on doit accueillir, je ne dis pas les présomptions, mais au moins les preuves des supercheries auxquelles ceux-ci peuvent avoir recours pour le tromper. Si donc le hasard en présente, et qu'elles sont de nature à faire suspecter les pièces de bord, il n'est pas douteux que le Conseil n'ait le droit de les peser dans la balance impartiale de la justice, et de les faire prévaloir sur les preuves légales, lorsqu'elles sont telles qu'elles ne peuvent se concilier avec elles.

"Les lois et les usages prescrivent de recueillir les déclarations des capturés, de les interroger. A quoi ces précautions serviraient-elles, s'il n'était pas permis de chercher la vérité à travers tous détours dans lesquels se cachent les négocians que la cupidité porte à favoriser l'ennemi par les moyens les moins délicats?"

"Une lettre est encore moins suspecte qu'une déclaration, et elle ne doit pas avoir moins de force; il est impossible de supposer que celui qui en était le dépositaire, suppose un titre qui lui porte préjudice; on doit donc ajouter foi à son contenu, et croire, lorsqu'elle présente des résultats contraires au pièces de bord, que celles-ci sont l'ouvrage de la simulation, et qu'elles ont été obtenues sur un faux exposé. Je pourrais maintenant examiner de plus près les connoissances, et l'on trouverait peut-être, en les comparant les uns aux autres et avec la lettre citée, que la plus grande partie de la cargaison est ennemie; mais s'il est prouvé que le bâtiment appartient aux Anglais, c'est une conséquence nécessaire que la cargaison soit confisquée. Tel est le droit consacré par nos traités, particulièrement par le dernier (art. 15), avec les Etats-Unis d'Amérique." (*Ib.* p. 985.)



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[\*NOTE III.]

## TO THE CASE OF THE AMIABLE ISABELLA.

*Articles of the French Treaties referred to in the Text.*

Art. 4. The subjects, people, and inhabitants of the said United States, and each of them, shall not pay in the ports, havens, roads, isles, cities, and places under the domination of His most Christian Majesty, in Europe, any other or greater duties or imposts, of what nature soever they may be, or by what name soever called, than those which the most favored nations are or shall be obliged to pay; and they shall enjoy all the rights, liberties, privileges, immunities, and exemptions in trade, navigation, and commerce, whether in passing from one port in the said dominions, in Europe, to another, or in going to and from the same, from and to any part of the world, which the said nations do or shall enjoy.

Art. 12. The merchant ships of either of the parties which shall be making into a port belonging to the enemy of the other ally, and concerning whose voyage, and the species of 24\*] goods on board her, there shall be just grounds of suspicion, shall be obliged to exhibit, as well upon the high seas, as in the ports and havens, not only her passports, but likewise certificates, expressly showing that her goods are not of the number of those which have been prohibited as contraband.

Art. 13. If, by the exhibiting of the above-said certificates, the other party discover there are any of those sorts of goods which are prohibited and declared contraband, and consigned for a port under the obedience of his enemies, it shall not be lawful to break up the hatches of said ship, or to open any chest, coffers, packs, casks, or any other vessels found therein, or to remove the smallest parcels of her goods, whether such ship belongs to the subjects of France, or the inhabitants of the said United States, unless the lading be brought on shore in the presence of the officers of the Court of Admiralty, and an inventory thereof made; but there shall be no allowance to sell, exchange, or alienate the same, in any manner, until after that due and lawful process shall have been had against 25\*] such prohibited goods, and the Court of Admiralty shall, by a sentence pronounced, have confiscated the same; saving always as well the ship itself as any other goods found therein, which by this treaty are to be esteemed free, neither may they be detained on pretense of their being, as it were, infected by the prohibited goods, much less shall they be confiscated as lawful prize; but if not the whole cargo, but only part thereof, shall consist of prohibited or contraband goods, and the commander of the ship shall be ready and willing to deliver them to the captor who has discovered them, in such case, the captor having received those goods shall forthwith discharge the ship, and not hinder her by any means, freely to prosecute the voyage on which she was bound. But in case

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Art. 4. Les sujets, peuples et habitants des dits Etats Unis, et de chacun d'eux, ne paieront dans les ports, havres, rades, isles, villes et places de la domination de sa Majesté très Chrétienne en Europe, d'autres ni plus grands droits ou impôts de quelque nature qu'ils puissent être et quelque nom qu'ils puissent avoir que les nations les plus favorisées sont, ou seront tenues de paier, et ils jouiront de tous les droits, libertés, privilèges et exemptions en fait de négoce, navigation et commerce soit en passant d'un port à un autre des dits états du roi très chrétien en Europe, soit en y allant ou en revenant du quelque partie ou pour quelque partie de monde que ce soit, dont les nations susdites jouissent ou jouiront.

Art. 12. Les navires marchands des deux parties qui seront destinés pour des ports appartenants à une puissance ennemie de l'autre allié, et dont le voyage ou la nature des marchandises dont ils seront chargés donneroit de justes soupçons, seront tenus d'exhiber soit en haute mer, soit dans les ports et havres, non seulement leurs passe-ports mais encore les certificats qui constateront expressément que leur chargement n'est pas de la qualité de ceux qui sont prohibés comme contrebande.

Art. 13. Si l'exhibition des dits certificats conduit à découvrir que le navire porte des marchandises prohibées et réputées contrebande, consignées pour un port ennemi, il ne sera pas permis de briser les écoutes des dits navires, ni d'ouvrir aucune caisse, coffre, malle, ballots, tonneaux et autres caisses qui s'y trouveront, ou d'en déplacer et détourner la moindre parties marchandises soit que le navire appartienne aux sujets du roi très chrétien ou aux habitants des Etats Unis jusqu'à ce que la cargaison ait été mise à terre en présence des officiers des Cours d'Amirauté, et que l'inventaire en ait été fait; mais on ne permettra pas de vendre, échanger ou aliéner les navires ou leur cargaison en manière quelconque, avant que le procès ait été fait et parfait légalement pour déclarer la contrebande, et que les cours d'amirauté aient prononcé leur confiscation par jugement, sans préjudice néanmoins des navires, ainsi que des marchandises qui en vertu du traité doivent être censées libres. Il ne sera pas permis retenir ces marchandises sous prétexte qu'elles ont été entachées par les marchandises de contrebande et bien moins encore de les confisquer comme des prises légales. Dans le cas où une partie seulement et non la totalité du chargement consisteroit en marchandises de contrebande, et que le commandant du vaisseau consente à les livrer au corsaire qui les aura découverts, alors le capitaine qui aura fait la prise, après avoir reçu ces marchandises doit incontinent relâcher le navire et ne doit l'empêcher en aucune manière de continuer son voyage. Mais dans le cas

Wheat. 6.

the contraband merchandises cannot be all received on board the vessel of the captor, then the captor may, notwithstanding the offer of delivering him the contraband goods, carry the vessel into the nearest port, agreeably to what is above directed.

**26\*]** \*Art. 14. On the contrary, it is agreed, that whatever shall be found to be laden by the subjects and inhabitants of either party on any ship belonging to the enemies of the other, or to their subjects, the whole, although it be not of the sort of prohibited goods, may be confiscated in the same manner as if it belonged to the enemy, except such goods and merchandises as were put on board such ship before the declaration of war, or even after such declaration, if so be it were done without knowledge of such declaration, so that the goods of the subjects and people of either party, whether they be of the nature of such as are prohibited or otherwise, which, as is aforesaid, were put on board any ship belonging to an enemy before the war, or after the declaration of the same, without the knowledge of it, shall no ways be liable to confiscation, but shall well and truly be restored without delay to the proprietors demanding the same; but so as that if the said merchandises be contraband, it shall not be any ways lawful to carry them afterwards to any ports belonging to the enemy.

**27\*]** \*The two contracting parties agree, that the term of two months being passed after the declaration of war, their respective subjects, from whatever part of the world they come, shall not plead the ignorance mentioned in this article.

Art. 15. And that more effectual care may be taken for the security of the subjects and inhabitants of both parties, that they suffer no injury by the men of war or privateers of the other party, all the commanders of the ships of His Most Christian Majesty and of the said United States, and all their subjects and inhabitants, shall be forbid doing any injury or damage to the other side; and if they act to the contrary they shall be punished, and shall moreover be bound to make satisfaction for all matter of damage, and the interest thereof, by reparation under the pain and obligation of their person and goods.

Art. 23. It shall be lawful for all and singular the subjects of the most Christian King, and the citizens, people, and inhabitants of the said United States, to sail with their ships with all **28\*]** manner of liberty and security, no distinction being made who are the proprietors of the merchandises laden thereon, from any port to the places of those who now are, or hereafter shall be, at enmity with the most Christian King, or the United States. It shall likewise be lawful for the subjects and inhabitants aforesaid, to sail with the ships and merchandises aforementioned, and to trade with the same liberty and security from the places, ports, and havens of those who are enemies of both or either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy aforementioned to neutral places, but also from one place belonging to an enemy to another place belonging to an enemy, whether they be under the jurisdiction of the same prince or under several. And it is

où les marchandises de contrebande ne pourroient pas être toutes chargées sur le vaisseau capteur, alors le capitaine du dit vaisseau sera le maître, malgré l'offre de remettre la contrebande, de conduire le patron dans le plus prochain port, conformément à ce qui est prescrit plus haut.

Art. 14. On est convenu, au contraire, que tout ce qui se trouvera chargé par les sujets respectifs sur des navires appartenant aux ennemis de l'autre partie ou à leurs sujets, sera confisqué sans distinction des marchandises prohibées ou non prohibées, ainsi et de même que si elles appartenaient à l'ennemi, à l'exception toutefois, des effets et marchandises qui auront été mis à bord des dits navires avant la déclaration de guerre ou même après la dite déclaration, si au moment du chargement on a pu l'ignorer de manière que les marchandises des sujets des deux parties, soit qu'elles se trouvent du nombre de celles de contrebande ou autrement, lesquelles comme, il vient d'être dit auront été mises à bord d'un vaisseau appartenant à l'ennemi avant la guerre ou même après la dite déclaration, lorsqu'on l'ignorait ne seront en aucune manière, sujettes à confiscation, mais seront fidèlement et de bonne foi rendues sans délai à leur propriétaires, qui les réclameront; bien entendu néanmoins, qu'il ne soit pas permis de porter dans les ports ennemis les marchandises qui seront de contrebande. Les deux parties contractantes conviennent que le terme de deux mois passés depuis la déclaration de guerre, leurs sujets respectifs, de quelque partie du monde qu'ils viennent, ne pourront plus alléguer l'ignorance dont il est question dans le présent article.

Art. 15. Et afin de pourvoir plus efficacement à la sûreté des sujets des deux parties contractantes, pour qu'il ne leur soit fait aucun préjudice par les vaisseaux de guerre de l'autre partie, ou par des armateurs particuliers, il sera fait défense à tous capitaines des vaisseaux de sa Majesté très Chrétienne et des dits Etats Unis, et à tous leurs sujets de faire aucun dommage ou insulte à ceux de l'autre partie, et au cas où ils y contreviendraient, ils en seront punis et de plus ils seront tenus et obligés en leurs personnes et en leurs biens de réparer tous les dommages et intérêts.

Art. 23. Il sera permis à tous et un chacun des sujets du roi très chrétien et aux citoyens, peuple et habitants des susdits Etats Unis, de naviguer avec leurs bâtimens avec toute liberté et sûreté, sans qu'il puisse être fait d'exception à cet égard, à raison des propriétaires des marchandises chargées sur les dits bâtimens, venant de quelque port que ce soit et destinés pour quelque place d'une puissance actuellement ennemie, ou qui pourra l'être dans la suite de sa majesté très chrétienne ou des Etats Unis. Il sera permis également aux sujets et habitants susmentionnés de naviguer avec leurs vaisseaux et marchandises et de fréquenter avec la même liberté et sûreté les places, ports, et havres des puissances ennemies des deux parties contractantes ou d'une d'entre elles sans opposition ni trouble, et de faire le commerce non seulement directement des ports de l'ennemi susdit à un port neutre, mais aussi d'un port ennemi à un autre port ennemi, soit qu'il se trouve sous sa juridiction ou sous celle de plusieurs; et il est



hereby stipulated, that free ships shall also give a freedom to goods, and that everything shall be deemed to be free and exempt which shall be found on board the ships belonging to the subjects of either of the confederates, although the whole lading, or any other part thereof, should appertain to the enemies of either, **29**]\* contraband goods being always excepted. It is also agreed in like manner, that the same liberty be extended to persons who are on board a free ship, with this effect, that although they be enemies to both or either party, they are not to be taken out of that free ship, unless they are soldiers, and in actual service of the enemies.

Art. 24. This liberty of navigation and commerce shall extend to all kinds of merchandises, excepting those only which are distinguished by the name of contraband; and under this name of contraband, or prohibited goods, shall be comprehended arms, great guns, bombs with the fuses, and other things belonging to them, cannon-ball, gunpowder, matches, pikes, swords, lances, spears, halberds, mortars, petards, grenades, saltpetre, muskets, musket-ball, bucklers, helmets, breast plates, coats of mail, and the like kinds of arms, proper for arming soldiers, musket-rests, belts, horses with their furniture, and all other warlike instruments whatever. These merchandises which follow, **30**]\* shall not be reckoned among contraband or prohibited goods; that is to say, all sorts of cloths, and all other manufactures woven of any wool, flax, silk, cotton, or any other materials whatever, all kinds of wearing apparel, together with the species whereof they are used to be made, gold and silver, as well coined as uncoined, tin, iron, latten, copper, brass, coals; as also wheat and barley, and other kind of corn and pulse; tobacco, and likewise all manner of spices; salted and smoked flesh, salted fish, cheese and butter, beer, oils, wines, sugars, and all sorts of salts; and in general all provisions which serve for the nourishment of mankind and the sustenance of life; furthermore, all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sail cloths, anchors, and any parts of anchors, also ships' masts, planks, boards and beams of what trees soever; and all other things proper either for building or repairing ships, and all other goods whatever which have not been worked into the form of any instrument or thing prepared for war by land or by sea, shall not be reputed **31**]\* contraband, \*much less such as have been already wrought and made up for any other use; all which shall be wholly reckoned among free goods; as likewise all other merchandises and things which are not comprehended and particularly mentioned in the foregoing enumeration of contraband goods; so that they may be transported and carried in the freest manner by the subjects of both confederates, even to places belonging to an enemy, such towns or places being only excepted as are at that time besieged, blocked up or invested.

Art. 25. To the end that all manner of dissensions and quarrels may be avoided and prevented, on one side and the other, it is agreed, that in case either of the parties hereto should be engaged in war, the ships and vessels belonging to the subjects or people of the other

stipulé par le present traité que les bâtimens libres assureront également la liberté des marchandises, et qu'on jugera libres toutes les choses qui se trouveront à bord des navires appartenant aux sujets d'une des parties contractantes, quand même ne le chargement ou partie d'icelui appartiendrait aux ennemis de l'une des deux; bien entendu néanmoins que la contrebande sera toujours exceptée. Il est également convenu que cette même liberté s'étendrait aux personnes qui pourraient se trouver à bord du bâtiment libre quand même elles seraient ennemies de l'une des deux parties contractantes, et elles ne pourront être enlevées des dits navires à moins qu'elles ne soient militaires et actuellement au service de l'ennemi.

Art. 24. Cette liberté de navigation et de commerce doit s'étendre sur toutes sortes de marchandises, à l'exception seulement de celles qui sont désignées sous le nom de contrebande: Sous ce nom de contrebande ou de marchandises prohibées doivent être compris les armes, canons, bombes avec leurs fusées et autres choses y relatives, boulets, poudre à tirer, mèches, piques, épées, lances, dards, hallebardes, mortiers, petards, grenades, salpêtre, fusils, balles, boucliers, casques, cuirasses, cote de mailles, et autres armes de cette espèce, propres à armer les soldats, portemousqueton, baudriers, chevaux avec leurs équipages, et tous autres instrumens de guerre quelconques. Les marchandises dénommées ci-après ne seront pas comprises parmi la contrebande ou choses prohibées, savoir toutes sortes de draps et toutes autres étoffes de laine, lin, soye, coton ou d'autres matières quelconques; toutes sortes de vêtements avec les étoffes dont on a coutume de les faire, l'or et l'argent monnoyé ou non, l'étain, le fer laiton, cuivre, airain, charbons, de même que le froment et l'orge, et toute autre sorte de bleds et légumes; le tabac et toutes les sortes d'épiceries, la viande salée et fumée, poisson sale, fromage et beurre, bière, huiles vins, sucres, et toute espèce de sel, et en général toutes provisions servant pour la nourriture de l'homme et pour le soutien de la vie. De plus, toutes sortes de coton, de chanvre, lin, goudron, poix, cordes, cables, voiles, toiles à voiles, ancres, parties d'ancres, mats, planches, madriers, et bois de toute espèce, et toutes autres choses propres à la construction et réparation des vaisseaux et autres matières quelconques qui n'ont pas la forme d'un instrument préparé, pour la guerre par terre comme par mer, ne seront pas réputées contrebande et encore moins celles qui sont déjà préparées pour quelque autre usage: Toutes les choses dénommées ci-dessus doivent être comprises parmi les marchandises, libres, de même que toutes les autres marchandises et effets qui ne sont pas compris et particulièrement nommés dans l'énumération des marchandises de contrebande; de manière qu'elles pourront être transportées et conduites de la manière la plus libre par les sujets des deux parties contractantes dans des places ennemies, à l'exception néanmoins de celles qui se trouveroient actuellement assiégées bloquées ou investies.

Art. 25. Afin d'écarter et de prévenir de part et d'autre toutes discussions et querelles il a été convenu que dans le cas où l'une des deux parties se trouveroit engagée dans une guerre, les vaisseaux et bâtimens appartenans aux sujets ou peuple de l'autre allié devront être pourvus



ally, must be furnished with sea-letters or pass-ports, expressing the name, property and bulk of the ship, as also the name and place of habitation of the master or commander of the said ship, that it may appear thereby that the ship really and truly belongs to the subjects of one **32\***] of \*the parties, which passport shall be made out and granted according to the form annexed to this treaty; they shall likewise be recalled every year, that is, if the ship happens to return home within the space of a year. It is likewise agreed, that such ships, being laden, are to be provided not only with passports as above mentioned, but also with certificates, containing the several particulars of the cargo, the place whence the ship sailed, and whither she is bound, that so it may be known whether any forbidden or contraband goods be on board the same; which certificates shall be made out by the officers of the place whence the ship set sail, in the accustomed form; and if anyone shall think it fit or advisable to express in the said certificates the person to whom the goods on board belong, he may freely do so.

Art. 26. The ships of the subjects and inhabitants of either of the parties, coming upon any coasts belonging to either of the said allies, but not willing to enter into port, or being entered into port and not willing to unload their **33\***] cargoes, or break bulk, they shall \*be treated according to the general rules prescribed or to be prescribed, relative to the object in question.

Art. 27. If the ships of the said subjects, people, or inhabitants of either of the parties shall be met with, either sailing along the coasts, or on the high seas, by any ship of war of the other, or by any privateers, the said ships of war or privateers, for the avoiding of any disorder, shall remain out of cannonshot, and may send their boats aboard the merchant ship which they shall so meet with and may enter her to the number of two or three men only, to whom the master or commander of such ship or vessel shall exhibit his passport concerning the property of the ship, made out according to the form inserted in this present treaty, and the ship, when she shall have showed such passport, shall be free and at liberty to pursue her voyage, so as it shall not be lawful to molest or search her in any manner, or to give her chase, or force her to quit her intended course.

Art. 28. It is also agreed, that all goods when **34\***] once put \*on board the ships or vessels of either of the two contracting parties, shall be subject to no farther visitation; but all visitation or search shall be made beforehand, and all prohibited goods shall be stopped on the spot, before the same be put on board, unless there are manifest tokens or proofs of fraudulent practice; nor shall either the persons or goods of the subjects of His Most Christian Majesty or the United States, be put under any arrest, or molested by any other kind of embargo for that cause; and only the subject of that state to whom the said goods have been or shall be prohibited, and who shall presume to sell or alienate such sort of goods, shall be duly punished for the offense.

de lettres de mer ou passe-ports, lesquels exprimeront le nom la propriété et le port du navire, ainsi que le nom et la demeure du maître ou commandant du dit vaisseau, afin qu'il apparaisse par là que le même vaisseau appartient réellement et véritablement aux sujets de l'une des deux parties contractantes; lequel passe-port, devra être expédié selon le modèle annexé au présent traité. Ces passe-ports devront également être renouvelés chaque année dans le cas où le vaisseau retourne chez lui dans l'espace d'une année. Il a été convenu également que les vaisseaux susmentionnés dans le cas où ils seroient chargés devront être pourvus non seulement de passe-ports mais aussi de certificats contenant le détail de la cargaison, le lieu d'où le vaisseau est parti, et la déclaration des marchandises de contrebande qui pourroient se trouver abord; lesquels certificats devront être expédiés dans la forme accoutumée par les officiers du lieu d'où le vaisseau aura fait voile, et s'il étoit jugé utile ou prudent d'exprimer dans les dits passe-ports la personne à laquelle les marchandises appartiennent, on pourra le faire librement.

Art. 26. Dans le cas où les vaisseaux des sujets et habitants de l'une des deux parties contractantes approcheroient des côtes de l'autre, sans cependant avoir le dessein d'entrer dans le port ou après être entré, sans avoir le dessein de décharger la cargaison, ou rompre leur charge, on se conduira à leur égard suivant les réglemens généraux prescrits ou à prescrire relativement à l'objet dont il est question.

Art. 27. Lorsqu'un bâtiment appartenant aux dits sujets, peuple et habitants de l'une des deux parties, sera rencontré naviguant le long des côtes ou en pleine mer, par un vaisseau de guerre, ou armateur, le dit vaisseau de guerre, ou armateur, afin d'éviter tout désordre, se tiendra hors de la portée du canon, et pourra envoyer sa chaloupe à bord du bâtiment marchand, et y faire entrer deux ou trois hommes, auxquels le maître ou commandant du bâtiment montrera son passe-port, lequel devra être conforme à la formule annexée au présent traité, et constatera la propriété du bâtiment, et après que le dit bâtiment aura exhibé un pareil passe-port, il lui sera libre de continuer son voyage et il ne sera pas permis de le molester, ni de chercher en aucune manière, de lui donner la chasse, ou de le forcer de quitter la course qu'il s'étoit proposée.

Art. 28. Il est convenu que lorsque les marchandises auront été chargées sur les vaisseaux ou bâtimens de l'une des deux parties contractante, elles ne pourront plus être assujéties à aucune visite; tout visite et recherche devant être faite avant le chargement, et les marchandises prohibées devant être arrêtées et saisies sur la plage avant de pouvoir être embarquées à moins qu'on n'ait des indices manifestes ou des preuves de versements frauduleux. De même aucun des sujets de sa Majesté très Chrétienne ou des Etats Unis, ni leurs marchandises, ne pourront être arrêtés ni molestés pour cette cause, par aucune espèce d'embargo; et les seuls sujets de l'état, auxquels les dites marchandises auront été prohibées, et qui se seront émanipés à vendre et aliéner de pareilles marchandises, seront dûment punis pour cette contravention.



*Treaty with Holland of 1782.*

Art. 10. The merchant ships of either of the parties, coming from the port of an enemy, or from their own, or a neutral port, may navigate freely towards any port of an enemy of the other ally; they shall be, nevertheless, held, whenever it shall be required, to exhibit, as well upon the high seas as in the ports, their sea-letters and other documents, described in the twenty-fifth article, stating expressly, that their effects are not of the number of those which are prohibited, as contraband; and not **35\*** having any contraband goods for an enemy's port, they may freely, and without hindrance, pursue their voyage toward the port of an enemy. Nevertheless, it shall not be required to examine the papers of vessels convoyed by vessels of war, but credence shall be given to the word of the officer who shall conduct the convoy.

Art. 11. If, by exhibiting the sea-letters, and other documents, described more particularly in the twenty-fifth article of this treaty, the other party shall discover there are any of those sorts of goods which are declared prohibited and contraband, and that they are consigned for a port under the obedience of his enemy, it shall not be lawful to break up the hatches of such ship, nor to open any chest, coffer, packs, casks, or other vessels found therein, or to remove the smallest parcel of her goods, whether the said vessel belongs to the subjects of their high mightinesses the states general of the United Netherlands, or to the subjects or inhabitants of the said United States of America, unless the lading be brought on shore, in presence of the officers of the court of admiralty, and an inventory thereof made; but there shall be no allowance to sell, exchange, or alienate the same, until after that due and lawful process shall have been had against such prohibited goods of contraband, and the court of admiralty, by a sentence pronounced, shall have confiscated the same, saving always as well the ship itself, as any other goods found therein, which are to be esteemed free, and may not be detained on pretense of their being infected by the prohibited goods, much less shall they be confiscated as lawful prize; but, on the contrary, when, by the visitation at land, it shall be found that there are no contraband goods in the vessel, and it shall not appear by the papers that he who has taken and carried in the vessel has been able to discover any there, he ought to be condemned in all the charges, damages, and interests of them, which he shall have caused, both to the owners of vessels, and to the owners and freighters of cargoes with which they shall be loaded, by his temerity in taking and carrying them in; declaring most expressly the free vessels shall assure the liberty of the effects with which they shall be loaded, and that this liberty shall **36\*** extend itself equally to the persons who shall be found in a free vessel, who may not be taken out of her, unless they are military men actually in the service of an enemy.

Art. 12. On the contrary, it is agreed, that whatever shall be found to be laden by the subjects and inhabitants of either party, on any ship belonging to the enemies of the other, or to their subjects, although it be not compre-

hended under the sort of prohibited goods, the whole may be confiscated in the same manner as if it belonged to the enemy, except, nevertheless, such effects and merchandises as were put on board such vessel before the declaration of war, or in the space of six months after it, which effects shall not be, in any manner, subject to confiscation, but shall be faithfully and without delay restored in nature to the owners who shall claim them, or cause them to be claimed, before the confiscation and sale, as also their proceeds, if the claim could not be made but in the space of eight months after the sale, which ought to be public; provided, nevertheless, that if the said merchandises are contraband, it shall by no means be lawful to transport them afterwards to any port belonging to enemies.

*The form of the Passport which shall be given to ships and vessels in consequence of the 25th article of this treaty:*

To all who shall see these presents, greeting: Be it known, that leave and permission are hereby given to —, master or commander of the ship or vessel, called —, of the burden of — tons, or thereabouts, lying at present in the port or haven of —, bound for —, and laden with —, to depart and proceed with his said ship or vessel on his said voyage, such ship or vessel having been visited, and the said master and commander having made oath before the proper officer, that the said ship or vessel belongs to one or more of the subjects, people, or inhabitants of —, and to him or them only.

In witness whereof, we have subscribed our names to these presents, and affixed the seal of our arms thereto, and caused the same to be countersigned by —, at —, this — day of —, in the year of our Lord Christ —.

*\*Form of the Certificate which shall be given to ships or vessels in consequence of the 25th article of this treaty.*

We, —, magistrates, or officers of the customs of the city or port of —, do certify and attest, that on the — day of —, in the year of our Lord —, C. D., of —, personally appeared before us and declared, by solemn oath, that the ship or vessel called —, of — tons or thereabouts, whereof —, of —, is, at present, master or commander, does rightfully and properly belong to him or them only; that she is now bound from the city or port of —, to the port of —, laden with goods and merchandises, hereunder particularly described and enumerated, as follows:

In witness whereof, we have signed this certificate, and sealed it with the seal of our office, this — day of —, in the year of our Lord Christ —.

*Form of the Sea-Letter.*

Most serene, serene, most puissant, puissant, high, illustrious, noble, honorable, venerable, wise, and prudent lords, emperors, kings, republics, princes, dukes, earls, barons, lords, burgomasters, schepens, councillors; as, also, judges, officers, justiciaries, and regents, of all the good cities and places, whether ecclesias-

Wheat. 6.

tical or secular, who shall see these patents or hear them read:

We, burgomasters and regents, of the city of —, make known, that the master of —, appearing before us, has declared, upon oath, that the vessel called —, of the burden of about — lasts, which he at present navigates, is of the United Provinces, and that no subject of the enemy have any part or portion therein, directly nor indirectly; so may God Almighty help him. And, as we wish to see the said master prosper in his lawful affairs, our prayer is to all the before mentioned, and to each of them separately, where the said master shall arrive with his vessel and cargo, that they may

please to receive the said master with goodness, and to treat \*him in a becoming manner, [\*38 permitting him, upon the usual tolls and expenses, in passing and repassing, to pass, navigate, and frequent the ports, passes, and territories, to the end, to transact his business, where and in what manner he shall judge proper: whereof we shall be willingly indebted.

In witness, and for cause whereof, we affix hereto the seal of this city.

(In the Margin.)

By ordinance of the high and mighty lords the states general of the United Netherlands.

*Treaty with Sweden of 1783.*

Art. 7. All and every the subjects and inhabitants of the kingdom of Sweden, as well as those of the United States, shall be permitted to navigate with their vessels in all safety and freedom, and without any regard to those to whom the merchandises and cargoes may belong, from any port whatever; and the subjects and inhabitants of the two states shall likewise be permitted to sail and trade with their vessels, and with the same liberty and safety to frequent the places, ports, and havens, of powers, enemies to both or either of the contracting parties, without being in any wise molested or troubled, and to carry on a commerce not only directly from the ports of an enemy to a neutral port, but even from one port of an enemy to another 39\*] \*port of an enemy, whether it be under the jurisdiction of the same or of different princes. And as it is acknowledged by this treaty, with respect to ships and merchandises, that free ships shall make merchandise free, and that everything which shall be on board of ships belonging to subjects of the one or the other of the contracting parties, shall be considered as free, even though the cargo, or a part of it, should belong to the enemies of one or both; it is, nevertheless, provided, that contraband goods shall always be excepted; which being intercepted, shall be proceeded against according to the spirit of the following articles. It is likewise agreed, that the same liberty be extended to persons who may be on board a free ship, with this effect, that although they be enemies to both or either of the parties, they shall not be taken out of the free ship, unless they are soldiers in the actual service of the said enemies.

Art. 8. This liberty of navigation and commerce shall extend to all kinds of merchant-40\*] ships, except those only \*which are expressed in the following article, and are distinguished by the name of contraband goods.

Art. 9. Under the name of contraband or prohibited goods, shall be comprehended arms, great guns, cannon-balls, arquebuses, muskets, mortars, bombs, petards, granadoes, saucisses, pitch balls, carriages for ordnance, musket-rests, bandoliers, cannonpowder, matches, saltpetre, sulphur, bullets, pikes, sabres, swords, morions, helmets, cuirasses, halberds, javelins, pistols and their holsters, belts, bayonets, horses with their harness, and all Wheat. 6.

Art. 7. Il sera permis a tous et un chacun des sujets et habitans du royaume de Suede, ainsi qu'à ceux des Etats Unis, de naviguer avec leurs bâtimens en touté sureté et liberté, et sans distinction de ceux à qui les marchandises et leurs chargemens appartiendront, de quelque port que ce soit. Il sera permis également aux sujets et habitans des deux etats de naviguer et de négocier avec leurs vaisseaux et marchandises, et de frequenter avec la même liberté et sureté, les places, ports et havres des puissances ennemies des deux parties contractantes, ou de l'une d'elles, sans être acunement inquiétés ni troublés, et de faire le commerce non seulement directement des ports de l'ennemi à un port neutre, mais encore d'un port ennemi à un autre port ennemi; soit qu'il se trouve sous la jurisdiction d'un même ou de différents princes. Et comme il est reçu par le présent traité par rapport aux navires et aux marchandises, que les vaisseaux libres rendront les marchandises libres, et que l'on regardera comme libre tout ce qui sera à bord des navires appartenants aux sujets d'une ou de l'autre des parties contractantes, quand même le chargement, ou partie d'icelui appartiendrait aux ennemis de l'une des deux; bien entendu néanmoins que les marchandises de contrebande seront toujours exceptées; les quelles étant interceptées, il sera procédé conformément à l'esprit des articles suivans. Il est également convenu que cette même liberté s'étendra aux personnes qui naviguent sur un vaisseau libre; de manière que quoi qu'elles soient ennemies des deux parties ou de l'une d'elles, elles ne seront point tirées du vaisseau libre, si ce n'est que ce fussent des gens de guerre actuellement au service des dits ennemis.

Art. 8. Cette liberté de navigation et de commerce s'étendra à toutes sortes de marchandises, à la reserve seulement de celles qui sont exprimées dans l'article suivant et désignées sous le nom de marchandises de contrebande:

Art. 9. On comprendra sous ce nom de marchandises de contrebande ou défendues, les armes, canons, boulets, arquebuses, mousquets, mortiers, bombes, pétards, grenades, saucisses, cercles poissés, affûts, fourchettes, bandoulières, poudre à canon, mèches, salpêtre, souffre, balles, piques, sabres, épées, morions, casques, cuirasses, hallebardes, javelines, pistolets et leurs fourreaux, baudriers, bayonettes, chevaux avec leurs harnois, et tous autres



other like kinds of arms and instruments of war for the use of troops.

Art. 10. These which follow shall not be reckoned in the number of prohibited goods; that is to say, all sorts of cloths, and all other manufactures of wool, flax, silk, cotton, or any other materials, all kinds of wearing apparel, together with the things of which they are commonly made, gold, silver, coined or uncoined; brass, iron, lead, copper, latten, coals, wheat, barley, and all sorts of corn or pulse; **41\***] tobacco, all kinds of spices, \*salted and smoked flesh, salted fish, cheese, butter, beer, oil, wines, sugar, all sorts of salt and provisions which serve for the nourishment and sustenance of man; all kinds of cotton, hemp, flax, tar, pitch, ropes, cables, sails, sail-cloth, anchors, and any parts of anchors, ship-masts, planks, boards, beams, and all sorts of trees and other things proper for building or repairing ships; nor shall any goods be considered as contraband which have not been worked into the form of any instrument or thing for the purpose of war by land or by sea, much less such as have been prepared or wrought up for any other use; all which shall be reckoned free goods, as likewise all others which are not comprehended and particularly mentioned in the foregoing article; so that they shall not by any pretended interpretation be comprehended among prohibited or contraband goods; on the contrary, they may be freely transported by the subjects of the king and of the United States, even to places belonging to an enemy, such places only excepted as are besieged, blocked or in-**42\***] vested; and those places \*only shall be considered as such, which are nearly surrounded by one of the belligerent powers.

Art. 11. In order to avoid and prevent on both sides all disputes and discord, it is agreed, that in case one of the parties shall be engaged in a war, the ships and vessels belonging to the subjects or inhabitants of the other shall be furnished with sea-letters or passports, expressing the name, property, and port of the vessel, and also the name and place of abode of the master or commander of the said vessel, in order that it may thereby appear that the said vessel really and truly belongs to the subjects of the one or the other party. These passports, which shall be drawn up in good and due form, shall be renewed every time the vessel returns home in the course of the year. It is also agreed, that the said vessels, when loaded, **43\***] \*shall be provided not only with sea-letters, but also with certificates containing a particular account of the cargo, the place from which the vessel sailed, and that of her destination, in order that it may be known whether they carry any of the prohibited or contraband merchandises mentioned in the 9th article of the present treaty; which certificates shall be made out by the officers of the place from which the vessel shall depart.

Art. 12. Although the vessels of the one and of the other party may navigate freely and with

semblables genres d'armes et d'instruments de guerre servant à l'usage des troupes.

Art. 10. On ne mettra point au nombre des marchandises défendues celles qui suivent, savoir, toutes sortes de draps, et tous autres ouvrages de manufactures de laine, de lin, de soye, de coton et de toute autre matière, tout genre d'habillement avec les choses qui servent ordinairement à les faire; or, argent monnoyé ou non monnoyé, étain, fer, plomb, cuivre, laiton, charbon à fourneau, bled, orge, et toute autre sorte de grains et de légumes, la nicotiane, vulgairement appelée tabac, toutes sortes d'aromates, chairs salées et fumées, poissons salés, fromage et beurre, bière, huile, vins, sucres, toutes sortes de sels et de provisions servant à la nourriture et à la subsistance des hommes; tous genres de coton, chanvre, lin, poix tant liquide que sèche, cordages, cables, voiles, toiles, propres à faire des voiles, ancres, et parties d'ancres quelles qu'elles puissent être, mats de navire, planches, madriers, poutres et toute sorte d'arbres, et \*toutes autres choses nécessaires pour construire ou pour radoubler les vaisseaux. On ne regardera pas non plus comme marchandises de contrebande, celles qui n'auront pas pris la forme de quelque instrument ou attirail, servant à l'usage de la guerre sur terre ou sur mer; encore moins celles qui sont préparées ou travaillées pour tout autre usage. Toutes ces choses seront censées marchandises libres, de même que toutes celles que ne sont point comprises et spécialement désignées dans l'article précédent, de sorte qu'elles ne pourront sous aucune interprétation prétendue d'icelles, être comprises sous les effets prohibés, ou de contrebande; au contraire elles pourront être librement transportées par les sujets du roi et des Etats Unis, même dans les lieux ennemis, excepté seulement dans les places assiégées, bloquées ou investies; et pour telles, seront tenues uniquement les places entourées de près par quelque une des puissances belligérantes.

Art. 11. Afin d'écarter et de prévenir de part et d'autre toutes sortes de discussions et de discordes, il a été convenu que dans les cas où l'une des deux parties se trouverait engagée dans une guerre, les vaisseaux et bâtimens appartenant aux sujets ou habitants de l'autre devront être munis de lettres de mer ou passeports, exprimant le nom, la propriété et le port du navire, ainsi que le nom et la demeure du maître ou commandant du dit vaisseau afin qu'il apparaisse par là, que le dit vaisseau appartient réellement et véritablement aux sujets de l'une ou de l'autre partie. Ces passeports qui seront dressés et expédiés en due et bonne forme, devront également être renouvelés toutes les fois que le vaisseau revient chez lui dans le cours de l'an. Il est encore convenu que ces dits vaisseaux chargés devront être pourvus non seulement de lettres de mer, mais aussi de certificats contenant les détails de la cargaison, le lieu d'où le vaisseau est parti et celui de sa destination, afin que l'on puisse connaître s'ils ne portent aucune des marchandises défendues ou de contrebande spécifiées dans l'article 9 du présent traité, lesquels certificats seront également expédiés par les officiers du lieu d'où le vaisseau sortira.

Art. 12. Quoique les vaisseaux de l'une et de l'autre partie pourront naviguer librement et



all safety, as is explained in the 7th article, they shall nevertheless be bound at all times when required, to exhibit as well on the high sea as in port, their passports and certificates above mentioned. And not having contraband merchandise on board for an enemy's port, they may freely and without hindrance pursue their voyage to the place of their destination. Nevertheless, the exhibition of papers shall not be demanded of merchant ships under the convoy 44\*] of vessels of war, but credit \*shall be given to the word of the officer commanding the convoy.

Art. 13. If, on producing the said certificates, it be discovered that the vessel carries some of the goods which are declared to be prohibited or contraband, and which are consigned to an enemy's port, it shall not, however, be lawful to break up the hatches of such ships, nor to open any chest, coffers, packs, casks, or vessels, nor to remove or displace the smallest part of the merchandises, until the cargo has been landed in the presence of officers appointed for the purpose, and until an inventory thereof has been taken; nor shall it be lawful to sell, exchange, or alienate the cargo, or any part thereof, until legal process shall have been had against the prohibited merchandises, and sentence shall have passed declaring them liable to confiscation, saving, nevertheless, as well the ships themselves, as the other merchandises which shall have been found therein, which, by virtue of this present treaty, are to be esteemed free, and which are not to be detained 45\*] on pretense \*of their having been loaded with prohibited merchandise, and much less confiscated as lawful prize. And in case the contraband merchandise be only a part of the cargo, and the master of the vessel agrees, consents, and offers to deliver them to the vessel that has discovered them, in that case the latter, after receiving the merchandises which are good prize, shall immediately let the vessel go, and shall not by any means hinder her from pursuing her voyage to the place of her destination. When a vessel is taken and brought into any of the ports of the contracting parties, if upon examination she be found to be loaded only with merchandises declared to be free, the owner, or he who has made the prize, shall be bound to pay all costs and damages to the master of the vessel unjustly detained.

Art. 14. It is likewise agreed, that whatever shall be found to be laden by the subjects of either of the two contracting parties, on a ship belonging to the enemies of the other party, the whole effects, although not of the number 46\*] of those declared contraband, \*shall be confiscated as if they belonged to the enemy, excepting, nevertheless, such goods and merchandises as were put on board before the declaration of war, and even six months after the declaration, after which term none shall be presumed to be ignorant of it; which merchandises shall not in any manner be subject to confiscation, but shall be faithfully and specifically delivered to the owners, who shall claim or cause them to be claimed before confiscation and sale, as also their proceeds, if the claim be made within eight months, and could not be made sooner after the sale, which is to be public; provided, nevertheless, that if the said

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avec toute sûreté comme il est expliqué à l'article 7, ils seront néanmoins tenus toutes les fois qu'on l'exigera, d'exhiber tant en pleine mer que dans les ports, leurs passe-ports et certificats ci-dessus mentionnés. Et n'ayant pas chargé des marchandises de contrebande pour un port ennemi, ils pourront librement et sans empêchement poursuivre leur voyage vers le lieu de leur destination. Cependant on n'aura point le droit de demander l'exhibition des papiers aux navires marchands convoyés par des vaisseaux de guerre; mais on ajoutera foi à la parole de l'officier commandant le convoi.

Art. 13. Si en produisant les dits certificats il fut découvert que le navire porte quelques uns de ces effets qui sont déclarés prohibés ou de contrebande, et qui sont consignés pour un port ennemi, il ne sera cependant pas permis de rompre les écoutilles des dits navires, ni d'ouvrir aucune caisse, coffre, malle, ballot et tonneau, ou d'en déplacer, ni d'en détourner la moindre partie des marchandises, jusqu'à ce que la cargaison ait été mise à terre en présence des officiers préposés à cet effet, et que l'inventaire en ait été fait. Encore ne sera-t-il pas permis de vendre, échanger ou aliéner la cargaison ou quelque partie d'icelle, avant qu'on aura procédé légalement au sujet des marchandises prohibées et qu'elles auront été déclarées confiscables par sentence: à la réserve néanmoins, tant des navires même que des autres marchandises qui y auront été trouvées et qui en vertu du présent traité doivent être censées libres; lesquelles ne peuvent être retenues sous prétexte qu'elles ont été chargées avec des marchandises défendues, et encore moins être confiscées comme une prise légitime. Et supposé que les dites marchandises de contrebande, ne faisant qu'une partie de la charge, le patron du navire agréat, consentit et offrit de les livrer au vaisseau qui les aura découvertes; en ce cas, celui-ci, après avoir reçu les marchandises, de bonne prise, sera tenu de laisser aller aussitôt le bâtiment, et ne l'empêchera en aucune manière de poursuivre sa route vers le lieu de sa destination. Tout navire pris et amené dans un des ports des parties contractantes, sous prétexte de contrebande, qui se trouve par la visite faite n'être chargé que de marchandises déclarées libres, l'armateur ou celui qui aura fait la prise, sera tenu de payer tous les frais et dommages au patron du navire retenu injustement.

Art. 14. On est également convenu que tout ce qui se trouvera chargé par les sujets d'une des deux parties dans un vaisseau appartenant aux ennemis de l'autre partie, sera confisqué en entier, quoique ces effets ne soient pas au nombre de ceux déclarés de contrebande, comme si ces effets appartenaient à l'ennemi même; à l'exception néanmoins des effets et marchandises qui auront été chargées sur des vaisseaux ennemis avant la déclaration de guerre, et même six mois après la déclaration, après lequel terme, l'on ne sera pas censé d'avoir pu l'ignorer; les quelles marchandises ne seront en aucune manière sujettes à confiscation, mais seront rendues en nature fidèlement aux propriétaires qui les réclameront ou feront réclamer avant la confiscation et vente; comme aussi leur provenu, si la réclamation ne pouvait se faire que dans l'intervalle de huit mois après la vente, laquelle doit être publique; bien entendu, néanmoins,



merchandises be contraband, it shall not be in any wise lawful to carry them afterwards to a port belonging to the enemy.

que si les dites marchandises sont de contrebande, il ne sera nullement permis de les transporter ensuite a aucun port appartenant aux ennemis.

*Treaties with Prussia, of 1785 and 1799.*

Art. 12. If one of the contracting parties should be engaged in war with any other power, the free intercourse and commerce of the subjects or citizens of the party remaining **47\*** neutral with the belligerent powers, shall not be interrupted. On the contrary, in that case as in full peace, the vessels of the neutral party may navigate freely to and from the ports, and on the coasts of the belligerent parties, free vessels making free goods, inasmuch, that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other; and the same freedom shall be extended to persons who shall be on board a free vessel, although they should be enemies to the other party, unless they be soldiers in actual service of such enemy.

Art. 13. And in the same case of one of the contracting parties being engaged in war with any other power, to prevent all the difficulties and misunderstandings that usually arise respecting the merchandise heretofore called contraband, such as arms, ammunition, and military stores of every kind, no such articles carried in the vessels, or by the subjects or citizens of one of the parties to the enemies **48\*** of the other, shall be deemed contraband, so as to induce confiscation or condemnation, and a loss of property to individuals. Nevertheless, it shall be lawful to stop such vessels and articles, and to detain them for such length of time as the captors may think necessary to prevent the inconvenience or damage that might ensue from their proceeding; paying, however, a reasonable compensation for the loss such arrest shall occasion to the proprietors; and it shall further be allowed to use, in the service of the captors, the whole, or any part of the military stores so detained, paying the owners the full value of the same, to be ascertained by the current price at the place of its destination. But in the case supposed, of a vessel stopped for articles heretofore deemed contraband, if the master of the vessel stopped will deliver out the goods supposed to be of contraband nature, he shall be admitted to do it, and the vessel shall not in that case be carried into any port, nor further detained, but shall be allowed to proceed on her voyage.

**49\*** Art. 14. And in the same case where one of the parties is engaged in war with another power, that the vessels of the neutral party may be readily and certainly known, it is agreed, that they shall be provided with sea-letters, or passports, which shall express the name, the property, and burden of the vessel, as also the name and dwelling of the master, which passports shall be made out in good and due form (to be settled by conventions between the parties whenever occasion shall require), shall be renewed as often as the vessel shall re-

Art. 12. Si l'une des parties contractantes était en guerre avec une autre puissance, la libre correspondance et le commerce des citoyens ou sujets de la partie qui demeure neutre envers les puissances belligérantes, ne seront point interrompus. Au contraire, et dans ce cas, comme en pleine paix, les vaisseaux de la partie neutre, pourront naviguer en toute sûreté dans les ports et sur les côtes des puissances belligérantes, les vaisseaux libres rendant les marchandises libres, en tant qu'on regardera comme libre tout ce qui sera à bord d'un navire appartenant à la partie neutre, quand même ces effets appartiendraient à l'ennemi de l'autre. La même liberté s'étendra aux personnes qui se trouveront à bord d'un vaisseau libre, quand mêmes elles seraient ennemies de l'autre partie, excepté que ce fussent des gens de guerre, actuellement au service de l'ennemi.

Art. 13. Dans le cas où l'une des parties contractantes se trouveroit en guerre avec une autre puissance, il a été convenu que pour prévenir les difficultés et les discussions qui surviennent ordinairement par rapport aux marchandises ci-devant appelées de contrebande, telles qu'armes, munitions, et autres provisions de guerre de toute espèce, aucun de ces articles, chargés à bord des vaisseaux des citoyens ou sujets de l'une des parties, et destinés pour l'ennemi de l'autre, ne sera censé de contrebande, au point d'impliquer confiscation ou condamnation, et d'entraîner la perte de la propriété des individus. Néanmoins il sera permis d'arrêter ces sortes de vaisseaux et effets et de les retenir pendant tout le temps que le preneur croira nécessaire pour prévenir les inconvénients et le dommage qui pourroient en résulter autrement; mais dans ce cas on accordera une compensation raisonnable pour les pertes qui auront été occasionnées par la saisie. Et il sera permis en outre aux preneurs d'employer à leur service, en tout ou en partie, les munitions militaires détenues, en payant aux propriétaires la pleine valeur, à déterminer sur le prix qui aura cours à l'endroit de leur destination; mais que dans le cas énoncé, d'un vaisseau arrêté pour des articles ci-devant appelés contrebande, si le maître du navire consentait à délivrer les marchandises suspectes, il aura liberté de le faire, et le navire ne sera plus amené dans le port, ni détenu plus longtemps, mais aura toute liberté de poursuivre sa route.

Art. 14. Dans le cas où l'une des deux parties contractantes se trouverait engagée dans une guerre avec une autre puissance, et afin que les vaisseaux de la partie neutre soient promptement et sûrement reconnus, on est convenu qu'ils devront être munis de lettres de mer ou passe-ports, exprimant le nom, le propriétaire, et le port du navire, ainsi que le nom et la demeure du maître. Ces passe-ports, qui seront expédiés en bonne et due forme (à déterminer par des conventions entre les parties, lorsque l'occasion le requerra) devront être

turn into port; and shall be exhibited whensoever required, as well in the open sea as in port. But if the said vessels be under convoy of one or more vessels of war, belonging to the neutral party, the simple declaration of the officer commanding the convoy, that the said vessel belongs to the party of which he is, shall be considered as establishing the fact, and shall relieve both parties from the trouble of further examination.

50\*] \*Art. 15. And to prevent entirely all disorder and violence in such cases, it is stipulated, that when the vessels of the neutral party, sailing without convoy, shall be met by any vessel of war, public or private, of the other party, such vessel of war shall not approach within cannonshot of the said neutral vessel, nor send more than two or three men in their boat on board the same, to examine her sea-letters or passports. And all persons belonging to any vessel of war, public or private, who shall molest or injure, in any manner whatever, the people, vessels, or effects of the other party, shall be responsible in their persons and property or damages and interest, sufficient security for which shall be given by all commanders of private armed vessels before they are commissioned.

renouvelés toutes les fois que le vaisseau retournera dans son port, et seront exhibés à chaque réquisition tant en pleine mer que dans le port. Mais si le navire se trouve sous le convoi d'un ou plusieurs vaisseaux de guerre appartenant à la partie neutre, il suffira que l'officier commandant du convoi déclare que le navire est de son parti moyennant quoi cette simple déclaration sera censée établir le fait, et dispensera les deux parties de toute visite ultérieure.

Art. 15. Pour prévenir entièrement tout désordre et toute violence en pareil cas, il a été stipulé que lorsque des navires, de la partie neutre, navigans sans convoi, rencontreront quelque vaisseau de guerre public ou particulier de l'autre partie, le vaisseau de guerre n'approchera le navire neutre qu'au delà de la portée du canon, et n'enverra pas plus de deux ou trois hommes dans sa chaloupe à bord, pour examiner les lettres de mer ou passe-ports. Et toutes les personnes appartenantes à quelque vaisseau de guerre public ou particulier, qui molesteront ou insultent en quelque manière que ce soit l'équipage, les vaisseaux ou effets de l'autre partie, seront responsables en leurs personnes et en leurs biens, de tous dommages et intérêts; pour lesquels il sera donné caution suffisante par tous les commandans de vaisseaux armés en course, avant qu'ils reçoivent leurs commissions.

*Treaty with Prussia of 1799.*

Art. 12. Experience having proved that the principle adopted in the twelfth article of 51\*] the treaty of 1785, according to which free ships make free goods, has not been sufficiently respected during the two last wars, and especially in that which still continues, the two contracting parties propose, after the return of a general peace, to agree either separately between themselves, or jointly with other powers alike interested, to concert with the great maritime powers of Europe, such arrangements and such permanent principles as may serve to consolidate the liberty and the safety of the neutral navigation and commerce in future wars. And if, in the interval, either of the contracting parties should be engaged in a war, to which the other should remain neutral, the ships of war and privateers of the belligerent power shall conduct themselves towards the merchant vessels of the neutral power, as favorably as the course of the war then existing may permit, observing the principles and rules of the law of nations, generally acknowledged.

Art. 12. L'expérience ayant démontré, que le principe adopté dans l'article 12, du traité de 1785, selon lequel les vaisseaux libres rendent aussi les marchandises libres, n'a pas été suffisamment respecté dans les deux dernières guerres, et notamment dans celle qui dure encore, les deux parties contractantes se réservent de s'entendre après le retour de la paix générale, soit séparément soit conjointement avec d'autres puissances intéressées pour concerter avec les grandes puissances maritimes de l'Europe, tels arrangements et tels principes permanens, qui puissent servir à consolider la liberté et la sûreté de la navigation et du commerce neutres dans les guerres futures. Et si, pendant cet intervalle, l'une des parties contractantes se trouve engagée dans une guerre à laquelle l'autre reste neutre, les vaisseaux de guerre et les armateurs de la puissance belligérante, se comporteront, à l'égard de bâtimens marchands de la puissance neutre, aussi favorablement que la raison de guerre, pour lors existante pourra le permettre, en observant les principes et les règles du droit des gens généralement reconnus.



52\*]

[\*NOTE IV.]

TO THE AMIABLE ISABELLA.

*Copy of the Convention with the Court of London, signed at St. Petersburg, the 5th (17th) of June, 1801.*

In the name of the Most Holy and Undivided Trinity.

The mutual desire of His Majesty the Emperor of all the Russias, and of His Majesty the King of the united kingdom of Great Britain and Ireland, being not only to come to an understanding between themselves with respect to the differences which have lately interrupted the good understanding and friendly relations which subsisted between the two states, but also to prevent, by frank and precise explanations upon the navigation of their respective subjects, the renewal of similar altercations and troubles which might be the consequence of them; and the object of the solicitude of their said majesties being to settle, as soon as can be done, an equitable arrangement of those differences, and an invariable determination of their principles upon the rights of neutrality in their application to their respective monarchies, in order to unite more closely the ties of friendship and good intercourse, of which they acknowledge the utility and the benefits, have named and chosen for their plenipotentiaries, viz.: His Majesty the Emperor of all the Russias, the Sieur Niquita, Count de Panen, his counsellor, &c.; His Majesty the King of the United Kingdom of Great Britain and Ireland, Alleyen, Baron St. Helens, privy counsellor, &c., who, after having communicated their full powers, and found them in good and due form, have agreed upon the following points and articles:

Art. I. There shall be hereafter between His Imperial Majesty of all the Russias, and His Britannic Majesty, their subjects, and the states and countries under their domination, good and unalterable friendship and understanding; and all the political, commercial, and other relations of common utility between the respective subjects, shall subsist as formerly, without their being disturbed or troubled in any manner whatever.

Art. II. His Majesty the Emperor and His Britannic Majesty declare that they will take the most especial care of the execution of the prohibitions against the trade of contraband of their subjects with the enemies of each of the high contracting parties.

Art. III. His Imperial Majesty of all the Russias, and His Britannic Majesty, having resolved to place under a sufficient safeguard the freedom of commerce and navigation of their subjects, in case one of them shall be at war whilst the other shall be neuter, have agreed:

1. That the ships of the neutral power shall navigate freely to the ports and upon the coasts of the nations at war.

2. That the effects embarked on board neu-

tral ships shall be free, with the exception of contraband of war, and of enemy's property; and it is agreed not to comprise in the number of the latter, the merchandise of the produce, growth, or manufacture of the countries at war, which should have been acquired by the subjects of the neutral power, and should be transported for their account, which merchandise cannot be excepted in any case from the freedom granted to the flag of the said power.

3. That in order to avoid all equivocation and misunderstanding of what ought to be qualified as contraband of war, His Imperial Majesty of all the Russias and His Britannic Majesty declare, conformably to the 11th article of the treaty of commerce concluded between the two crowns on the 10th (21st) February, 1797, that they acknowledge as such only the following objects, viz., cannons, mortars, fire-arms, pistols, bombs, grenades, balls, bullets, firelocks, flints, matches, powder, saltpetre, sulphur, helmets, pikes, pouches, swords, sword-belts, saddles and bridals, excepting, however, the quantity of the said articles which may be necessary for the defense of the ship and of those who compose the crew; and all other articles whatever, not enumerated here, shall not be reputed warlike and naval ammunition, nor be subject to confiscation, and of course shall pass freely, without being subjected to the smallest difficulty, unless they be considered enemy's property in the above settled sense. It is also agreed, that which is stipulated in the present article shall not be to the prejudice of the particular stipulations of one or the other crown with other powers, by which objects of a similar kind should be reserved, prohibited, or permitted.

4. That in order to determine what characterizes a blockaded port, that determination is given only to that where there is, by the disposition of the power which attacks it with ships stationary, or sufficiently near, an evident danger in entering.

5. That the ships of the neutral power shall not be stopped but upon just causes and evident facts; that they be tried without delay, and that the proceeding be always uniform, prompt and legal.

In order the better to ensure the respect due to these stipulations, dictated by the sincere desire of conciliating all interests, and to give a new proof of their loyalty and love of justice the high contracting parties enter here into the most formal engagement to renew the severest prohibitions to their captains, whether of ships of war or merchantment, to take, keep, or conceal on board their ships any of the objects which, in the terms of the present convention, may be reputed contraband, and respectively to take

care of the execution of the orders which they shall have published in their admiralities, and wherever it shall be necessary.

Art. IV. The two high contracting parties, wishing to prevent all subjects of dissention in future by limiting the right of search of merchant ships going under convoy to the sole causes in which the belligerent power may experience a real prejudice by the abuses of the neutral flag, have agreed,

1. That the right of searching merchant ships belonging to the subject of one of the contracting powers, and navigating under convoy of a ship of war of the said power, shall only be exercised by ships of war of the belligerent party, and shall never extend to the fitters out of privateers, or other vessels, which do not belong to the imperial or royal fleet of their Majesties, but which their subjects shall have fitted out for war.

**55\***] \*2. That the proprietors of all merchant ships belonging to the subjects of one of the contracting sovereigns, which shall be destined to sail under convoy of a ship of war, shall be required, before they receive their sailing orders, to produce to the commander of the convoy their passports and certificates, or sea-letters, in the form annexed to the present treaty.

3. That when such ship of war, and every merchant ship under convoy, shall be met with by a ship or ships of war of the other contracting party, who shall then be in a state of war, in order to avoid all disorder, they shall keep out of cannonshot, unless the situation of the sea, or the place of meeting, render a nearer approach necessary; and the commander of the ship of the belligerent power shall send a sloop on board the convoy, where they shall proceed reciprocally to the verification of the papers and certificates that are to prove, on one part, that the ship of war is authorized to take under its escort such or such merchant ships of its nation, laden with such a cargo, and for such a port; on the other part, that the ship of war of the belligerent party belongs to the imperial or royal fleet of their Majesties.

4. This verification made, there shall be no pretense for any search, if the papers are found in due form, and if there exists no good motive for suspicion. In the contrary case, the captain of the neutral ship of war (being duly required thereto by the captain of the ship of war, or ships of war, of the belligerent power) is to bring to and detain his convoy during the time necessary for the search of the ships which compose it, and he shall have the faculty of naming and delegating one or more officers to assist at the search of the said ships, which shall be done in his presence on board each merchant ship, conjointly with one or more officers selected by the captain of the ship of the belligerent party.

5. If it happen that the captain of the ship or ships of war of the power at war, having examined the papers found on board, and having interrogated the master and crew of the ship, shall see just and sufficient reasons to detain the merchant ship, in order to proceed to an ulterior search, he shall notify that intention **56\***] \*to the captain of the convoy, who shall have the power to order an officer to remain on board the ship thus detained, and to assist at the examination of the cause of her detention. The

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merchant ship shall be carried immediately to the nearest and most convenient port belonging to the belligerent power, and the ulterior search shall be carried on with all possible diligence.

Art. V. It is also agreed, that if any merchant ship thus convoyed should be detained without just and sufficient cause, the commander of the ship or ships of war of the belligerent power, shall not only be bound to make to the owners of the ship and of the cargo a full and perfect compensation for all the losses, expenses, damages, and costs, occasioned by such a detention, but shall farther be liable to an ulterior punishment for every act of violence or other fault which he may have committed, according as the nature of the case may require. On the other hand, no ship of war with a convoy shall be permitted, under any pretext whatsoever, to resist by force the detention of a merchant ship or ships, by the ship or ships of war of the belligerent power; an obligation which the commander of a ship of war, with convoy, is not bound to observe towards privateers and their fitters-out.

Art. VI. The high contracting powers shall give precise and efficacious orders, that the sentences upon prizes made at sea shall be conformable with the rules of the most exact justice and equity; that they shall be given by judges above suspicion, and who shall not be interested in the matter. The government of the respective states shall take care that the said sentences shall be promptly and duly executed, according to the forms prescribed. In case of the unfounded detention, or other contravention of the regulations stipulated by the present treaty, the owners of such a ship and cargo shall be allowed damages proportioned to the loss occasioned by such detention. The rules to observe for these damages, and for the case of unfounded detention, as also the principles to follow for the purpose of accelerating the process, shall be the matter of additional articles, which the contracting parties agree to settle between them, and which shall have the same force and validity \*as if they were **[57]** inserted in the present act. For this effect, their Imperial and Britannic Majesties mutually engage to put their hand to the salutary work, which may serve for the completion of these stipulations, and to communicate to each other without delay, the views which may be suggested to them by their equal solicitude to prevent the least grounds for dispute in future.

Art. VII. To obviate all the inconveniences which may arise from the bad faith of those who avail themselves of the flag of a nation without belonging to it, it is agreed to establish, for an inviolable rule, that any vessel whatever, to be considered as the property of the country the flag of which it carries, must have on board the captain of the ship, and one-half of the crew of the people of that country, and the papers and passports in due and perfect form; but every vessel which shall not observe this rule, and which shall infringe the ordinances published on that head, shall lose all rights to the protection of the contracting powers.

Art. VIII. The principles and measures adopted by the present act, shall be alike applicable to all the maritime wars in which one of the two powers may be engaged whilst the other remains neutral. These stipulations shall, in con-



sequence, be regarded as permanent, and shall serve for a constant rule to the contracting powers in matter of commerce and navigation.

Art. IX. His Majesty the King of Denmark, and His Majesty the King of Sweden, shall be immediately invited by His Imperial Majesty, in the name of the two contracting parties, to accede to the present convention, and at the same time to renew and confirm their respective treaties of commerce with His Britannic Majesty; and His said Majesty engages, by acts which shall have established that agreement, to render and restore to each of these powers, all the prizes that have been taken from them, as well as the territories and countries under their domination, which have been conquered by the arms of His Britannic Majesty since the rupture, in the state in which those possessions were found, at the period at which the troops of His Britannic Majesty entered them. The orders of His said Majesty for the restitution **58\*** of those prizes and conquests shall be immediately expedited after the exchange of the ratification of the acts by which Sweden and Denmark shall accede to the present treaty.

Art. X. The present convention shall be ratified by the two contracting parties, and the ratifications exchanged at St. Petersburg in the space of two months at farthest, from the day of the signature. In faith of which, the respective plenipotentiaries have caused to be made

two copies perfectly similar, signed with their hands, and have sealed with their arms.

Done at St. Petersburg, the 5th (17th) June, 1801.

(L. s.)  
(L. s.)

N. COUNT DE PANIN.  
ST. HELENS.

*Formula of the Passports and Sea-Letters which ought to be delivered in the respective Admiralties of the States of the two High Contracting Parties to the Ships of War, and Merchant Vessels, which shall sail from them, conformable to Article IV. of the present Treaty.*

Be it known, that we have given leave and permission to N—, of the city or place of N—, master or conductor of the ship N—, belonging to N—, of the port of N—, of — tons, or thereabouts, now lying in the port or harbor of —, to sail from thence to N—, laden with N—, on account of N—, after the said ship shall have been visited before its departure in the usual manner by the officers appointed for that purpose; and the said N—, or such other as shall be vested with powers to replace him, shall be obliged to produce in every port or harbor which he shall enter with the said vessel, to the officers of the place, the present license, and to carry the flag of N—, during his voyage.

In faith of which, &c.

**59\*]**

[\*NOTE V.]

TO THE CASE OF THE BELLO CORRUNES, *ante*, p. 156.

*Décision du Conseil des Prises sur les Précautions Conservatoires du Produit des Prises.*

Au nom de la république Française, une et indivisible, le conseil a rendu la décision suivante:

Vu le mémoire présenté au conseil par le commissaire général des relations commerciales de sa majesté Danoise près la république Française;

Vu les conclusions du commissaire du gouvernement laissées ce jourd'hui sur le bureau, et dont la teneur suit:

Le commissaire-général des relations commerciales de sa majesté Danoise a présente au conseil des prises, le 13 floreal présent mois, un mémoire par lequel il demande la mise en sûreté ou le cautionnement du produit des ventes, dans les contestations sur la validité des prises Danoises, antérieure au 4 nivôse dernier, sans excepter celles qui se trouvaient pendantes au tribunal de cassation. Il se dit particulièrement chargé des intérêts des négocians Danois.

J'ai pris connaissance de ce mémoire, d'après l'invitation que le conseil m'a faite, par sa délibération du 23 floreal, de donner mes conclu-

sions par écrit, conformément à l'article 13 de l'arrêté des consuls, du 6 germinal an 8, contenant règlement sur la manière de statuer relativement aux prises maritimes.

Avant de m'occuper de la demande, il m'a paru important d'examiner si le commissaire Danois avait qualité pour la former.

Ce commissaire est un agent politique. Dès qu'il est reconnu par le gouvernement français, il peut incontestablement remplir les fonctions attachées à son mandat; mais, peut-il, par des actions ou par des demandes, intervenir dans des contestations particulières, mues entre des négocians Français et des négocians de sa nation?

L'article 13 de l'arrêté du 6 germinal, n'admet que les \*parties ou leurs défen- **[\*60]** seurs qui justifieront préalablement de leurs droits et de leurs pouvoirs.

Le commissaire Danois ne se montre pas pour son intérêt propre, mais comme chargé des intérêts d'autrui. Il n'est point partie; il ne prétend exercer que le ministère de défen-

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seur. Justifie-t-il de son droit et de son pouvoir?

Il est vraisemblable qu'il n'agit qu'en vertu de son titre de commissaire-général des relations commerciales. Il est possible qu'on l'ait autorisé, par ce titre, à donner une attention particulière aux contestations dans lesquelles il se dit chargé des intérêts des négocians Danois.

Mais tout titre, que le commissaire Danois ne tiendrait que de son gouvernement, ne saurait le rendre le véritable représentant des parties. Au gouvernement appartient la protection, et aux parties seules, la propriété. Un propriétaire peut disposer de son bien et exercer ses droits par lui-même ou par autrui. Mais, chacun étant arbitre et régulateur de sa propre fortune, il n'est libre à qui que ce soit d'intervenir dans les affaires d'un autre, s'il n'en a reçu de lui le pouvoir. La mission générale donnée au commissaire Danois par son souverain, pour le charger de veiller à l'intérêt des négocians de sa nation, et surtout de ceux qui ont essuyé des prises, ne suffirait donc jamais pour établir ce commissaire mandataire, proprement dit, de chacun de ses négocians. Dans les principes du droit politique, la mission du commissaire Danois est essentiellement limitée aux bons offices d'un protecteur qui recommande, et ne s'étend pas aux actes d'un fondé de pouvoir qui régit ou qui dispose.

Je conviens qu'un droit, plus ancien et plus sacré que le droit politique, je veux dire le droit social, autorise tout homme à suivre les affaires d'un absent qui ne connaît pas sa situation personnelle, et qui a besoin des secours spontanés de cette bienveillance naturelle dont le germe n'a pu être entièrement étouffé par nos vices, et dont le droit civil s'honore de sanctionner les effets.<sup>1</sup>

**61\*]** \*Il a été reconnu, dans tous les temps et chez tous les peuples policés, qu'un homme, à l'insu de son semblable, peut lui faire du bien, et que s'il n'est jamais permis de faire le préjudice d'un autre, il l'est toujours de contribuer à son avantage, quoiqu'il n'en ait pas donné le mandat.<sup>2</sup>

Le commissaire Danois, à défaut de tout mandat particulier ou spécial, pourrait peut-être se prévaloir de ces principes pour justifier les démarches qu'il fait, auprès du conseil des prises, dans la cause ou dans les affaires de ses compatriotes absens. Qui les défendra, s'il ne les défend pas, et si par leur éloignement ou par d'autres circonstances, ils sont dans l'impossibilité de se défendre eux-mêmes?

Cependant, comme, dans l'état de nos sociétés, il importe au maintien de l'ordre public et à la tranquillité ainsi qu'à la sûreté des particuliers, que les actions en justice ne soient pas populaires, il est de maxime constante et universelle que l'intérêt seul est le principe de l'action, et qu'il faut être partie ou muni d'un pouvoir de la partie, pour pouvoir intervenir dans un litige. On a cru qu'il était nécessaire de prévenir les incursions dangereuses que des

esprits entreprenans ou inquiets peuvent faire dans des choses qui ne les concernent pas. On a cru encore que, pour arrêter les indiscretions d'un faux zèle, il était utile de prescrire des limites à la bienfaisance même.

Mais on a établi, près toutes les administrations et tous les tribunaux, un ministère public, connu aujourd'hui, en France sous le nom de commissaire du gouvernement, qui est le défenseur-né de tous ceux qui n'en ont point, qui est partie principale dans les affaires importantes, et partie jointe dans toutes. Cette institution admirable, qui manquait aux anciens, est une barrière contre les surprises, les dénis de justice, les violences et les abus. La partie publique agit, et tous les droits sont conservés. Elle veille, et tous les citoyens sont tranquilles. Elle exerce toutes les actions du public. Elle est la vive-voix \*du faible et du pauvre. [**\*62** Elle représente les absens; et, parmi nous, une de ses principales fonctions, selon le témoignage du savant et vertueux d'Aguesseau, est de faciliter l'accès de la justice aux étrangers, de proposer leur défense, de leur offrir un appui, et de se rendre à leur égard le garant de la loyauté nationale.

Le commissaire Danois ne doit donc point s'alarmer, si je réclame les règles qui ne permettent qu'aux parties où à leurs fondés de pouvoirs d'exercer des actions et de former des demandes. L'intérêt de protection, qu'il doit à ses compatriotes, suffit pour l'autoriser à éclairer la religion des membres du conseil par des notes, par des instructions, par des mémoires. Jamais on ne doit dédaigner les moyens de connaître la vérité. De quelque part qu'elle vienne, elle a des droits sur l'esprit et sur le cœur des hommes.

En ma qualité de commissaire du gouvernement, je suis particulièrement obligé de faire valoir les exceptions favorables aux étrangers qui sont forcés de plaider en France, et d'encourager, par l'impartialité de mon ministère, des hommes entraînés hors du lieu de leur naissance et de leurs habitudes, des hommes auxquels il importe de persuader que rien n'est possible de ce qui ne serait pas juste. Il n'est point de Français qui ne me désavouât si je professais d'autres principes. Notre nation s'est toujours distinguée par ses procédés décens et modérés envers les autres peuples. Elle a rempli l'Europe de la gloire de ses armes; mais l'équité, la générosité sied bien à la toute-puissance.

J'ai donc pensé que si je ne pouvais regarder le commissaire Danois comme partie ou comme représentant de quelqu'une des parties intéressées, il était toujours de mon devoir d'examiner sa demande, et de la regarder comme un éveil donné à ma sollicitude; je serais dans le cas, si cette demande paraissait fondée, de la réaliser en mon nom, malgré le silence des parties et de leurs défenseurs. Car les objets, dont la sûreté et la conservation, pendant le litige, sont réclamées par le commissaire Danois, sont sous la garde du droit des gens. Or, en pareille occurrence, je pourrais agir d'office, comme ayant les actions du \*gouvernement, qui est le [**\*63** gardien naturel, dans l'état, de tout ce qui repose sous la foi publique.

Je passe donc à l'examen foncier de la demande qui a été soumise à votre décision.

Cette demande tend à faire ordonner la mise

1.—Digeste, liv. III., tit. 5. De negotiis gestis, loi: hoc edictum necessarium est, quoniam magna utilitas absentium versatur, ne indefensi—patiantur.

2.—Si quis absentis negotia gesserit, licet ignorant, tamen quidquid utiliter in rem ejus impendebat—habeat eo nomine actionem. Lib. II., Ibid.

Sufficit, si utiliter gessit. Lib. X.



en sûreté ou le cautionnement du produit des ventes, dans les contestations sur la validité des prises Danoises, antérieures au 4 nivôse dernier.

On ne peut nier que, pendant le litigela chose litigieuse doit être en sûreté, et que rien ne doit être innové pendant le procès. Ce principe général, dicté par le bon sens et par la raison, a été appliqué à la matière des prises, par tous les réglemens qui régissent cette matière.

On lit par-tout qu'en général il ne doit y avoir ni vente, ni déchargement avant le jugement de la prise; que la vente provisoire ne peut avoir lieu que dans le cas où la prise serait dans un danger reconnu de dépérissement pour le navire ou la cargaison, et encore dans le cas où la prise serait reconnue constamment ennemie; que le produit des ventes provisoires doit être assuré par le dépôt ou par le cautionnement.

Le commissaire Danois est rassuré, par l'arrêté des consuls, du 6 germinal, pour toutes les prises postérieures au 4 nivôse d'aparavant. Il ne réclame l'autorité du conseil que pour les prises faites avant cette époque.

Mais ici les diverses époques ne doivent pas être confondues.

Avant l'établissement du conseil des prises, la matière des prises suivait l'ordre hiérarchique des tribunaux. Comme dans les autres matières, on pouvait recourir au tribunal de cassation, pour faire annuler le jugement rendu par le tribunal d'appel. Tout était conduit d'après les principes ordinaires de l'ordre judiciaire.

Parmi les contestations sur les prises antérieures au 4 nivôse, il y en a qui étaient pendantes au tribunal de cassation, quand le conseil des prises a été institué. D'autres étaient et sont encore devant les tribunaux d'appel, ou peut-être même devant les tribunaux de première instance.

D'après le vœu de tous les réglemens, les précautions pour la mise en sûreté d'une prise, ne doivent cesser qu'après que la validité ou l'indalité de cette prise a été définitivement jugée; d'où le commissaire Danois conclut que, 64\*] tant qu'il y aura litige \*devant quelque tribunal que ce soit, même celui de cassation, il faut continuer les précautions conservatoires.

Mais on peut répondre que l'on regardait une prise comme définitivement jugée, quand le tribunal d'appel avait prononcé sur sa validité ou sur son invalidité. En effet, dans les principes de l'ordre judiciaire, les jugemens des tribunaux d'appel sont des jugemens définitifs et en dernier ressort, dont aucune puissance, dans l'état, ne peut empêcher ni suspendre l'exécution.

L'appel a, par lui-même, un effet dévolutif, et il a de plus un effet suspensif, toutes les fois que l'on ne se trouve dans aucun des cas où les lois autorisent l'exécution provisoire des jugemens de première instance.

Le recours en cassation n'a aucun des effets ni des caractères de l'appel. Par ce recours, il n'y a ni dévolution de la matière, ni suspension du jugement contre lequel on l'exerce.

Le tribunal à qui le recours en cassation est porté, n'est juge que des infractions de formes, ou des contraventions formelles aux lois; il ne peut prononcer sur le bien ou le mal jugé; il est tenu, quand il casse, de renvoyer le fond de la contestation à un autre tribunal.

Le tribunal de cassation est plutôt le gardien des lois que l'arbitre de l'intérêt des parties. C'est l'institution par laquelle le législateur surveille, maintient et protège son propre ouvrage.

Par l'événement de la cassation, une cause est agitée de nouveau. Mais le jugement, qui la terminait, était définitif; il tenait lieu de la vérité même, *res judicata pro veritate habetur*. La cassation le fait disparaître, en le déclarant nul. Mais tant qu'il existe, il est le dernier terme de la justice nationale; il peut être anéanti et non réformé. Il est aussi souverain que la loi, à moins qu'il ne soit constaté que le magistrat qui l'a rendu cherchait à être plus puissant que la loi même.

Il est donc évident que, tant que la matière des prises a été laissée aux tribunaux ordinaires, il n'y avait plus lieu à continuer des précautions conservatoires, après le jugement d'un tribunal d'appel, vu que des précautions uniquement relatives à un état que l'on suppose provisoire, ne peuvent avoir de vie que jusqu'au jugement définitif.

\*Je sais que tout est changé depuis la [\*65 loi qui dépouille les tribunaux de la matière des prises, et depuis l'établissement du conseil auquel cette matière a été attribuée.

Mais quels sont les effets de ce changement? S'étendent-ils sur le passé, ou n'ont-ils trait qu'à l'avenir?

Les contestations qui ne sont plus pendantes devant aucun tribunal, et dans lesquelles tous les degrés de juridictions et tous les genres de recours ont été épuisés, sont terminées irrévocablement.

Celles que le nouvel ordre de choses a trouvées pendantes au tribunal de cassation, pouvaient revivre; suivant le langage des jurisconsultes, elles étaient encore dans le hasard des jugemens, *in aleâ judiciorum*. Si la nullité du jugement attaqué était reconnue, la question du fond demeurait entière, comme si elle n'avait point été définitivement jugée, et le renvoi en était fait à d'autres juges.

Dans les contestations dont je parle, le conseil des prises remplace à la fois et le tribunal de cassation où elles étaient pendantes, et le tribunal auquel elles auraient été renvoyées à la suite d'une sentence ou d'un jugement de cassation. Le conseil des prises n'a donc point une compétence limitée à des points de procédure ou de forme, et l'on voit, par les termes dans lesquels est conçu le titre de son établissement, que les questions foncières sur la validité ou invalidité des prises maritimes, sont le véritable objet de son attribution.

Il était possible, dira-t-on, que si l'ancien ordre eût été conservé, le tribunal de cassation n'eût point jugé nuls la plupart des jugemens qui lui étaient dénoncés comme tels, et, dans, ce cas, les parties que ces jugemens intéressaient, n'eussent pas été exposées à de nouvelles incertitudes sur le fond de leurs différends. J'en conviens; mais il était également possible que la cassation fut prononcée. Dans le doute, faut-il que le conseil des prises prononce sur des questions de forme, avant de se croire autorisé à prononcer sur les questions du fond? Mais, se trouvant juge du fond et de la forme, il séparerait des choses que son attribution unit; il mauquerait le but principal de son établissement; il agirait contre le bon sens et

la raison qui ne permettent pas de sacrifier la justice <sup>66\*</sup> essentielle à de \*simples formes de procéder, dans une matière ou la loi juge nécessaire d'écarter les formes contentieuses de la procédure, pour laisser plus de latitude à l'application des principes de la justice essentielle.

Je remarquerai pourtant que, pour ne pas aggraver ou compromettre, sans des considérations majeures, le sort des parties qui peuvent, jusqu'à un certain point, se prévaloir de l'autorité de la chose jugée, il est équitable de ne pas reformer légèrement des décisions régulières dans la forme, et intervenues en dernier ressort. Un simple mal jugé, dans des hypothèses qui peuvent laisser plus ou moins de liberté à l'opinion du magistrat, ne serait point un motif suffisant de réformation; car si rien n'est purement arbitraire à la volonté du juge, il est une foule de circonstances dans lesquelles plusieurs choses demeurent arbitraires à sa raison. Mais nous ne sanctionnerons jamais une décision qui renfermerait une injustice évidente, ou qui blesserait l'intérêt d'état.

Je sais que l'injustice, même évidente, ne peut autoriser le tribunal de cassation à annuler un jugement rendu en dernier ressort, si elle n'est jointe à la violation formelle de quelque loi positive. Mais cette règle est fondée sur ce que les justiciables ordinaires du tribunal de cassation, sont des citoyens qui vivent entr'eux, non dans l'état de nature, mais sous des lois civiles.

Le conseil des prises, au contraire, n'a pour justiciables que des hommes, Français ou étrangers, qui n'ont eu, entr'eux, que des relations assises sur le droit de la guerre, c'est-à-dire, des relations absolument régies par le droit des gens; la cause de ces particuliers est toujours liée plus ou moins à celle même des nations dont ils font partie. Or, les nations vivant entr'elles dans l'indépendance de l'état de nature, il suit que, dans la matière qui nous est attribuée, la loi naturelle conserve un empire qu'elle obtient rarement dans les matières civiles; car, dans l'ordre civil, les principes du droit naturel dirigent; mais il n'y a que les lois positives qui commandent, au lieu que, relativement aux choses qui appartiennent au droit des gens, la loi naturelle est le véritable code des peuples: <sup>67\*</sup> de-là toute infraction \*manifeste de la justice, de l'équité, ou de la raison naturelle, peut déterminer la décision du conseil.

L'intérêt d'état, blessé ou méconnu, devient encore un juste motif de réformation; cet intérêt ne saurait atteindre les objets qui sont sous l'empire de la loi civile; mais il est lui-même la loi suprême dans ceux qui sont sous l'empire immédiat de la cité.

La guerre est le droit des états, et non celui des particuliers; la course est une délégation du droit de la guerre; personne ne peut armer en course, s'il n'y est autorisé par une permission spéciale du souverain ou du gouvernement; cette permission, que le souverain ou le gouvernement peut refuser; est, à plus forte raison, susceptible de conditions.

Un particulier, qui n'aurait pas le mandat de son souverain, et qui, forcé de se battre pour se défendre personnelle, prendrait un navire ennemi, n'en deviendrait point propriétaire; la propriété de ce navire appartiendrait à l'état.

Les produits de la course en faveur de l'armateur sont donc une cession du souverain.

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Ils pourraient être réduits à la juste et rigoureuse indemnité du négociant qui arme à ses frais et à ses risques. Tout ce qui va au-delà de cette indemnité, est un bénéfice librement abandonné par l'état à titre de dou, de récompense ou d'encouragement.

Ce qui n'est acquis qu'à titre d'encouragement, de récompense, ou même d'indemnité, ne l'est qu'autant qu'il est reconnu qu'on s'est trouvé dans le cas de la récompense ou de l'indemnité stipulée ou promise. Conséquemment le souverain demeure toujours juge de la manière dont on a exécuté son mandat.

Il est donc évident que l'on n'a droit aux produits de la course qu'après le jugement qui prononce la validité de la prise. Jusques-là, tout demeure incertain et contentieux. Il est encore incontestable que, dans ce jugement, l'intérêt de l'armateur demeure toujours subordonné à l'intérêt national. Car la puissance publique n'a ni la volonté ni le pouvoir de se nuire.

Les produits de la course ne peuvent donc être regardés que comme une propriété politique que l'on ne saurait assimiler <sup>68</sup> aux propriétés civiles ordinaires. C'est même parler peu exactement que de donner le nom de propriété à des émolumens ou à des produits dont la cession ne peut se réaliser qu'après due vérification des faits sur lesquels on fonde leur légitimité; vérification dans laquelle on doit avoir égard non aux règles de cette justice privée qui gouverne les individus, mais à cette sagesse supérieure qui régit les sociétés.

Les armateurs en course connaissent les conditions inhérentes à la nature de ce genre périlleux d'entreprises. Ils savent que la course étant la délégation d'un droit qui n'appartient qu'à l'état, ceux qui sollicitent ou qui acceptent cette délégation, ne peuvent jamais faire le préjudice de l'état qui les délègue; et qu'ils doivent être jugés d'après les principes sur lesquels le bien même de l'état repose.

Ces principes seront la base des jugemens du conseil, même dans les affaires que nous avons trouvées pendantes au tribunal de cassation.

D'autre part, j'ai déjà observé qu'indépendamment de tout texte positif, l'infraction manifeste de la loi naturelle pouvait autoriser, dans les mêmes affaires, la réformation des sentences rendues par les tribunaux d'appel.

Il semble donc qu'il ne restait plus qu'à conclure que, rien n'étant fini avant que le conseil des prises ait prononcé, il faudrait soumettre tous ceux en faveur de qui la main-levée a été ordonnée à une nouvelle consignation ou au cautionnement: car, avant que tout soit terminé par un jugement absolument irrévocable, le gage de toutes les parties intéressées doit, d'après les lois de la matière, demeurer en sûreté.

Une loi du 4 prairial, an 6, relative à la question que j'examine, portait: qu'aucun neutre ou soi-disant tel, ne pouvait, en matière de prises maritimes, mettre à exécution aucun jugement définitif, et qu'il ne lui serait accordé aucune main-levée, à moins qu'il n'eût fourni au préalable bonne et valable caution, dans le cas où les armateurs se seroient pourvus en cassation, ou seraient encore dans le délai utile pour se pourvoir.

Mais on voit, par cette loi, que la mesure du cautionnement ou du refus de toute main-levée,



**69\***] n'avait été prise qu'en faveur \*des armateurs Français, et qu'elle ne grevait que les étrangers qui gagnaient leur cause dans les tribunaux d'appel; les armateurs Français obtenaient pleine main-levée, sans être soumis à un cautionnement lorsque les jugemens des tribunaux d'appel leur étaient favorables.

Le directoire, en provoquant la loi dont il s'agit, avait reconnu dans son message que, de droit commun, l'exécution des jugemens rendus par les tribunaux d'appel, ne peut être suspendue. Mais il pensait qu'il fallait faire exception à ce principe général, contre les étrangers dont la disparition pouvait rendre inutile l'action en nullité que des armateurs Français pouvaient être obligés de porter au tribunal de cassation.

Je n'ai point à examiner si ce motif était ou n'était pas raisonnable. Mais je ne dois pas perdre de vue qu'en force des lois existantes, les armateurs Français obtenaient, après un jugement du tribunal d'appel qui leur avait donné gain de cause, la main-levée qui, dans le même cas, était refusée aux étrangers. Une mesure qui, dans les circonstances obligerait les armateurs Français à déposer de nouveau le produit des ventes, ou à fournir caution, serait évidemment rétroactive; et tout effet rétroactif est réprouvé par la justice.

Mais si, par quelques considérations particulières, des armateurs français n'ont point obtenu la main-levée, quoiqu'ils aient gagné leur cause par un des jugemens que l'on regardait comme définitifs, il est équitable que cet état de choses ne soit pas changé jusqu'après le jugement du conseil des prises, saisi de toutes les affaires pendantes au tribunal de cassation. Car dans ce cas, il ne s'agit pas d'inquiéter ceux qui tiennent, mais seulement de ne pas investir ceux qui ne tiennent point encore. Or, comme il est plus favorable de suspendre une main-levée, que de la faire rétracter, quand elle a été consommée, il n'y aurait pas de raison, depuis la nouvelle législation sur les prises, de faire cesser un état provisoire qui est utile à tous, qui a été continué jusqu'à ce moment, et auquel les réglemens nouveaux, à quelques exceptions près, ne fixent d'autre terme qu'une décision du conseil établi pour remplacer, dans la matière des prises, tous les tribunaux.

**70\***] \*On annonce des jugemens rendus par les tribunaux ordinaires, soit de première instance ou d'appel, depuis la publication de la loi qui les dépouille tous. Je n'ai pas des instructions assez précises sur l'existence de ces jugemens, et sur les circonstances dans lesquelles ils sont intervenus, pour pouvoir en faire l'objet de mes conclusions; mais je pense que de tels jugemens s'ils existent, sont incompetens et nuls, comme en fraude de la loi, et par des juges sans pouvoirs et sans caractère. Aucune main levée n'a pu valablement être accordée à la suite de ces jugemens, et les parties sont incontestablement autorisées à faire réparer le dommage qui pourrait en résulter.

Quant aux affaires qui peuvent avoir été terminées dans les tribunaux d'appel, avant la loi qui les dépouille, on doit distinguer celles où les parties sont encore dans le délai du recours en cassation, d'avec celles où les parties ont laissé passer ce délai, et ont exécuté les jugemens sans se plaindre. Dans les affaires de cette seconde espèce, tout est consommé et tout doit

l'être, puisque les parties ont accédé à l'autorité de la chose jugée. Dans les premières, au contraire, les parties peuvent porter au conseil des prises, le recours qu'elles auraient pu porter au tribunal de cassation. Ce recours ne saurait être regardé comme une surcharge, puisqu'il était dans le vœu des lois, sous lesquelles la contestation était née, et dans la prescience des parties qui agissaient sous l'égide de ces lois. Ce n'est point une innovation, mais l'exécution d'un droit acquis à tous ceux qui ont été dans le cas de plaider devant les juges ordinaires; or, comme les jugemens rendus par les tribunaux d'appel ne pouvaient être suspendus dans leur exécution, si la main-levée a déjà été réalisée à la suite de ces jugemens, on laissera les choses en l'état où elles se trouvent sans rien innover non plus dans les causes où les jugemens en dernier ressort n'auront encore reçu aucune exécution, et où les parties sont conséquemment assez heureuses pour voir continuer les précautions conservatrices de leur gage.

Je ne crois pas avoir besoin de parler des contestations non jugées par les tribunaux d'appel, ou dont l'instruction est peut-être encore pendante devant les tribunaux de première instance. \*Ces contestations sont portées de **[\*71]** droit au conseil des prises, et il est incontestable qu'avant le jugement qui les terminera, on ne peut délivrer à aucune des parties les effets ou les marchandises qui sont l'objet du litige. Tout juge, tout agent, tout administrateur qui méconnaîtrait ce qui est prescrit par les réglemens, répondrait en son propre et privé nom, des dommages et intérêts auxquels il aurait donné lieu par sa conduite.

On voit, par les détails dans lesquels je suis entré, qu'indépendamment du défaut de pouvoir ou de qualité suffisante dans la personne du commissaire Danois, pour intenter des actions et former des demandes, proprement dites dans des contestations qui lui sont individuellement étrangères, il serait impossible de faire droit à sa réclamation, et surtout d'y faire droit par forme de mesure générale, sans s'exposer à commettre une foule d'injustices en confondant des hypothèses qui sont dans le cas d'être distinguées, et en assignant un sort commun à des parties qui sont dans des situations différentes.

Le commissaire Danois peut recommander et instruire. Il peut, par le devoir de sa place, protéger indéfiniment les négocians de sa nation. Mais pour pouvoir agir plus particulièrement dans les contestations pendantes, il aurait besoin d'un pouvoir spécial de la partie ou des parties au nom desquelles il agirait.

Le procureur fondé de plusieurs parties, doit agir, séparément dans chaque cause, pour l'intérêt de chaque client, et ne pas cumuler, par des demandes *in globo*, des intérêts divers qui ne se ressemblent souvent pas, et qui exigent chacun un examen séparé et une prononciation distincte.

Comme chaque cause doit être instruite et jugée séparément, c'est aux parties et à leurs défenseurs à faire, dans chaque cause, tous les actes nécessaires à l'instruction et au jugement.

J'ai pourtant cru qu'il était essentiel de rappeler les maximes qui veillent, pendant le litige, à la sûreté des effets litigieux: maximes aussi anciennes que la matière des prises, maximes vraies sous tous les régimes et dans tous les tems.

**72\*]** \*Dans ces circonstances, je conclus à ce qu'il soit dit n'y avoir lieu de prononcer sur la demande du commissaire général des relations commerciales du Danemark, sauf à lui de fournir aux commissaires du gouvernement près le conseil, telles notes ou tels mémoires qu'il jugera utiles à l'intérêt des négocians de sa nation, et sauf aux parties ou à leurs défenseurs qui justifieront de leurs droits et de leurs pouvoirs, d'intenter telles actions, et de former, dans les affaires les concernant, telles demandes qu'elles aviseront; et néanmoins, pour prévenir les dangers ou les abus contre lesquels on pourrait vouloir être rassuré, je requiers, en mon nom (pour l'intérêt du gouvernement et pour celui des armateurs ou négocians Français et étrangers, dont les propriétés et les gages doivent être garantis par la foi publique), qu'il soit décidé que dans les contestations antérieures au 4 nivose, et dans celles postérieures à cette époque qui n'ont point encore été jugées définitivement, ou dont les jugemens définitifs, mais soumis au recours en cassation, n'ont point encore été exécutés, aucune vente, aucune main-levée, aucune décharge de cautionnement, ne puissent être accordées, autrement que dans les cas marqués par l'arrêté des consuls du 6 germinal dernier, et par les réglemens auquel cet arrêté ne déroge pas.

Délibéré à Paris, le 3 prairial, an 8.

*Signé, PORTALIS.*

Le conseil, après en avoir délibéré, décide n'y Wheat. 6.

avoir lieu de prononcer sur la demande du commissaire-général des relations commerciales du Danemark, sauf à lui de fournir au commissaire du gouvernement près le conseil, telles notes ou tels mémoires qu'il jugera utiles à l'intérêt des négocians de sa nation, et sauf aux parties ou à leurs défenseurs qui justifieront de leurs droits et de leurs pouvoirs, d'intenter telles actions, et de former dans les affaires les concernant, telles demandes qu'elles aviseront; et sur les fins prises d'office par le commissaire du gouvernement, décide que dans les contestations antérieures au 4 nivôse, et dans celles postérieures à cette époque, qui n'ont point encore été jugées définitivement, ou dont les jugemens définitifs, mais soumis au recours en cassation, n'ont point encore été exécutés, aucune vente, aucune \*main-levée, aucune [\*73 décharge de cautionnement ne pourront être accordées autrement que dans les cas marqués par l'arrêté des consuls, du 6 germinal dernier, et par les réglemens auxquels cet arrêté ne déroge pas.

Fait à Paris, le 3 prairial, an 8, maison de l'Oratoire, lieu des séances du conseil. Présens les citoyens REDON, président; NIOU, LACOSTE, MOREAU, MONTIGNY-MONTPLAISIR, BARENES, DUFAUT, PARCEVAL-GRANDMAISON et TOURNACHON, membres du conseil.

En foi de quoi, la présente décision a été signée par le président.

*Signé, REDON, président.*

Par le conseil,

*Le secrétaire-général; signé, CALMELET.*





## NOTE.

The **Extra Annotation** here following is arranged in the order of the cases in the original reporter's volume which precede it. At the upper outside corner of the page is given the volume and pages of the cases to which the Annotation refers. After the official reporter's volume and page in the heading of each case is given book and page of the present edition, the abbreviation **L** being used for Lawyers' Edition, or Law. Ed. for brevity, as it is throughout in the duplicate citations of cases from the Supreme Court.

### ABBREVIATIONS.

**F. C.** appended to a citation from the regular reports of the U. S. Circuit and District Courts refers to the series of reprints called the Federal Cases and gives, as its publishers do and recommend, the number of the case in that series.

**Fed. Cas.** is used when the case is contained in the series of Federal Cases but is not reported in the regular series of U. S. Circuit and District Court Reports, and the citation of such cases is to the volume and page of Fed. Cas., not to the number of the case.

**Fed. or Fed. Rep.** refers to the well known series Federal Reporter, containing reports of the Circuit and District Court decisions since 1880.

**L. R. A.** will be readily recognized as the abbreviation for the Lawyers' Reports Annotated, and particular attention should be given to these citations, as in a large proportion of cases the citing case will be found accompanied by a note on its principal point absolutely exhaustive of the authorities thereon.

**Am. Dec., Am. Rep. and Am. St. Rep.** will be readily recognized as the abbreviations for the well known trinity of selected case reports, The American Decisions, American Reports and American State Reports.

Pennsylvania State Reports (**Pa. St.**) The New Jersey Law Reports (**N. J. L.**) and Equity Reports (**N. J. Eq.**) are distinguished by the number of the series, not by the name of the reporter, while the North and South Carolina Reports, Law and Equity, are cited by the name of the reporter where the reports are so titled and it has been the universal custom.

Duplicate citations are given to the National Reporter System where cases are therein contained, and to the Reporter System alone of cases not, at the date of the preparation of the annotation, officially reported. The usual abbreviations are used, as follows:

<b>Atl.</b> Atlantic Reporter,	<b>So.</b> Southern Reporter,
<b>Pac.</b> Pacific Reporter,	<b>S. E.</b> Southeastern Reporter,
<b>N. E.</b> Northeastern Reporter,	<b>S. W.</b> Southwestern Reporter,
<b>N. W.</b> Northwestern Reporter,	<b>S. Ct.</b> Supreme Court Reporter.

We think that in all other respects the abbreviations used are clear and familiar to all who are accustomed to the use of legal reports and text books.

EDITOR.



## VI WHEATON.

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6 Wheat. 1-101, 5 L. 191, *THE AMIABLE ISABELLA*.

**Prize.**— Seizure by noncommissioned privateer, if decreed good prize, passes the property to the government, p. 60.

Cited and applied in *Carrington v. Insurance Co.*, 8 Pet. 522, 8 L. 1031, holding that a noncommissioned cruiser may seize for the benefit of the government; *The Tropic Wind*, Blatchf. Pr. 65, F. C. 14,186, holding any person may take possession of property seizable as a prize; *The Ouachita*, Blatchf. Pr. 309, F. C. 10,620, holding if vessel arrested as prize was violating law, she is liable to condemnation, though party making seizure was without authority.

**Prize.**— If the capture be by a noncommissioned privateer the government may contest the right of the captor after condemnation, but the claimant may not raise the point, p. 66.

**Treaty.**— Form of passport by which freedom of ship was to be established, never having been annexed to treaty of 1795 with Spain, that part of treaty purporting to give effect to passports is inoperative, p. 69.

Cited in *The Springbok*, Blatchf. Pr. 457, F. C. 13,264, holding absence of invoices from on board vessel in time of war casts suspicion on the honesty of her commerce; *The Peterhoff*, Blatchf. Pr. 539, F. C. 11,024, where there were no invoices for contraband articles; *United States v. Packages*, 27 Fed. Cas. 286, holding use of fraudulent invoices to procure permit shows fraudulent intent. Cited approvingly but without special application in *United States v. Amistad*, 15 Pet. 595, 10 L. 854.

**Construction of treaty** should be according to the intention of the parties; courts cannot interpolate terms, p. 71.

Cited in *Ex parte McCabe*, 46 Fed. 373, 12 L. R. A. 595, refusing extradition under Mexican treaty.

**Prize.**— Onus probandi of a neutral interest is on claimant, p. 77.

Cited in *United States v. The Wren*, 28 Fed. Cas. 788, denying restitution where claimant failed to establish neutrality of the vessel; *The Adula*, 89 Fed. 353, condemning neutral vessel chartered to enemy.

Distinguished in *Cushing v. Laird*, 107 U. S. 79, 27 L. 395, 2 S. Ct. 204, holding final decree in prize cause merely determines the question of prize or no prize.

**Prize.**—Evidence to acquit or condemn must first come from the ship's papers and examination of captured persons, p. 77.

Cited and affirmed in *United States v. Arcola*, 24 Fed. Cas. 850, determining citizenship of owner of captured vessel; *The Adula*, 89 Fed. 353, condemning neutral vessel chartered to enemy.

**Prize.**—The assertion of a claim wholly or partly false by an agent or in connivance with the real owner, is substantive cause of condemnation, p. 78.

Miscellaneous.—Cited in *The Clinton Bridge*, Woolw. 156, F. C. 2,900, apparently to no point decided by main case; *Daggett v. Willey*, 6 Fla. 506, evidently an error; *Lewis v. State*, 4 Ohio, 397, not in point.

6 Wheat. 102, 103, 5 L. 215, *BUSSARD v. LEVERING*.

**Bills and notes.**—Notice of nonpayment of bill can be given by mail, p. 103.

Cited and applied in *Shed v. Brett*, 1 Pick. 409, 11 Am. Dec. 313, holding putting notice in post-office is sufficient where indorser lives in another town; *Globe Printing Co. v. Stahl*, 23 Mo. App. 456, admitting evidence of answer received by telephone; *Insurance Co. v. Wilson*, 29 W. Va. 557, 2 S. E. 903, where indorser lives in another place, notice must be sent by first mail after day of dishonor; *Brewster v. Arnold*, 1 Wis. 282, holding notice of dishonor sent by mail sufficient.

Distinguished in *Provident Sav. L. A. S. v. Nixon*, 73 Fed. 148, 44 U. S. App. 316, considering whether "mailed" implies prepayment of postage; *Todd v. Neal*, 49 Ala. 274, if notice is sent through any but United States mails it must be affirmatively shown to have been received.

**Days of grace.**—If third day or, falls on Sunday bill is due on Saturday, p. 103.

Rule applied, *Wood v. Corl*, 4 Met. 205, holding legal presumption is that three days' grace is allowed in every State; *Cuyler v. Stevens*, 4 Wend. 567, where holder was excused from giving notice of nonpayment to indorser on Fourth of July. Cited in note, 1 Blackf. (Ind.) 83, on this topic. Affirmed in *Doremus v. Burton*, 5 Biss. 58, F. C. 4,002.

**Notice of nonpayment** given on last day of grace will charge drawer, p. 103.

Rule applied in *McFarland v. Pico*, 8 Cal. 634, holding notice may be given immediately after refusal to pay; *Staples v. Franklin Bank*, 1 Met. 55, 35 Am. Dec. 353, holding maker of promissory note may be sued on last day of grace if he refuses to pay. Cited in *Manches-*



ter Bank v. Fellows, 28 N. H. 310, deciding that holder of promissory note may forward notice on day of dishonor.

Distinguished in *Dennie v. Walker*, 7 N. H. 201, holding notice of nonpayment given prior to demand is void.

6 Wheat. 104-106, 5 L. 216, *LINDENBERGER v. BEALL*.

**Negotiable paper.**—Notice given after demand on third day of grace is sufficient, p. 106.

Rule applied in *Beeding v. Pic*, 2 Cr. C. C. 152, F. C. 1,227, holding demand of payment after last day of grace is too late; *McFarland v. Pico*, 8 Cal. 634, holding notice may be given immediately after refusal to pay; *Wood v. Corl*, 4 Met. 205, holding legal presumption is that three days' grace is allowed in every State; *Carter v. Burley*, 9 N. H. 571, holding holder may forward notice on day of dishonor; *Remington v. Harrington*, 8 Ohio, 511, holding there should be positive proof of certain facts, from which notice might be reasonably inferred.

Distinguished in *Dennie v. Walker*, 7 N. H. 201, holding notice of nonpayment prior to demand is void.

**Negotiable paper.**—Evidence of a letter containing notice having been put in post-office, directed to the indorser at his place of residence, is sufficient proof of the notice to be left to the jury, and admissible without previously notifying defendant to produce the letter, p. 106.

Rule applied in *Dickens v. Beal*, 10 Pet. 580, 9 L. 541, holding testimony by a notary that he send notice is admissible without producing a copy of the notice; *Henderson v. Carbondale Coal Co.*, 140 U. S. 36, 35 L. 337, 11 S. Ct. 695, holding presumption that a letter mailed reaches its destination is one of fact; *Brooks v. Blaney*, 62 Me. 458, allowing notary to testify to contents of notice, though no notice has been given indorser to produce such notice at trial; *Shed v. Brett*, 1 Pick. 409, 11 Am. Dec. 213, holding putting notice in post-office is sufficient where indorser lives in another town; *Pierce v. Pendar*, 5 Met. 356, where both indorser and holder reside in place where note is dishonored, notice must be given personally; *Offit v. Vick*, Walk. (Miss.) 102, holding notice of protest may be proved without producing the written notice; *Ellis v. Bank*, 7 How. (Miss.) 299, if holder places notice in proper post-office in due time, he is not responsible for irregularities of the mail; *Globe Printing Co. v. Stahl*, 23 Mo. App. 456, admitting evidence of answer received by telephone; *Faribault v. Ely*, 2 Dev. 69, 72, holding contents of letter giving indorser notice may be proved by parol without notice to produce the original; *Arnold v. Brewster*, 1 Wis. 282, holding notice of dishonor sent by mail sufficient. See also note to 13 Am. Dec. 316, to the point that secondary evidence may be given of notice of protest.

Distinguished in *Prov. S. L. A. S. v. Nixon*, 73 Fed. 148, 44 U. S. App. 316, considering whether "mailed" implies prepayment of postage.

6 Wheat. 106-109, 5 L. 217, *MECHANICS' BANK OF ALEXANDRIA v. WITHERS*.

**Practice.**—Circuit Court of District of Columbia may adjourn to a distant day, and the adjourned session is considered as the same term, p. 108.

The following citing cases affirm this ruling and variously apply the principle on which it rests: *Gonzales v. Cunningham*, 164 U. S. 627, 41 L. 577, 17 S. Ct. 188, holding judge may continue Special Term to a day beyond that fixed for the regular term; *Ex parte Casey*, 18 Fed. 87, holding court can modify its judgment on an adjourned day of the same term; *Florida v. Charlotte H. P. Co.*, 70 Fed. 885, 30 U. S. App. 535, holding term of Circuit Court may be adjourned to a distant day and this is one term, though another term of the court has been held at another place during adjournment; *Williams v. Moseley*, 2 Fla. 332, holding court may be adjourned beyond the term in another county; dissenting opinion, *Conkling v. Ridgeley*, 112 Ill. 47, majority holding where court adjourned for thirty-two days, the intervening period is a vacation; *Smurr v. State*, 105 Ind. 128, 4 N. E. 447, where court had statutory authority to appoint adjourned term, proceedings at a term appointed when another court might have been in session are not void; *Sawyer v. Bryson*, 10 Kan. 201, holding an adjourned term is not an independent term; *State v. Weaver*, 11 Neb. 165, 8 N. W. 386, construing "rising of the court" to be equivalent to "the last day of the term;" *In re Dossett*, 2 Okl. 381, 382, 37 Pac. 1070, 1071, holding proceedings at an adjourned session are not void, though regular term in another county in the same district intervened; *Stirling v. Wagner*, 4 Wyo. 31, 32, 33, 31 Pac. 1040, holding, in absence of statutory regulation, a term may be adjourned to a day succeeding an intervening term in another county of the same district.

Distinguished in *Dunn v. State*, 2 Ark. 250, 35 Am. Dec. 64, holding proceedings before Special Term, held without proper order being entered, are void; *Graham v. Parham*, 32 Ark. 689, holding County Court cannot convene again before time fixed for next regular term; *Grimmett v. Askew*, 48 Ark. 154, 2 S. W. 708, holding where act limited session to six days, board of supervisors could not adjourn to another day; *Garner v. Carrol*, 7 Yerğ. 366, holding a Special Term is not part of the regular term.

Miscellaneous.—Cited in *Irwin v. Askew*, 74 Ga. 586, not to point decided by principal case.



6 Wheat. 109-118, 5 L. 218, HOPKINS v. LEE.

**Res judicata.**— Judgment or decree of court of competent jurisdiction conclusive as to matters directly decided, but not as to collateral points, or such as are only argumentatively decided, pp. 113, 114.

The citations collect a large number of cases on this topic, and showing the following various applications of the rule here laid down; *Ex parte Sibbald v. United States*, 12 Pet. 492, 9 L. 1169, holding Superior Courts cannot reverse their own decrees; *Bank of United States v. Beverly*, 1 How. 148, 149, 11 L. 81, holding court could not revise the evidence on which the decree was rendered; *Washington Bridge Co. v. Stewart*, 3 How. 426, 11 L. 664, holding court could not revise its decision after expiration of term; *Smith v. Kernochen*, 7 How. 217, 218, 12 L. 674, holding decree in chancery declaring instrument void is a bar to future action on it; *Pennington v. Gibson*, 16 How. 77, 14 L. 852, holding a decree of equity is as binding as a judgment of law; *Aurora City v. West*, 7 Wall. 101, 19 L. 49, holding plea of *res judicata* applies to every objection urged in second suit which might have been urged in first suit; *Johnson, etc., Co. v. Wharton*, 152 U. S. 257, 38 L. 432, 14 S. Ct. 609, where judgment was for royalties on sale of patented articles; *Dowell v. Applegate*, 152 U. S. 344, 38 L. 469, 14 S. Ct. 618, holding same issue cannot be retried in an independent suit based upon a title which might have been set up in the first suit; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 687, 39 L. 862, 15 S. Ct. 735, holding judgment was conclusive as to the particular ground in controversy; *New Orleans v. Citizens' Bank*, 167 U. S. 397, 42 L. 211, 17 S. Ct. 914, holding two judgments holding exemption from taxes continued during extension of charter are *res judicata*; *Southern Pac. R. R. Co. v. United States*, 168 U. S. 49, 42 L. 377, 18 S. Ct. 27, holding a right or fact directly determined by a court of competent jurisdiction is conclusively established; *Vogler v. Spaugh*, 4 Biss. 293, F. C. 16,988, refusing to admit parol evidence contradicting record; *Putnam v. New Albany*, 4 Biss. 383, F. C. 11,481, holding for an adjudication to be an estoppel it must have been distinctly put in issue; *Baring v. Fanning*, 1 Paine, 556, F. C. 982, holding judgment can be used as evidence in another suit only as against parties and privies; as also in *Society for P. of G. v. Hartland*, 2 Paine, 542, F. C. 13,155, ruling similarly; *Radford v. Folsom*, 3 Fed. 202, holding fact that in one suit might have been determined, does not prevent its being raised in a suit upon a different cause of action; *Flanagin v. Thompson*, 9 Fed. 183, where in foreclosing one mortgage validity of assignment was decided, it could not be raised in foreclosing second mortgage given for same note; *The Tubal Cain*, 9 Fed. 836, 838, holding where the issue in two actions is substantially the same, each is a bar, though the causes of action be different; *B. & O. Ry. Co. v. Pittsburg, etc., R. R. Co.*,

55 Fed. 703, holding one having obtained benefit of contract in suit was estopped to deny its validity in second suit for different claim; Bissell Carpet Sweeper Co. v. Goshen Sweeper Co., 72 Fed. 552, 43 U. S. App. 47, holding decision of Circuit Court of Appeals finally settles the matter and lower court must carry it into effect; Newton Mfg. Co. v. Wilgus, 90 Fed. 488, holding judgment in patent case conclusive against the parties in a subsequent suit; Poole v. Nixon, 19 Fed. Cas. 1000, 1004, 9 Pet. Appx. 770, 8 L. 309, 312, holding court of equity cannot order rehearing of a cause after the close of a term; Warner v. Brinton, 29 Fed. Cas. 235, doubting as to whether minutes of Register's Court are competent evidence in an ejectment to try title of land.

In the State courts the citing cases affirm and apply the syllabus doctrine as follows: Phillips v. Thompson, 3 Stew. & P. 379, holding decree is as conclusive as a judgment; Wyman v. Campbell, 6 Port. 237, 31 Am. Dec. 686, holding judgment of court having jurisdiction of the parties is conclusive, notwithstanding irregularities that would authorize reversal; Mills v. Stewart, 12 Ala. 95, holding where record of court of one State, properly authenticated, is offered in evidence, presumption is that the court had jurisdiction; Davidson v. Dallas, 15 Cal. 83, holding decision of Supreme Court cannot be reviewed when case comes up on second appeal; Caperton v. Schmidt, 26 Cal. 494, 85 Am. Dec. 191, holding judgment is conclusive between parties and privies as to all matters put in issue and passed on; McCreery v. Fuller, 63 Cal. 32, holding same as to judgment entered upon a stipulation; Lillis v. Emigrant Ditch Co., 95 Cal. 559, 30 Pac. 1110, holding judgment is conclusive as to facts in issue, not as to matters coming collaterally; Betts v. Starr, 5 Conn. 553, 554, 13 Am. Dec. 97, 98, holding former judgment is conclusive, although cause of action and object of were different; Denison v. Hyde, 6 Conn. 517, holding decree of District Court in another case deciding title between same parties is conclusive; Coit v. Tracy, 8 Conn. 276, 20 Am. Dec. 112, holding former judgment is conclusive evidence as to facts directly decided; Holcomb v. Phelps, 16 Conn. 131, holding judgment of court of competent jurisdiction is conclusive as to title claimed under it; Davis v. Millaudon, 17 La. Ann. 104, 87 Am. Dec. 518, holding opinion of court does not have the force of the thing adjudged unless disposed of by a decree of the court; McKim v. Odom, 12 Me. 101, holding action of debt will lie as well on a decree of a court of chancery in another State as on a judgment; Russ v. Wilson, 22 Me. 211, holding whenever a party could have defended himself, in an action at law, and has not, he cannot be relieved by injunction; dissenting opinion, People v. Dawell, 25 Mich. 271, holding State court judgment divorcing parties domiciled elsewhere is a nullity; Lank v. Keirn, 52 Miss. 347, holding judgment is conclusive as to facts directly in issue; Ridgley v. Stillwell, 27 Mo. 132, holding judgment is not conclusive as to matters collaterally considered; Kittredge v. Emerson, 15 N. H. 263,



holding Federal courts cannot treat judgment of State court with jurisdiction as a nullity even if founded on an erroneous construction of bankrupt act; *Divall v. Atwood*, 41 N. H. 445, holding judgment was conclusive as to fact of usury, incidentally coming up in another cause; *Mutual Fire Ins. Co. v. Newton*, 50 N. J. L. 577, 14 Atl. 759, holding defense that decree for deficiency had been made in foreclosure suit respecting the same debt, is good plea to action upon the bond; *McFadden v. Geddis*, 17 S. & R. 339, holding decree of Orphans' Court settling account of executor is conclusive as to all matters therein in any collateral suit; *Viles v. Moulton*, 13 Vt. 517, query whether a decree in chancery is more than prima facie evidence of facts found; *Gray v. Pingry*, 17 Vt. 424, 44 Am. Dec. 347, holding last requisite of estoppel by matter of record is that the particular fact was in issue and found; *Tilson v. Davis*, 32 Gratt. 104, holding party to creditor's suit not setting up a claim is concluded from setting it up thereafter; *Shenandoah V. R. R. Co. v. Griffith*, 76 Va. 925, holding judgment of court of competent jurisdiction is conclusive between same parties upon same matter directly in question in subsequent action; *Blackwell v. Bragg*, 78 Va. 539, holding decree of administrator's account cannot be reopened save as provided by statute as to parties under disabilities; *McCullough v. Dashiell*, 85 Va. 41, 6 S. E. 612, holding all questions involved in an appeal are finally adjudicated, whether distinctly raised and passed on below and here or not; *Fishburne v. Ferguson*, 85 Va. 325, 7 S. E. 363, holding when one set up a judgment as a bar, he must show the matter was actually litigated or might have been; *Western M. & M. Co. v. Virginia Cannel Co.*, 10 W. Va. 281, holding a fact directly decided by a court of competent jurisdiction is res judicata; *Coville v. Gilman*, 13 W. Va. 328, holding judgment is conclusive only as to matters directly involved; *Oakley v. Hibbard*, 2 Pinn. 22, 52 Am. Dec. 140, holding when court of last resort has entered its final judgment or decree, it has no power to rehear the cause; *Pierce v. Kneeland*, 9 Wis. 38, holding final decision of Supreme Court upon an order of the court below is conclusive; *Akerly v. Vilas*, 24 Wis. 174, 1 Am. Rep. 173, construing words "final hearing or trial" in act providing for transfer of causes from State to Federal courts. See note to 21 Am. Dec. 119, on power of Supreme Court after remittitur. Cited in *Jackson v. Astor*, 1 Pinn. 158, 159, 39 Am. Dec. 291, 292, without special application. Cited, arguendo, in dissenting opinion, *Harrison v. Nixon*, 9 Pet. 534, 9 L. 220.

Distinguished in *Gaines v. Hennen*, 24 How. 579, 16 L. 779, holding where parties and object of two suits are dissimilar, one is not a bar to the other; *Badger v. Badger*, 1 Cliff. 245, F. C. 717, holding record of former suit where complainant moved to dismiss bill is not a bar; *The Sloop Davis, Crabbe*, 191, F. C. 12,357, holding dismissal of bill, to be a bar, must have been ordered upon a hearing of the parties or on the merits; *Allen v. Blunt*, 2 Wood. & M. 133, F. C.

217, holding where there was no judgment on the verdict, but bill was dismissed it is not a bar; *Woodland v. Newhall*, 31 Fed. 437, holding where suit for legacy is dismissed on general demurrer, it is no bar to action for same sum claimed under a trust; *Rodgers v. Russell*, 11 Ala. 457, holding judgment is not evidence against one not a party; *Fairman v. Bacon*, 8 Conn. 425, holding former judgment is not an estoppel as to facts not directly in issue in that case; *Hilton v. Guyot*, 159 U. S. 183, 40 L. 115, 16 S. Ct. 151, declaring this a dictum so far as foreign judgments are concerned, and holding judgment of court of France is prima facie evidence only, since this is the effect of our judgments in France.

Measure of damages for not delivering thing sold is price of article sold at time of the breach, and the rule applies to both realty and personalty, p. 118.

Cited and principle applied in *Patrick v. Leach*, 1 McCrary, 252, 2 Fed. 121, holding in action for breach of covenant of warranty, damages is the consideration money, with interest; *Missouri Furnace Co. v. Cochran*, 8 Fed. 464, holding measure of damages is difference between contract price and market price at place of delivery; *Snodgrass v. Reynolds*, 79 Ala. 461, 58 Am. Rep. 606, where measure of damages between lessor and lessee was declared to be the value of the lease; *Logan v. Moulder*, 1 Ark. 324, 33 Am. Dec. 345, holding vendor is liable for purchase money and interest; *Kempner v. Cohn*, 47 Ark. 528, 1 S. W. 872, holding damages for breach of contract to convey is difference between contract price and value of land at time of breach, with interest; *McAlpin v. Lee*, 12 Conn. 133, 30 Am. Dec. 610, allowing difference between contract price and value of property sold, as damages; *Biggers v. Pace*, 5 Ga. 176, allowing difference between contract price and market price at place of delivery; *Green v. Williams*, 45 Ill. 209, allowing difference between rent in covenant and actual value of premises at time of breach; *Plummer v. Rigdon*, 78 Ill. 226, 20 Am. Rep. 264, allowing value of land at time conveyance was to be made; *Reese v. McQuilkin*, 7 Ind. 452, giving purchase money and interest, in suit upon covenant of warranty; *Galting v. Newell*, 12 Ind. 125, rejecting evidence as to what price patent rights sold several years before had brought; *Case v. Wolcott*, 33 Ind. 23, allowing vendee difference between unpaid purchase money and actual value of land at time of breach; *Wood v. Bibbins*, 58 Ind. 397, allowing for breach of warranty, purchase money and interest; *Puterbaugh v. Puterbaugh*, 7 Ind. App. 296, 33 N. E. 813, allowing vendee value of land at time of breach, less contract price; dissenting opinion, *Stone v. Morgan*, 13 Ind. App. 59, 41 N. E. 83, majority allowing, in claim based on contract unenforceable because of statute of frauds, the value of services rendered; *Foley v. McKeegan*, 4 Iowa, 11, 66 Am. Dec. 114, holding if vendor is in fault, vendee should recover the increased value of the land; *Sweem v. Steele*, 5 Iowa, 356, hold-



ing damages to be value of land when it should have been conveyed; *Hill v. Hobart*, 16 Me. 169, allowing value of land at time conveyance should have been made; *Doherty v. Dolan*, 65 Me. 90, 20 Am. Rep. 679, holding vendee could recover value of land at date of breach, minus what he owed for it; *Marshall v. Haney*, 9 Gill, 260, giving value of land at time of breach; *Alexander v. Macauley*, 6 Md. 369, allowing actual value of stock at time it should have been transferred; *Hammond v. Hannin*, 21 Mich. 388, 4 Am. Rep. 495, holding, where vendor acts in bad faith, value of land at time of breach is the damage; *Gridley v. Tucker*, 1 Freem. Ch. 213, holding measure of damages in executory contract is value of land at time of breach; *Kirkpatrick v. Downing*, 58 Mo. 41, 17 Am. Rep. 685, allowing vendee value of land at time of breach; *Hartzell v. Crumb*, 90 Mo. 637, 3 S. W. 61, holding damages is difference between contract price and value of property at time of breach; *Taylor v. Holter*, 1 Mont. 701, holding measure of damages for breach of warranty is value of property at time of conveyance, with interest; *Carver v. Taylor*, 35 Neb. 434, 53 N. W. 388, allowing for breach of an executory contract, value of land at time contract should have been performed, less contract price; *Violet v. Rose*, 39 Neb. 676, 58 N. W. 221, holding, where vendor delays performance, measure of damages is difference between value at time conveyance should have been made and when it was made; *Pinkerton v. Railroad Co.*, 42 N. H. 461, holding, in suit for certificate of stock, damages is value at time of demand, with interest; *Pumpelly v. Phelps*, 40 N. Y. 65, 67, 100 Am. Dec. 466, 467, holding, where vendor contracts to sell land, knowing he has not title, he is liable to vendee, even though he believed he would be able to procure title; *Jack v. McKee*, 9 Pa. St. 242, holding damages for breach of contract to give land for services is the value of the land; *McDowell v. Oyer*, 21 Pa. St. 426, allowing value of the land which party had promised to convey; *Phillips v. Herndon*, 78 Tex. 382, 22 Am. St. Rep. 63, 14 S. W. 858, holding damages where vendor sold to another is value of land at time of such sale; *Dunshee v. Geoghegan*, 7 Utah, 117, collecting cases and applying rule to breach of contract to convey land; *Park v. Bates*, 12 Vt. 388, 36 Am. Dec. 350, allowing value of land at time decision was made against title of warrantor; *Combs v. Scott*, 76 Wis. 669, 45 N. W. 534, allowing for breach of contract to convey, value of land at time conveyance should have been made; *Johnson v. McMullin*, 3 Wyo. 239, 21 Pac. 702, holding damages were market value of land at time deed ought to have been delivered. Cited in *Whiteside v. Jennings*, 19 Ala. 791, but unnecessary to the decision; *Blanchard v. Ely*, 21 Wend. 347, 34 Am. Dec. 253, considering general doctrine of damages; *Dunshee v. Geoghegan*, 7 Utah, 117, 25 Pac. 732, where one contracts to convey real estate, knowing he has no right to sell, measure of damages is difference between contract price and price at time of the purchase.

Distinguished in *Orange, etc., R. R. Co. v. Placide*, 35 Md. 320, holding, in absence of proof as to the market value of the bonds, measure of damages was difference between contract value of work and materials of contractors and amount paid to them; *Drake v. Baker*, 34 N. J. L. 362, holding, where one is prevented from conveying by latent flaw in title, vendee cannot recover for loss of bargain; *Baldwin v. Munn*, 2 Wend. 407, 20 Am. Dec. 631, holding, if vendor acts in good faith, but discovers defect in his title, he is not liable for damages; *Cox v. Henry*, 32 Pa. 19, holding, where vendee has been evicted by paramount title, damages is the consideration paid; *Morgan v. Bell*, 3 Wash. 579, 28 Pac. 933, 16 L. R. A. 623, and n., holding one contracting to convey land not his own is liable for amount paid him, with interest. Denied in *Wallace v. Long*, 105 Ind. 530, 55 Am. Rep. 228, 5 N. E. 671, holding, where one performed services in consideration of property to be conveyed, and contract is unenforceable because of statute of frauds, measure of damages is value of services and not of the property; *Hertzog v. Hertzog*, 34 Pa. St. 429, 433, holding, in action for breach of contract, where land was to be conveyed for services rendered, damages are value of consideration and not the value of the land.

6 Wheat. 119-127, 5 L. 221, THATCHER v. POWELL.

**Tax sale.**—Execution by public officer of power to sell land for taxes must be in strict pursuance of the statute, p. 127.

The citations collect a large number of cases upon this point, which affirm and apply this doctrine as follows: *Mason v. Fearson*, 9 How. 260, 13 L. 130, construing strictly a statute empowering a municipality to sell a lot to pay taxes; *Early v. Doe*, 16 How. 618, 619, 14 L. 1083, holding statute providing for duration of time of publication must be exactly complied with; *Ransom v. Williams*, 2 Wall. 319, 17 L. 805, holding burden of proving compliance with statute authorizing execution to issue against land of deceased debtor is on purchaser; note to *Gray v. Larrimore*, 2 Abb. (U. S.) 549, F. C. 5,721, holding statute authorizing suit to be commenced against a nonresident by means of service by publication, must be strictly pursued; *Cowdrey v. Caneadea*, 21 Blatchf. 352, 16 Fed. 533, construing statute providing for issuing bonds of a town in aid of a railroad; *United States v. Brown*, Gilp. 182, F. C. 14,663, holding bond taken under a statute must conform to it; *United States v. Pacific R. R. Co.*, 1 McCrary, 7, 1 Fed. 102, holding, in order to establish a lien for taxes, all prerequisites must be complied with; *Dunin v. Games*, 1 McLean, 328, F. C. 4,176, holding person claiming under a tax deed must show that all legal requisites have been complied with; *Hilliard v. Brevoort*, 4 McLean, 25, F. C. 6,505, holding unless averment of citizenship be contradicted, it need not be proved on trial; *Mayhew v. Davis*, 4 McLean, 221, F. C. 9,347, holding collector of taxes must make a demand before judgment



can be properly rendered against land; *Arrowsmith v. Burlingim*, 4 McLean, 499, F. C. 563, holding to render an auditor's deed evidence of title to land sold for taxes, it must be first shown that all legal requisites have been complied with; *Tolmie v. Thompson*, 3 Cr. C. C. 135, F. C. 14,080, holding everything necessary to proceedings for partition or sale of land of an intestate must be proved; *United States v. Allen*, 14 Fed. 265, holding sale under revenue tax law is void unless statute is literally followed; *Lackett v. Rumbaugh*, 45 Fed. 30, holding provision of code authorizing attachment of nonresident's property upon service of summons by publication cannot be recognized in case commenced in a Federal court; *Cook v. Lasher*, 73 Fed. 707, 42 U. S. App. 42, holding tax deed is invalid unless every prerequisite prescribed by statute has been performed; *Turner v. Thrower*, 5 Port. 53, holding party setting up title to fugitive slave sold under statute, must prove that all requisitions have been complied with; *Wyman v. Campbell*, 6 Port. 244, 31 Am. Dec. 691, holding proceedings of Orphans' Court are invalid, unless facts necessary to jurisdiction appear on the record; *Lyon v. Hunt*, 11 Ala. 313, 46 Am. Dec. 223, holding purchaser at tax sale must affirmatively show the fulfillment of every substantial requisite; *Wightman v. Korsner*, 20 Ala. 455, holding orders made at unauthorized Special Term of court of limited jurisdiction are void; *Eslava v. Lepretre*, 21 Ala. 522, 56 Am. Dec. 272, holding proceedings in Orphans' Court to declare party non compos mentis, if made without notice, are void; *Foster v. Glazener*, 27 Ala. 397, holding judgment of sister State, summary in character, void unless record shows statute authorizing the proceedings; *Gunn v. Howell*, 27 Ala. 675, 62 Am. Dec. 789, holding summary proceedings must pursue statute; *Moody v. Bibb*, 50 Ala. 248, holding appointment of guardian of supposed lunatic by Probate Court, without an inquisition of lunacy, is void; *Driggers v. Cassady*, 71 Ala. 533, holding jurisdiction of Probate Court to order sale of land for taxes, appearing on record, its judgment cannot be collaterally attacked; *Carlisle v. State*, 78 Ala. 488, holding sale of land for unpaid taxes invalid where notice was not given as prescribed by statute; *Wartensleben v. Haithcock*, 80 Ala. 570, 1 So. 42, holding the affidavit which the tax collector is required to file in office of probate judge, as to his inability to find personal property, is a jurisdictional fact without which order of sale is void; *Gibney v. Crawford*, 51 Ark. 40, 9 S. W. 311, holding, in proceeding for calling in county warrants, statute must be strictly pursued; dissenting opinion, *People v. Holladay*, 25 Cal. 309, to effect that no intendment is to be made in favor of regularity of proceedings of courts of special jurisdiction; *Sears v. Terry*, 26 Conn. 286, holding Probate Court in appointing conservators must conform strictly to the statutes; *Dorrance v. Raynsford*, 67 Conn. 6, 7, 52 Am. St. Rep. 268, 34 Atl. 707, holding purchaser under administrator's deed must prove that

proper notice was given; *Swepson v. Call*, 13 Fla. 359, holding requirements of statute authorizing transfer of case from one court to another must be strictly followed; *Dickerson v. Acosta*, 15 Fla. 620, holding same as to forfeiture of land for nonpayment of taxes; *D'Antignac v. City Council of Augusta*, 31 Ga. 710, as to proceedings under statute whereby man may be deprived of his property; *Fitch v. Pinckard*, 4 Scam. 79, holding purchaser at tax sale must prove that every prerequisite has been complied with; as also in *Graves v. Bruen*, 11 Ill. 438, ruling similarly; *Haywood v. Collins*, 60 Ill. 336, holding, in summary proceedings, jurisdictional facts ought to appear in record; *Dentler v. State*, 4 Blackf. (Ind.) 260, holding motion to vest title of land in State for nonpayment of taxes will not be granted unless notice has been published as prescribed by statute; *Wilson v. Poole*, 33 Ind. 447, holding where precept was void, the treasurer of city could not pass title; *McEwen v. Gilker*, 38 Ind. 246, sustaining demurrer to complaint where transcript on appeal from assessment for street work fails to show advertisement for bids; *Doctor v. Hartman*, 74 Ind. 231, holding where court is without jurisdiction of subject-matter, parties cannot confer it by waiver; *Goring v. McTaggart*, 92 Ind. 204, granting injunction to restrain sale of real estate upon a void precept issued for street work.

Other citing cases also follow and apply the proposition syllabused above: *Scott v. Babcock*, 3 G. Greene, 140, 142, holding tax sale not legal unless all requirements of statute have been fully complied with; *Laraby v. Reid*, 3 G. Greene, 421, holding same as to sale under revenue law; *Cooper v. Sunderland*, 3 Iowa, 123, 129, 66 Am. Dec. 56, 61, holding if sufficient appears on face of record in special proceeding to give jurisdiction, presumption is in favor of the proceedings; *Bradley v. Jamison*, 46 Iowa, 73, holding to acquire jurisdiction where service is by publication, statute must be strictly followed; *Stafford v. Twitchell*, 33 La. Ann. 528, holding where property was not legally assessed and notice was not properly given, sale for taxes was inoperative; *Campbell v. Webb*, 11 Md. 481, holding officer responsible who executes process of court of limited jurisdiction which shows the court is without jurisdiction; *Steuart v. Meyer*, 54 Md. 466, holding, under statute, onus of showing illegality of tax sale is on party resisting sale; *Coward v. Dillinger*, 56 Md. 61, holding objection to attachment that it does not show affirmatively upon its face that statutory requisites have been complied with may be availed of on motion to quash, in arrest of judgment or on appeal; *Friedenwald v. Shipley*, 74 Md. 230, 24 Atl. 156, holding examiner, in condemning streets, must conform strictly to statute; *Folger v. Insurance Co.*, 99 Mass. 273, 96 Am. Dec. 751, refusing to recognize decree of New York in excess of the jurisdiction of that court; *Wight v. Warner*, 1 Doug. (Mich.) 388, holding jurisdictional facts must affirmatively appear in statutory proceeding;



Sibley v. Smith, 2 Mich. 496, holding, under statute, tax deed is prima facie evidence of regularity of proceedings; Platt v. Stewart, 10 Mich. 265, holding all jurisdictional facts ought affirmatively to appear on record in partition proceedings; Chauncey v. Wass, 35 Minn. 21, 30 N. W. 834, holding, in proceedings to enforce payment of taxes, jurisdiction of court is not affected by fact that taxes have been previously paid; Vick v. Mayor of Vicksburg, 1 How. (Miss.) 440, 445, 31 Am. Dec. 180, 185, holding partition not binding unless proper notice was given; Marks v. McElroy, 67 Miss. 547, 7 So. 408, holding no presumption of jurisdiction arises from decree removing disability of minor; Morton v. Reeds, 6 Mo. 73, holding strict proof of compliance with requisites is necessary in summary proceedings; dissenting opinion, State v. Woodson, 41 Mo. 238, majority holding same as to power to relieve parties from disabilities; Johnson v. Hahn, 4 Neb. 148, enjoining sale of realty where owner has personalty; Morrill v. Taylor, 6 Neb. 242, holding valid assessment a prerequisite to exercise of taking power; Cahoon v. Coe, 57 N. H. 569, 596, holding purchaser of tax title must show all requirements have been performed; Barrow v. Bispham, 11 N. J. L. 114, holding sale for taxes void where statute was not strictly pursued; State v. Mayor of Jersey City, 36 N. J. L. 192, holding illegality of assessment will avoid sale; State v. Mayor of Newark, 36 N. J. L. 290, as to publication of notice to taxpayers; Bloom v. Burdick, 1 Hill, 141, 37 Am. Dec. 307, holding statutory authority depriving one of his estate must be strictly pursued; Sharp v. Speir, 4 Hill, 86, and Hubbell v. Weldon, Lalor's Sup. to Hill & D. 145, ruling similarly as to sale for taxes; Striker v. Kelly, 7 Hill, 25, holding purchaser must prove sale was regular; Sherwood v. Reade, 7 Hill, 434, holding statute authorizing sale under mortgage must be strictly followed; Cruger v. Dougherty, 43 N. Y. 122, holding same as to tax sale; Merritt v. Port Chester, 71 N. Y. 312, 27 Am. Rep. 48, as to statute charging property with local improvements; Lafferty v. Byers, 5 Ohio, 458, holding misdescription of quantity in notice invalidated tax sale; Adams v. Jeffries, 12 Ohio, 272, 40 Am. Dec. 478, holding administrator's sale void where order failed to show heirs were parties; Spice v. Steinruck, 14 Ohio St. 218, as to statutory civil arrest; as also in Norman v. Zieber, 3 Or. 203; Waln v. Shearman, 8 S. & R. 369, holding five years' limit for institution of suit to recover land sold for taxes runs from time purchaser enters into possession; dissenting opinion, Stewart v. Shoenfelt, 13 S. & R. 375, majority holding sale valid under statute, though land was assessed by assessor from another township; In re College Street, 11 R. I. 474, holding assessment by commissioners without authority void; Baker v. Chisholm, 3 Tex. 158, holding court established by law cannot transcend the jurisdiction given by that law; Hadley v. Tankersley, 8 Tex. 20, holding purchaser at tax sale must show performance of all prerequisites; Mitchell v. Runkle, 25 Tex. Sup. 137, holding in summary proceedings, jurisdictional facts must

appear; *Solon v. State*, 5 Tex. App. 305, holding courts cannot transcend the authority of the law of their creation; *Boon v. Simmons*, 88 Va. 265, 13 S. E. 441, holding every statutory provision in which the owner can possibly have an interest, must be strictly obeyed, else tax title will be void; *McCullough v. Hunter*, 90 Va. 701, 19 S. E. 776, holding sale by ex-collector void; *McAllister v. Guggenheimer*, 91 Va. 320, 21 S. E. 476, holding attachment void, statutory requirements not appearing on its face; *Whitney v. Brunette*, 15 Wis. 68, holding attachment not in statutory form void. See also valuable notes, 13 Am. Dec. 180, 17 Am. Dec. 507. And see 1 Blackf. 120, note; also note to *State Tax Law Cases*, 54 Mich. 447, collecting a great number of cases to illustrate the frequency of the intervention of the judiciary in tax proceedings.

Distinguished in *Hunt v. Ellison*, 32 Ala. 198, considering the effect of recitals of appearance in record; *Minor v. Pres. of Natchez*, 4 S. & M. 626, 43 Am. Dec. 494, holding departure of officer from statutory mode of advertising will not vitiate sale; *Freeman v. Thompson*, 53 Mo. 198, holding jurisdiction is acquired, when attachment is levied; *Werz v. Werz*, 11 Mo. App. 35, holding suit for divorce not within the rule; *Liddel v. McVickar*, 11 N. J. L. 52, 19 Am. Dec. 377, holding Orphans' Court may make a second order of sale to pay debts; *Bulow v. Witte*, 3 S. C. 325, holding sale by master in equity valid, though he accepted Confederate currency; *Guilford v. Love*, 49 Tex. 743, holding partition in Probate Court not a special proceeding; *Williams v. Ball*, 52 Tex. 609, 36 Am. Rep. 732, holding judgment of justice of peace cannot be collaterally attacked, because it does not show jurisdiction of facts; *Keystone B. Co. v. Summers*, 13 W. Va. 504, where there was no irregularity; *Davis v. Pt. Pleasant*, 32 W. Va. 294, 9 S. E. 230, holding city may tax agricultural lands incorporated into its limits, though not laid out into streets; *Potts v. Cooley*, 51 Wis. 355, 8 N. W. 154, holding tax deed valid where notice stated it was given by the holder of the certificate instead of by the owner.

**Statutory construction.**—In construing local statutes respecting real property, Supreme Court is governed by the decisions of the State tribunals, p. 127.

Rule applied in *Jackson v. Chew*, 12 Wheat. 168, 6 L. 589, adopting local law of real property as ascertained by State courts; *Green v. Neal*, 6 Pet. 297, 8 L. 405, following construction of State courts, of statute of limitations; *McArthur v. Scott*, 113 U. S. 391, 28 L. 1031, 5 S. Ct. 667, following State court's construction of statute that decree setting aside a will is void as to all persons in interest not made parties; *Ridings v. Johnson*, 128 U. S. 224, 32 L. 405, 9 S. Ct. 76, followed decisions of State courts on registry laws; *Thompson v. Phillips*, 1 Bald. 284, F. C. 13,974, following settled construction of State law by the highest court of that State; *Derby v. Jacques*, 1 Cliff. 439, F. C. 3,817, holding as to writ of right in Circuit Court, the



State having abolished the writ; *Boyle v. Arledge*, Hemp. 623, F. C. 1,758, holding exposition of State statutes by local tribunals are considered as a part of the law, and become a rule of property; *Mitchell v. Lippincott*, 2 Woods, 472, 473, F. C. 9,665, refusing to enforce a mortgage which, at time when made, was valid according to decisions of State courts, but according to subsequent decisions, invalid; *Hiller v. Shattuck*, 1 Flipp. 274, F. C. 6,504, following State ejectment law; *New Hampshire v. Grand Trunk Ry. Co.*, 3 Fed. 888, following State construction of local laws; *Hempstead v. Reed*, 6 Conn. 487, holding it is not improper condescension for State court to yield to United States court construction of the Constitution; *McClure v. Owen*, 26 Iowa, 254, holding Federal courts will follow latest construction of State statute and Constitution by State courts; *Levy v. Mentz*, 23 La. Ann. 262, refusing to follow Federal interpretation of State statute adverse to construction of State courts.

Distinguished in *Beals v. Hale*, 4 How. 54, 11 L. 873, holding court not bound by State decision not in the court of last resort; *Burgess v. Seligman*, 107 U. S. 34, 27 L. 365, 2 S. Ct. 22, holding where State law has not been settled, Federal courts may exercise their own judgment; *Vaughan v. Phebe*, 1 Mart. & Yerg. 24, 17 Am. Dec. 779, holding judgment of another State as to freedom of slave not binding.

Miscellaneous.—Cited in *Blanchard v. Sprague*, 1 Cliff. 290, F. C. 1,516, to point that in trials at law, laws of State furnish rules of evidence in Federal tribunals; *Low v. Commissioners of Pilotage*, Charl. (Ga.) 311, apparently not in point.

6 Wheat. 128, 5 L. 223, **RANDOLPH v. BARBOUR.**

**Appeal in equity** will be dismissed upon certificate from court below that it has not been prosecuted, p. 128.

Cited in note to 41 Am. St. Rep. 640, that failure to comply with rules prescribing time within which certain acts must be done, may deprive appellant of his right to judgment.

6 Wheat. 129, 130, 5 L. 223, **MAYHEW v. THATCHER.**

**Interest on judgment.**—As in Louisiana, questions of fact in civil cases are tried by the court, unless either of the parties demands a jury, in action of debt on a judgment, interest on original judgment may be computed without a writ of inquiry, p. 130.

Cited in *Farrelly v. Cross*, 10 Ark. 410, holding issue of nuli tiel record can be tried alone by the court; *Tannehill v. Thomas*, 1 Blackf. (Ind.) 145, n., holding in action on note damages may be assessed by the court.

**Appearance of party** cures any objection to proceedings in attachment, p. 130.

Cited in *State v. Richmond*, 26 N. H. 242, holding, where selectmen had jurisdiction of subject-matter, irregularity in proceedings could

be waived by parties; *Campbell v. Wilson*, 6 Tex. 393, holding non-resident appearing in attachment suit waives right to object to jurisdiction.

**Record of a judgment** in one State is conclusive evidence in another, although suit was commenced by attachment of property, defendant afterwards having appeared, p. 130.

Cited to this point and rule applied in *Insurance Co. v. Harris*, 97 U. S. 336, 24 L. 962, under similar facts; *Taylor v. Carpenter*, 2 Wood. & M. 4, F. C. 13,785, holding an "exemplified copy" is competent evidence of a judgment; *Mills v. Stewart*, 12 Ala. 95, holding if form of record of court does not indicate a limited jurisdiction, presumption favors its jurisdiction; *Mitchell v. Ferris*, 5 Houst. 40, holding jurisdiction of court rendering judgment may be inquired into; *Whiting v. Burger*, 78 Me. 294, 4 Atl. 696, holding judgment in New York is bar to action in Maine commenced first; *Pepin v. Lachenmeyer*, 45 N. Y. 29, holding certified copy of judgment is prima facie evidence of acts of the court therein; *Carter v. Wilson*, 1 Dev. & B. 365, holding only proper plea to record of one State pleaded in bar in another is nul tiel record; *Bennett v. Morley*, 10 Ohio, 103, holding under plea of nul tiel record to judgment of sister State, evidence is not admissible to show one of the defendants was not in fact served; *Miller v. Miller*, 1 Bailey L. 249, holding jurisdiction of court rendering judgment may be inquired into; *Hoxie v. Wright*, 2 Vt. 268, under facts similar to principal case; *Black v. Smith*, 13 W. Va. 793, holding validity of judgment rendered in another State by court with jurisdiction cannot be inquired into here. Cited in note, 3 McCrary, 613, 11 Fed. 384, on this subject, collecting authorities.

Distinguished in *Hill v. Bowman*, 14 La. 446, holding, under code, proceedings by attachment are in rem and in personam also; *Choppin v. Harmon*, 46 Miss. 307, refusing to enforce foreign judgment against married woman, where no separate property was pointed out from which to satisfy it; *Judkins v. Insurance Co.*, 37 N. H. 477, holding nil debet is a good plea in action of debt upon a judgment rendered in another State; *Price v. Hickok*, 39 Vt. 301, holding judgment in another State against nonresident, not served in that State nor appearing, cannot be enforced here.

Miscellaneous.—Cited in *Sumner v. Marcy*, 3 Wood. & M. 115, F. C. 13,609, apparently not in point.

6 Wheat. 131-135, 5 L. 224, **FARMERS & MECHANICS' BANK v. SMITH.**

**State insolvent law** discharging debtor from pre-existing contract is unconstitutional; and it makes no difference that suit was brought in court of State of which both parties were citizens, where contract was made and the discharge obtained, p. 134.



Rule applied in dissenting opinion, *Ogden v. Saunders*, 12 Wheat. 333, 6 L. 647, majority holding State insolvent law discharging debtor's person and future debts, valid; *Cook v. Moffat*, 5 How. 308, 316, 12 L. 166, 169, holding debt in New York not discharged by insolvent laws of Maryland, though passed prior to its contraction; *Planters' Bank v. Sharp*, 6 How. 328, 330, 12 L. 459, holding law forbidding banks to transfer notes by indorsement or otherwise is unconstitutional; *Woodhull v. Wagner*, 1 Bald. 298, 301, F. C. 17,975, holding discharge under insolvent law of one State does not protect debtor from arrest for debt in another State; *Byrd v. Badger*, McAll. 265, F. C. 2,265, holding discharge under insolvent law of a State cannot be pleaded in bar of action on foreign contract; *Newton v. Hagerman*, 10 Sawy. 462, 22 Fed. 526, holding a discharge under a State insolvent law is no bar to an action by a citizen of another State, who did not appear or take part in the insolvency proceedings; as also in *Towne v. Smith*, 1 Wood. & M. 128, 130, F. C. 14,115; *In re Klein*, 14 Fed. Cas. 723 (reversed, 1 How. 278, n.), holding act of congress discharging debtor from pre-existing debts unconstitutional; *Woodbridge v. Wright*, 3 Conn. 527, holding discharge in one State does not operate against creditor in another; *Deering v. Boyle*, 8 Kan. 535, 12 Am. Rep. 489, holding statute exempting married woman's separate estate does not apply to note previously given; dissenting opinion, *Doughty v. Sheriff*, 27 La. Ann. 360, majority holding homestead law exempting from pre-existing debts, valid; *Orr v. Lisso*, 33 La. Ann. 477, holding foreign creditors subject to insolvency law; *Savoye v. Marsh*, 10 Met. 596, 43 Am. Dec. 453, holding discharge of makers and indorsers under our laws no bar to action by foreign indorsees; *Marsh v. Putnam*, 3 Gray, 556, holding certificate of discharge is a bar to an action on contract between citizens of this State to be performed elsewhere; *Stevens v. Bowen*, 49 Miss. 599, holding State may pass insolvent laws operating on future contracts; *Hicks v. Hotchkiss*, 7 Johns. Ch. 313, 11 Am. Dec. 483, holding insolvent act not a bar to foreign debt; *Hoyt v. Thompson*, 5 N. Y. 349, holding action may be maintained on chose in action assigned by a foreign insolvent corporation; *Herring v. Selding*, 2 Aikens, 17, holding insolvent laws attempting to discharge contracts void, though contracts be subsequent; *Elton v. O'Connor*, 6 N. Dak. 6, 33 L. R. A. 526, statute unconstitutional as to prior creditors, and the acceptance of a dividend by them no waiver. Cited in *Merrill v. Bowler*, 38 Atl. 116, affirming power of States to establish insolvency laws in absence of Federal act.

Distinguished in *Hundley v. Chaney*, 65 Cal. 363, 4 Pac. 238, where subsequent act was an amendment favoring creditor; *Boardman v. De Forest*, 5 Conn. 12, holding certificate of discharge could not be granted on judgment after petition on previously existing debt; *Hardeman v. Downer*, 39 Ga. 428, holding homestead law constitutional; *Pugh v. Bussel*, 2 Blackf. (Ind.) 399, holding foreign creditor may sue debtor discharged here, but cannot imprison him.

6 Wheat. 135-146, 5 L. 225, UNITED STATES v. WILKINS.

**Treasury department — Set-offs.**— Under act of 1797, defendant is entitled to the benefit of any credit in his favor arising out of the same or of distinct transactions, and constituting a legal or equitable set-off against the United States, p. 143.

Rule applied in *United States v. Ripley*, 7 Pet. 25, 8 L. 596, holding allowance should be made for disbursements and services not ordinarily attached to the office; as also in *United States v. Fillebrown*, 7 Pet. 48, 8 L. 603; *United States v. Hawkins*, 10 Pet. 133, 9 L. 372, holding defendant may have his credits submitted to a jury at the trial if they have been refused by treasury officers; *Gratiot v. United States*, 15 Pet. 370, 10 L. 771, allowing commissions for disbursing public moneys, and extra services to be set off; *United States v. Buchanan*, 8 How. 105, 12 L. 1006, refusing to allow pursuer to set up losses arising from wrongs or torts done; *Watkins v. United States*, 9 Wall. 765, 19 L. 822, holding claims cannot be set off except in certain cases, unless they have been disallowed; *United States v. Flanders*, 112 U. S. 93, 28 L. 632, 5 S. Ct. 70, allowing revenue collector to set off money paid for advertising; *United States v. Collier*, 3 Blatchf. 350, F. C. 14,833, holding officer sued by United States can set off all equitable demands disallowed by proper officials; *United States v. Mann*, 2 Brock. 12, F. C. 15,716, holding officer of United States who has levied on money on an execution in favor of the government may retain it by way of set-off; *United States v. Buchanan*, Crabbe, 577, F. C. 14,678, allowing unliquidated damages arising from torts to be set off against a government claim; *Yates v. United States*, 90 Fed. 62, collecting authorities and applying rule, holding mere suspension of action on a claim not a disallowance; *Andrews v. United States*, 2 Story, 208, F. C. 381, holding collector entitled to compensation for rent, clerk, etc., though he did not transmit yearly account for same; *United States v. Patrick*, 73 Fed. 807, 36 U. S. App. 645, holding government agent not liable for property which careless clerk omits from a return; *United States v. North American Com. Co.*, 74 Fed. 153, holding claims not presented to secretary of treasury cannot be set off; so also in *United States v. Wade*, 75 Fed. 266; *Powers v. Central Bank*, 18 Ga. 661, holding attorney may retain money sufficient to satisfy his claim; *State v. Dennison*, 84 N. Y. 281, holding State by coming into court does not subject itself to an affirmative judgment upon a set-off.

Distinguished in *Gratiot v. United States*, 4 How. 112, 11 L. 899, refusing to allow commission where officer received money and held same until it could be paid to agent; *Browne v. United States*, 1 Curt. 21, F. C. 2,036, holding extra compensation cannot be allowed to an officer because he has disbursed public money outside of his official duties; *United States v. Hall*, 2 Dill. 427, F. C. 15,284, holding courts cannot make allowance for items which secretary of the treasury has rejected; *United States v. Smith*, 1 Wood. & M. 194,



F. C. 16,346, holding a marshal is not entitled to commissions on money paid to deputies, it being part of his official duty; *Raymond v. State*, 54 Miss. 565, 28 Am. Rep. 384, holding defenses growing out of recoupment cannot be set up in suit against State; *State v. Corbin*, 16 S. C. 542, and *Moore v. Tate*, 87 Tenn. 740, 10 Am. St. Rep. 721, 11 S. W. 938, holding individual cannot interpose a set-off in action against him by State; as also in *Borden v. Houston*, 2 Tex. 610, 611, where action brought by Republic of Texas.

**Contract.**—Price not being settled in contract, a reasonable compensation is allowed, p. 143.

Cited and applied in dissenting opinion, *Sun Mut. Ins. Co. v. Wright*, 23 How. 420, 16 L. 532, majority holding policy was not binding where insured had not paid the additional premium to be fixed by the underwriter; *Humaston v. Telegraph Co.*, 20 Wall. 28, 22 L. 281, holding if person breaks agreement to submit to arbitrators, value may be ascertained by a jury.

**Miscellaneous.**—Cited in *Smedes v. Utica Bank*, 20 Johns. 384, apparently not in point.

6 Wheat. 146-152, 5 L. 228, *YOUNG v. BRYAN*.

Circuit Court has jurisdiction of suit brought by indorsee, a citizen of one State, against indorser, citizen of another, whether or not suit could have been brought in that court by indorser against maker, p. 151.

Rule applied in *Evans v. Gee*, 11 Pet. 83, 9 L. 641, under similar facts; *Phillips v. Preston*, 5 How. 291, 12 L. 157, holding this court has jurisdiction of suit brought by first indorser against second indorser, on independent contract to divide loss, though second indorsee and defendant be citizens of same State; *Coffee v. Planters' Bank*, 13 How. 187, 14 L. 106, holding this court has jurisdiction of action by corporation of one State, indorsee, against immediate indorser, citizen of another State; *Superior City v. Ripley*, 138 U. S. 96, 34 L. 916, 11 S. Ct. 289, applying same rule to acceptor and payee; *Campbell v. Jordan*, Hemp. 535, F. C. 2,362, holding indorsee, a citizen of another State, may sue his immediate indorser in this State, whether maker is suable in such court or not; *Towne v. Smith*, 1 Wood. & M. 119, 120, F. C. 14,115, holding Circuit Court has jurisdiction of action by holder against maker, where note was payable to bearer and passed by delivery; *Varner v. West*, 1 Woods, 495, F. C. 16,885, holding same where note payable to bearer was indorsed by payee; *Brown v. Hull*, 33 Gratt. 29, holding indorsement of overdue note is an independent contract.

Distinguished in *Mollan v. Torrance*, 9 Wheat. 538, 6 L. 154, holding where suit is against remote indorser, plaintiff must show intermediate indorser could have maintained the action there; *Keary v. Bank*, 16 Pet. 95, 10 L. 899, where maker, a citizen of

same State as payee, was joined, the action could not be maintained; *Parker v. Ormsby*, 141 U. S. 85, 35 L. 656, 11 S. Ct. 913, holding Circuit Court has no jurisdiction of suit by assignee against maker, unless payee could have maintained it there; *Shuford v. Cain*, 1 Abb. (U. S.) 307, F. C. 12,823, holding where payee could not maintain action in Circuit Court against maker, his indorsee cannot; *Hill v. Winne*, 1 Biss. 277, F. C. 6,503, holding court had no jurisdiction of bill by assignee of mortgage, where mortgagor and mortgagee are citizens of the same State; *Noell v. Mitchell*, 4 Biss. 348, F. C. 10,287, holding court had no jurisdiction where it did not appear by averment that indorser and plaintiff were citizens of a different State than defendant; *Milledollar v. Bell*, 2 Wall., Jr., 337, F. C. 9,549, holding court had jurisdiction of suit by remote indorser if mortgagee could have maintained it.

**Bills and notes.**—Protest is not required by the common law on promissory note, p. 152.

Rule applied in *Burke v. McKay*, 2 How. 71, 11 L. 183; *Bay v. Church*, 15 Conn. 17, 18, protest is not necessary to charge indorser of promissory note made in one State and payable in another; *Johnson v. Bank*, 29 Ga. 260, not allowing notarial expenses, where protest was not required; *Kaskaskia Bridge Co. v. Shannon*, 1 Gilm. (Ill.) 24, holding notarial protest is not evidence, in case of inland bill, of demand of payment; *Carter v. Burley*, 9 N. H. 565, holding that a protest is not competent evidence of the dishonor of an inland bill of exchange; *Coddington v. Davis*, 3 Den. 22, holding indorser may make a valid agreement to waive presentment and notice; *Ashe v. Beasley*, 6 N. Dak. 193, holding protest not evidence of dishonor of a note; *Brown v. Wilson*, 45 S. C. 530, 55 Am. St. Rep. 782, 23 S. E. 633, holding protest is not necessary to promissory notes; as also in *Corbin v. Planters' Nat. Bank*, 87 Va. 664, 24 Am. St. Rep. 675, 13 S. E. 99. See also note to 43 Am. Dec. 219, on this subject, and note to 96 Am. Dec. 603, on protest as evidence, authorities being collected.

Distinguished in *Simpon v. White*, 40 N. H. 543, holding under statute protest is evidence in all cases.

6 Wheat. 152-176, 5 L. 229, **THE BELLO CORRUNES**.

**Foreign consul** may intervene in prize cases where property of individuals of his nation is involved, p. 168.

Rule applied in *The Elizabeth*, Blatchf. Pr. 253, F. C. 4,350, under similar facts; *The Ship Adolph*, 1 Curt. 89, F. C. 86, holding foreign consul could petition court to have proceeds of property libelled paid into the registry; *The Conserva*, 38 Fed. Rep. 434, allowing consul to file claim for vessel libelled, which belonged to his government.

Distinguished in dissenting opinion. *De Lacy v. Antoine*, 7 Leigh (Va.), 449, majority holding insufficient the claim of vice-consul



that applicants are slaves, supported by affidavit that he believes them to be.

**Foreign consul** not specifically authorized, may not receive the proceeds of property libelled, p. 169.

**Fraud.**—A citizen of this country who has violated its laws by engaging in marine hostilities against Spain cannot claim as a captor in our courts, p. 169.

Rules applied in *United States v. Packages*, 27 Fed. Cas. 286, holding party fraudulently mixing prohibited and nonprohibited goods forfeits all; *United States v. Barrels of Cement*, 27 Fed. Cas. 297, holding license obtained by fraud will not prevent forfeiture.

**Admiralty.**—Property is not forfeited because of breach of revenue laws by captors or rescuers from captors, but only by those intrusted with vessel and cargo by the owners, p. 172.

Rule applied in the *Waterloo*, Blatchf. & H. 120, F. C. 17,257, holding same as to entry by salvors; *Merritt v. Package of Mdse.*, 30 Fed. 197, deciding between claims for salvage, and of government for duties.

Salvage is forfeited by misconduct of salvors, spoliation or gross neglect, p. 173.

Rule applied in dissenting opinion in *The Clandeboye*, 70 Fed. 639, 25 U. S. App. 453, majority allowing salvage though salvor was guilty of unfair dealing; *The Mulhouse*, 17 Fed. Cas. 965, holding embezzlement of part of goods forfeits salvage; *Roberts v. The St. James*, 20 Fed. Cas. 926, holding failure to report saved property, forfeits salvage.

**Miscellaneous.**—Cited in *Hubbard v. Express Co.*, 10 R. I. 249, as to definition of "war."

6 Wheat. 176-187, 5 L. 235, *SMITH v. UNIVERSAL INS. CO.*

**Marine insurance.**—If any peril begins to act, but subject is removed before loss, and voyage is resumed, insured cannot abandon, p. 185.

Rule applied in *Bradlie v. Insurance Co.*, 12 Pet. 402, 9 L. 1134, under similar facts; *Greene v. Insurance Co.* 9 Allen, 225, holding there was a total loss where vessel was barratrously taken, possession regained, but voyage was wholly broken up.

Distinguished in *Andrews v. Marine Ins. Co.*, 3 Mason, 21, F. C. 374, holding insurance did not warrant a right of entry into the port for inquiry.

To constitute a technical total loss, it is not sufficient that the voyage has been lost, but loss must be occasioned by some peril actually insured against, p. 185.

**Miscellaneous.**—Cited in *Taylor v. Benham*, 5 How. 276, 12 L. 151, apparently not in point.

6 Wheat. 187-192, 5 L. 238, THE ROBERT EDWARDS.

Circumstantial evidence is sometimes the most satisfactory and convincing, p. 190.

Cited in note to 62 Am. Dec. 181, on advantages and disadvantages of circumstantial evidence where authorities are collected.

**Evidence.**—Where the *res gestæ* in a revenue case are incapable of explanation consistent with innocence of the party, condemnation follows, although there be no positive testimony of the offense having been committed, p. 190.

Rule applied in *The Meteor*, 17 Fed. Cas. 197, holding failure of claimants to explain suspicious circumstances must lead to condemnation.

6 Wheat. 193, 194, 5 L. 239, NUEVA ANNA & LIEBRE.

**Admiralty.**—Condemnation in courts under an alleged republic not recognized by the United States will not be respected in courts of United States, p. 193.

Cited in dissenting opinion in *Cherokee Nation v. Georgia*, 5 Pet. 47, 8 L. 41, majority holding Cherokee Nation is not a "foreign State;" *The Three Friends*, 166 U. S. 58, 41 L. 916, 17 S. Ct. 590, holding "people" in statute includes any insurrectionary body conducting hostilities, although its belligerency has not been recognized; *The Ambrose Light*, 25 Fed. 429, holding recognition of belligerency to be a political act.

Miscellaneous.—Cited in *Lincoln v. Towne*, 2 McLean, 477, F. C. 8,355, not in point.

6 Wheat. 194-203, 5 L. 239, THE COLLECTOR.

**Appeal.**—In proceedings in rem, on an appeal, the property follows the cause into the Circuit Court, but never to the Supreme Court, p. 203.

Rule applied in *The William Bagaley*, 5 Wall. 412, 18 L. 591, holding those not parties in lower court and who are neither appellants nor appellees cannot be heard as intervenors; *The Lottawanna*, 20 Wall. 225, 22 L. 264, under facts similar to main case; *The "Wanata"*, 95 U. S. 617, 24 L. 466, holding appeal in admiralty carries up the whole fund; *Davis v. The Seneca*, Gilp. 40, F. C. 3,651, holding, after appeal, District Court no longer has control of prize; *The Phebe*, 1 Ware, 361, F. C. 11,065, holding when vessel is in custody of the law wharfinger cannot enforce his lien by detaining vessels; *Folger v. The Robert G. Shaw*, 2 Wood. & M. 540, F. C. 1,899, holding after appeal to Circuit Court no order about the property can be made in District Court; *Braithwaite v. Jordan*, 5 N. Dak. 252, 65 N. W. 720, 31 L. R. A. 259, holding action on appeal bond, not being integral of original action, would lie in lower court.



Distinguished in *The Peterhoff*, Blatchf. Pr. 622, F. C. 11,025, holding appeal to Supreme Court places the property under the control of that court.

It is a great irregularity for marshal to keep property or proceeds, or to distribute same, without a special order from the court, but such irregularity may be waived, pp. 201, 202.

6 Wheat. 204-235, 5 L. 242, *ANDERSON v. DUNN*.

**Constitutional law.**— Many powers are necessarily implied under the express grants of power in the Constitution. It would be utopian to suppose that government can exist without leaving the exercise of discretion somewhere, pp. 225, 226.

Cited in *Ex parte Henderson*, 6 Fla. 294, holding Circuit Courts are not confined to cases of original jurisdiction; Opinion by the Chief Justice, 8 Fla. 511, holding Supreme Court can act through a majority of its members; dissenting opinion, *Griswold v. Hepburn*, 2 Duv. (Ky.) 61, majority holding congress and the States are forbidden to make currency a legal tender; *Metropolitan Bank v. Van Dyck*, 27 N. Y. 430, holding contra to preceding case; *Casey v. State*, 25 Tex. 386, holding contempts are not criminal cases, though of a criminal nature.

Courts have power to impose decorum in their presence, and submission to their lawful mandates, p. 227.

Rule applied in *Ex parte Terry*, 128 U. S. 303, 32 L. 408, 9 S. Ct. 70, also reported in 13 Sawy. 460, holding Circuit Courts can punish contempts of their authority, as incidental to their general powers; *Eilenbecker v. Plymouth Co.*, 134 U. S. 36, 33 L. 803, 10 S. Ct. 426, holding District Court can punish disobedience of injunction restraining one from selling liquor; *Interstate Commerce Commission v. Brimson*, 154 U. S. 489, 38 L. 1061, 14 S. Ct. 1138, holding, in matter of contempt, a jury is not required; dissenting opinion of same case, 155 U. S. 5, 39 L. 50, 15 S. Ct. 20; *In re Debs*, 158 U. S. 596, 39 L. 1106, 15 S. Ct. 916, holding Circuit Court can punish disobedience of injunction to remove obstructions from highways, for passage of interstate commerce and mails; *United States v. New Bedford Bridge*, 1 Wood. & M. 440, F. C. 15,867, holding the authority to punish for contempt is granted as a necessary incident in establishing a court; *In re Lyman*, 55 Fed. 42, holding unlawful ousting of District Court from its rooms to be contempt; *Ex parte Burr*, 2 Cr. C. C. 391, F. C. 2,186, holding court may inquire in a summary manner as to charges of malpractice; *Towns v. Springer*, 9 Ga. 132, holding superior court cannot punish disobedience to process of inferior court; *Hawkins v. State*, 125 Ind. 573, 25 N. E. 819, holding Circuit Court has inherent power to punish contempt; *State v. Markuson*, 5 N. Dak. 160, 64 N. W. 938, holding, since statute prescribing minimum punishment for contempt, does not impair the

inherent power of courts to punish for contempts, it is valid; *State v. Tugwell*, 19 Wash. 252, 43 L. R. A. 723, affirming court's power to punish summarily a contempt in publishing article derogatory to member of the court. See also note on this subject, 12 Am. Dec. 179.

**Contempt.**—House of representatives has power to punish for contempt, p. 229.

The citations collect a number of cases on this point, which affirm and apply the doctrine as follows: *Ex parte Nugent*, 18 Fed. Cas. 472, 473, holding senate has power to punish for contempt, and is the sole judge of its own contempts; *Ex parte McCarthy*, 29 Cal. 405, holding State senate may punish witness for refusing to testify; *Smith v. Myers*, 109 Ind. 7, 58 Am. Rep. 380, 9 N. E. 697, holding courts cannot enjoin secretary of state from delivering sealed returns to speaker of house; *Langenberg v. Decker*, 131 Ind. 482, 31 N. E. 194, 16 L. R. A. 113, power to punish for contempt may not be conferred on State board of tax commissioners; dissenting opinion, *Koehler v. Hill*, 60 Iowa, 675, 15 N. W. 644, majority holding determination of assembly of the regularity of preliminary proceedings is not conclusive upon the courts; *In re Gunn*, 50 Kan. 211, 32 Pac. 486, 19 L. R. A. 535, house of representatives may imprison a contumacious witness; *In re Davis*, 58 Kan. 379, 380, 49 Pac. 163, holding legislative committee has no power to imprison witness; *Lowe v. Summers*, 60 Mo. App. 649, holding assembly can punish for contempt; *State v. Matthews*, 37 N. H. 453, holding all legislative and judicial bodies have an inherent right to punish contempt; *People v. Keeler*, 99 N. Y. 475, 476, 478, 52 Am. Rep. 53, 54, 55, 2 N. E. 620, 621, 622, holding power of legislature to punish for contempt, not abrogated by penal code, declaring such contempts shall be punished according to its provisions and not otherwise; *Ex parte Dalton*, 44 Ohio St. 150, 151, 153, 58 Am. Rep. 801, 802, 804, 5 N. E. 138, 139, holding legislature can imprison for contempt. See note to 22 Am. St. Rep. 425; also 7 Wheat. 45, note, 5 L. 393.

Criticised and some of the reasoning of the opinion overruled in *Kilbourn v. Thompson*, 103 U. S. 197, 198, 199, 200, 26 L. 389, 390, holding congress could not compel a witness to testify in an investigation, the subject-matter of which was judicial, not legislative; *Interstate Commerce Commission v. Brimson*, 154 U. S. 485, 38 L. 1060, 14 S. Ct. 1136, holding (with few exceptions), power to compel performance of a legal duty can only be exercised by a competent judicial tribunal; *Sanborn v. Carleton*, 15 Gray, 402, holding warrant of arrest issued by senate of United States and addressed to the sergeant-at-arms, cannot be served in Massachusetts by a deputy; *Whitcomb's Case*, 120 Mass. 122, 123, 21 Am. Rep. 505, holding city council cannot punish for contempt; *F. & F. P. R. R. Co. v. Woodhull*, 25 Mich. 104, 12 Am. Rep. 236, holding legislature, except in a few cases, cannot exercise judicial authority. Referred to in *People v. Keeler*, 99 N. Y. 477, 483, 52 Am. Rep. 55, 60, as overruled



by *Kilbourn v. Thompson*, *supra*, in so far as asserting a general power in the house to punish for contempt and the conclusiveness of its judgment.

**Imprisonment for contempt** by legislative body terminates with the adjournment, p. 231.

Rule applied in *Whittem v. State*, 36 Ind. 216, holding imprisonment for contempt must be for a definite time; *In re Davis*, 58 Kan. 380, 49 Pac. 163, holding legislative committee cannot imprison witness; *Hovey v. Elliott*, 145 N. Y. 137, 39 N.E. 843, 39 L.R.A. 460, holding statute limits modes of punishment for, to modes there specified.

Miscellaneous citations.—Cited in note to *In re Barry*, 136 U. S. 608, 34 L. 507, 42 Fed. 121, F. C. 1,059, and in the opinion of Betts, J., *In the Matter of Barry*, that where Federal courts have been given jurisdiction by statute, the remedies are to be according to the common law. Miscited *Jones v. Cullen*, 100 Tenn. 19.

6 Wheat. 235-239, 4 L. 249, **LA CONCEPTION**.

**Admiralty**.—New proofs taken in an admiralty case on appeal, p. 238.

Cited to this point in *Folger v. The Robert G. Shaw*, 2 Wood. & M. 540, 541, F. C. 4,899, holding after case is entered in appellate court, and appellant declines to prosecute, court should give judgment on the merits.

**Prize**.—Capture of Spanish property by vessel built, armed, equipped, and owned in the United States, there being no satisfactory proof of her transfer to a citizen of a belligerent State, is illegal, p. 239.

**Admiralty**.—Transfer of ownership of vessel, is best evidenced by bill of sale, p. 239.

6 Wheat. 240-260, 5 L. 251, **WILLINKS v. HOLLINGSWORTH**.

**Agency**.—Consignor of a cargo taken and sold by consignee, who in turn consigns a cargo to the consignor, who, although objecting to the purchase, receives and sells it, is liable to such consignee in action for money had and received and may not recoup damages for breach of his orders, p. 259.

Rule applied in *Bryne v. Doughty*, 13 Ga. 53, holding an adoption of a transaction by principal may arise by implication; *Newton v. Bronson*, 13 N. Y. 594, 67 Am. Dec. 93, holding that executor may ratify contract executed by agent.

Miscellaneous.—Cited in *Jameson's Appeal*, 1 Mich. 103, apparently not in point; *State v. Crocker*, 5 Wyo. 398, 40 Pac. 684, as an illustration that certificate of division does not remove the original cause to higher court.

6 Wheat. 260-264, 5 L. 256, GREEN v. WATKINS.

**Abatement.**—At common law, death of party before judgment abates the suit, p. 262.

Cited to this point in Macker v. Thomas, 7 Wheat. 531, 532, 5 L. 515, 516, where deceased party never appeared; Martin v. Baltimore & O. R. R. Co., 151 U. S. 697, 702, 38 L. 320, 322, 14 S. Ct. 542, 544, holding, as under West Virginia code personal tort does not survive, death of party pending writ of error abates the action; Currell v. Villars, 72 Fed. 332, holding real action in equity abated at party's death; Gould v. Carr, 33 Fla. 537, 15 So. 264, 24 L. R. A. 136, and n., so does a real action in law; as also in Hoffman v. St. Clair Judge, 40 Mich. 352.

Distinguished in Mellus v. Thompson, 1 Cliff. 129, F. C. 9,405, because death of party to a bill in equity does not extinguish the right of further prosecution.

**Abatement.**—Death of party pending writ of error, and whether before or after assignment of error, does not abate suit, respecting either realty or personalty, pp. 263, 264.

Rule applied in Marck v. A Lodge, 29 Fed. 896, holding death of party did not abate appeal; United States M. A. A. v. Weller, 30 Fla. 215, 11 So. 787, holding subsequent marriage of female defendant did not abate writ of error; Carroll v. Bowie, 7 Gill, 38, death after rule for reargument was entered did not abate cause; Coombs v. Jordan, 3 Bland Ch. 328, 22 Am. Dec. 275, holding lien was continued during appeal, though party had died; Long v. Thompson, 55 Pac. 979, affirming and following the rule; Tunstall v. Walker, 2 S. & M. 686, refusing petition for reargument, where party died after case was taken under advisement; Philhower v. Voorhees, 12 N. J. L. 69, holding appeal is not abated by marriage of appellee; Bemus v. Beekman, 3 Wend. 673, holding on death of party to writ of error, judgment is entered nunc pro tunc; Gibbs v. Belcher, 30 Tex. 85, holding death does not abate a writ of error. See also valuable note to 50 Am. St. Rep. 742, on substitution, and revivor.

Distinguished in Martin v. Baltimore & O. R. R. Co., 151 U. S. 697, 38 L. 320, 14 S. Ct. 542, holding under law of West Virginia, death of party pending writ of error abates action for personal tort, see dissenting opinion, p. 710, 38 L. 324, 14 S. Ct. 544; Harryman v. Harryman, 49 Md. 70, holding where party dies before appeal is taken, action abates.

**Appeal.**—Death of party produces no change in the condition of the cause or the rights of the parties, pp. 263, 264.

Cited to this point in Hatfield v. Bushnell, 1 Blatchf. 395, F. C. 6,211, 22 Vt. 661, holding death of party will not divest court of jurisdiction.



Writ of error does not abate by death of party, at common law, and his personal representatives not only may become parties, but may be required to, p. 263.

Cited in *Poole v. Nixon*, 19 Fed. Cas. 1001, 9 Pet. App. 770, 9 L. 310, holding a bill of review lies only in favor of a party or privy to the original suit; *Townsend v. Davis*, 1 Ga. 496, 44 Am. Dec. 676, holding no person can bring writ of error to reverse judgment, who was not a party or a privy to the record, or prejudiced by the party; *New Orleans, etc., R. R. Co. v. Rollins*, 36 Miss. 387, holding writ of error lies against administrator without revivor; *Foresman v. Haag*, 37 Ohio St. 145, holding proceedings in error may be revived against representatives of deceased defendant; *Wood v. Yarbrough*, 41 Tex. 542, holding writ of error will only issue at instance of party, his legal representative, or privy.

Miscellaneous.—Cited in *Planters' Bank v. Bass*, 2 La. Ann. 434, as an instance of where a court exercised inherent power; *Dorman v. Richard*, 1 Fla. 296, defining nature of a writ of error.

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**Jurisdiction.**—Judicial power of the United States extends to controversies between States, pp. 378, 383.

Cited and applied in *Rhode Island v. Massachusetts*, 12 Pet. 720, 727, 9 L. 1259, 1261, holding Supreme Court has jurisdiction of controversy, as to boundaries between States; *Texas v. Lewis*, 14 Fed. 66, holding congress may confer upon Circuit Court jurisdiction of case by State against an alien.

Distinguished in *State ex rel. v. Doyle*, 40 Wis. 200, 203, 215, holding a Circuit Court has no jurisdiction of suit by foreign corporation to prevent a State officer from revoking a license.

**Constitutional law.**— Spirit and meaning of the Constitution must be collected from the words, p. 380.

Rule applied in *The Cherokee Nation v. Georgia*, 5 Pet. 42, 8 L. 40, holding Cherokee Nation is not a "foreign State" within the meaning of that term in the Constitution; *Rhode Island v. Massachusetts*, 12 Pet. 722, 723, 748, 9 L. 1260, 1270, holding where no exception is made in terms none will be by implication; *Ames v. Kansas*, 111 U. S. 471, 28 L. 490, 4 S. Ct. 448, holding suits not required to be brought originally in Supreme Court, may be removed from State to Circuit Courts; *United States v. Kendall*, 5 Cr. C. C. 247, F. C. 15,517, holding Circuit Court of the District of Columbia has jurisdiction of cases arising under Federal law or Constitution if either party resides or is found therein; *Gittings v. Crawford*, Taney, 3, 9, F. C. 5,465, holding grant of jurisdiction to one court does not imply that it is exclusive; *Lafayette, etc., R. R. Co. v. Geiger*, 34 Ind. 212, declaring that Constitutions are to be construed strictly.

**Constitutional law.**— The people made the Constitution and can unmake it; but this power to unmake resides in the whole body of the people not in any subdivision of them, p. 389.

Cited upon this point in *Noble v. Cullom*, 44 Ala. 565, holding since Constitution of 1865 was never submitted to the vote of the people, it was never the Constitution of Alabama; *Mayor, etc., of Mobile v. Dargan*, 45 Ala. 317, holding municipal charter may be altered by legislature, and by the Constitution; *Ex parte Selma R. R.*, 45 Ala. 726, 6 Am. Rep. 726, holding legislature has power to authorize a county to subscribe for stock in a railroad company; *Ex parte Reid*, 50 Ala. 443, holding right to office is determined by number of votes cast, and not by the certificate of election; *Opinion of Randall*, 12 Fla. 683, holding resignation of senators or their expulsion cannot have the effect of creating a quorum composed of less than the majority elected; *Wanser v. Hoos*, 60 N. J. L. 525, 64 Am. St. Rep. 602, 38 Atl. 450, holding construction of Constitution is a judicial question. Cited, *arguendo*, in dissenting opinion, *Eakin v. Raub*, 12 S. & R. 358.

Federal courts have jurisdiction of cases arising under the laws and Constitution of the United States whoever may be parties, and even when a State is a party and the proceeding a writ of error to the State court, p. 392.

The importance of *Cohen v. Virginia* as authority for this principle is well illustrated by the large number of citations. They make the following applications of this doctrine, for which the principal case is a leading authority; *Rhode Island v. Massachusetts*, 12 Pet. 744, 9 L. 1268, holding court has jurisdiction to determine boundary between States; *Mayor v. Cooper*, 6 Wall. 253,



18 L. 853, holding Circuit Court has jurisdiction of a case whose correct decisions depend upon the construction of Federal law or Constitution; *Gold-Washing, etc., Co. v. Keyes*, 96 U. S. 201, 24 L. 658, holding case not removable to Federal court, because a construction of Federal law or Constitution may be necessary; *Tennessee v. Davis*, 100 U. S. 264, 270, 25 L. 650, 652, holding this includes both civil and criminal cases; see dissenting opinion of same case, p. 286, ff, 25 L. 658; *Railroad Co. v. Mississippi*, 102 U. S. 140, 26 L. 98, holding a petition for mandamus to remove bridge authorized by act of congress was removable; *Ames v. Kansas*, 111 U. S. 462, 467, 468, 470, 28 L. 487, 489, 490, 4 S. Ct. 443, 445, 446, 447, holding suit in the nature of quo warranto against a State corporation, consolidated under a law of the United States, arises under the laws of the United States; *Kansas-Pacific v. Atchison R. R. Co.*, 112 U. S. 416, 28 L. 795, 5 S. Ct. 209, where both corporations claimed title to same land under different acts of congress; dissenting opinion, *In re Neagle*, 135 U. S. 94, 34 L. 82, 10 S. Ct. 679, majority holding habeas corpus lies where person is in custody for doing act in pursuance of a Federal law; *United States v. Texas*, 143 U. S. 643, 36 L. 292, 12 S. Ct. 492, holding Supreme Court has original jurisdiction of suit involving boundary between a territory and a State; *United States v. Old Settlers*, 148 U. S. 468, 37 L. 524, 13 S. Ct. 667, holding that a claim which could only be asserted by disregarding a treaty is not one arising from or growing out of it; *Whitten v. Tomlinson*, 160 U. S. 238, 40 L. 411, 16 S. Ct. 300, holding United States courts can by habeas corpus inquire into person detained under State authority in violation of the Constitution, or of a law or treaty of the United States; *Stanley v. Board of Supervisors*, 19 Blatchf. 147, 6 Fed. 561, holding Circuit Court has jurisdiction of suit to enforce right conferred by Federal statute regarding taxation of national bank shares; *The Wave*, Blatchf. & H. 251, F. C. 17,297, holding admiralty courts have jurisdiction of actions for pilot fees; *United States v. Williams*, 4 Cr. C. C. 392, 393, F. C. 16,712, holding all cases arising in the District of Columbia arise under the Constitution and laws of the United States; *Connor v. Scott*, 4 Dill. 246, F. C. 3,119, holding case involving construction of bankrupt law removable; *North Carolina v. Trustees of University*, 1 Hughes, 135, 136, F. C. 10,318, 7 Bank. Reg. 468, holding Circuit Courts have not jurisdiction of a case by a State against its own citizens; *Van Allen v. Railroad Co.*, 1 McCrary, 600, 3 Fed. 546, 547, holding that a case arises under the Constitution or laws of the United States, whenever it involves their construction; *Magee v. Railroad Co.*, 2 Sawy. 449, F. C. 8,945, holding fact that a corporation is organized under a Federal law, is not sufficient to give Circuit Court jurisdiction; *Dowell v. Griswold*, 5 Sawy. 43, F. C. 4,041, holding that an averment that an action arises on a Federal law is not enough to confer jurisdiction; *The State*

Lottery Co. v. Fitzpatrick, 3 Woods, 240, 266, F. C. 8,541, holding Circuit Court had jurisdiction, where bill charged that law repealing charter impaired the obligation of the contract; Virginia Coupon Cases, 25 Fed. 659, 660, holding Federal courts have jurisdiction of cases arising thus, though a State be a party; Kansas v. Bradley, 26 Fed. 289, deciding that a point once decided by Supreme Court is no longer a Federal question; Woodfin v. Phœbus, 30 Fed. 294, holding Federal courts have jurisdiction of fort on Federal territory; Illinois v. Illinois C. R. R. Co., 33 Fed. 725, holding averment that repealing act impairs the obligation of a contract is sufficient to make cause removable; Briscoe v. South Kansas Ry. Co., 40 Fed. 277, holding that a Federal question is involved when a right depends on the construction of a Federal law; Jones v. Florida, C. & P. R. R. Co., 41 Fed. 71, holding dispute as to pre-emptor's title to land under land laws is such a question; Dunton v. Muth, 45 Fed. 395, holding case removable, where parties claimed under Federal statute; Pacific Gas Co. v. Ellert, 64 Fed. 429, holding statement by plaintiff that defendant will claim his acts violate the Constitution will not give jurisdiction; Wood v. Drake, 70 Fed. 883, holding suit against Federal officer for false imprisonment for executing process of Federal court is removable; King v. Lawson, 84 Fed. 210, where defendant's claim had been rejected by secretary of the interior; Nashville, etc., Ry. Co. v. Taylor, 86 Fed. 172, 173, 179, 181, holding question involving right of equalization is removable.

In the State courts the following citing cases affirm and apply the syllabus doctrine: Pollard v. State, 65 Ala. 630, holding State courts bound by decisions of Supreme Court of United States construing act organizing national banks; Rison v. Powell, 28 Ark. 435, holding State courts have concurrent jurisdiction of bill to set aside conveyance fraudulently made by bankrupt; Mims v. Wimberly, 33 Ga. 595, holding judges of Confederate States have the right to adjudicate cases arising under the enrolling acts of the Confederate congress; Lord v. Cannon, 75 Ga. 308, holding a Federal question was involved, where shortly before adjudication of bankruptcy exempt land was sold under execution from Circuit Court; dissenting opinion, State v. Kolsem, 130 Ind. 454, 29 N. E. 601, 14 L. R. A. 574, and n., legislature is exclusive judge of necessity for special law; Municipality No. One v. Wheeler, 10 La. Ann. 747, holding that power to decide constitutionality of a law lies with the judiciary; Johnson v. The N. O. Nat. B. Assn., 33 La. Ann. 480, holding suit involving Federal question is removable by State to Circuit Court; dissenting opinion of Hathway in 44 Me. 521, majority holding free colored male person could vote; Opinion of Appleton, p. 559, of same case; Delafield v. Illinois, 2 Hill, 168, holding State court may take jurisdiction where another State is a party; State v. Hoskins, 77 N. C. 541, 543, 544, holding case removable where revenue officer of the United States was indicted;



Setzer v. Douglass, 91 N. C. 429, holding action for breach of contract by United States marshal against his deputy not removable; dissenting opinion. Piqua Bank v. Knoup, 6 Ohio St. 380, 382, majority holding the Supreme Court of the United States has appellate jurisdiction over State courts; Tod ex rel. v. Fairfield Com. Pleas, 15 Ohio St. 387, holding Federal law providing for removal of suits for acts done under the authority of the president during the rebellion is constitutional; State v. Southern Pac. R. R. Co., 23 Or. 431, 31 Pac. 962, holding no cause for removal where defendant was a foreign corporation and question was settling of freight rates; State v. Bowen, 8 S. C. 387, holding action in nature of quo warranto to determine title to office of presidential elector not removable; State v. Davis, 12 S. C. 553, holding jurisdiction of State court over soldier discharged with crime not removable by writ of habeas corpus to Federal court; State v. Insurance Co., 97 Tenn. 99, 36 S. W. 724, holding State court will follow decision of Federal court as to Federal question; Stone v. Edwards, 35 Tex. 558, holding State court cannot enjoin the infringement of a patent; Ableman v. Booth, 11 Wis. 508, 520, court dividing as to the appellate jurisdiction of Supreme Court of the United States over State courts. Cited, arguendo, on this point in dissenting opinion, Charles River Bridge v. Warren Bridge, 11 Pet. 585, 9 L. 839. Cited approvingly, but without special application, in McCormick v. Humphrey, 27 Ind. 152.

Distinguished in Starin v. New York, 115 U. S. 257, 29 L. 390, 6 S. Ct. 31, holding question whether city of New York has exclusive right to ferries over public waters, is not one arising under Federal laws and Constitution; Jones v. The Oceanic S. N. Co., 11 Blatchf. 410, F. C. 7,485, holding suit against corporation chartered by Great Britain not removable from State court; Celluloid Manuf. Co. v. Goodyear D. V. Co., 13 Blatchf. 388, F. C. 2,543, where the question was not one of Federal jurisdiction, but whether the facts were sufficient to sustain the bill; Wise v. Nixon, 76 Fed. 5, where construction of Federal statute was not involved; Fleming v. Clark, 12 Allen, 195, 198, refusing to discharge prisoner on writ of habeas corpus issued by justice of Supreme Court, if no question of law were brought up; State v. Trustees, 65 N. C. 716, 717, holding Circuit Court has no jurisdiction of suit by a State against its own citizens; Applegate v. Dowell, 15 Or. 527, 16 Pac. 658, holding an averment of fraud upon revenue laws of United States is not sufficient to show a Federal question; Texas, etc., Ry. Co. v. McAllister, 59 Tex. 359, holding case not removable, where petition states it to be a Federal question, without giving facts.

**Constitutional law — Construction.**—Affirmative words are often negative of other objects than those affirmed, but not where they have full operation without giving them this negative meaning, pp. 395, 398.

Cited and applied in *Lyon v. Kent*, 45 Ala. 665, holding a charge will be presumed to be oral, when record does not show it was moved for in writing; *Territory v. Ortiz*, 1 N. Mex. 13, holding an affirmative grant of original jurisdiction in particular cases implies a negative in all other cases.

Distinguished in *Ex parte Henderson*, 6 Fla. 295, 296, holding grant of one power by Constitution is not necessarily exclusive of another.

**Original jurisdiction of Supreme Court** is defined by the Constitution, and cannot be enlarged by congress, pp. 396, 399, 400.

Cited and applied in dissenting opinion, *Ex parte Crane*, 5 Pet. 202, 205, 8 L. 97, 98, majority holding this court has jurisdiction to issue writ of mandamus to Circuit Court commanding it to review its settlement of proposed bill of exceptions; *Ex parte Vallandigham*, 1 Wall. 252, 17 L. 593, holding Supreme Court cannot review proceedings of a military commission by certiorari; *Böes v. Preston*, 111 U. S. 258, 28 L. 421, 4 S. Ct. 410, holding constitutional grant of original jurisdiction to Supreme Court of cases affecting consuls, does not make it exclusive; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 298, 299, 32 L. 246, 8 S. Ct. 1378, holding Supreme Court has not original jurisdiction of an action by a State upon a judgment in its own courts against a corporation of another State; *California v. Southern Pac. R. R. Co.*, 157 U. S. 258, 39 L. 694, 15 S. Ct. 602, holding Supreme Court has no original jurisdiction of suit between a State and its citizens, and citizens of another State; *Baker v. Biddle*, 1 Bald. 403, 406, F. C. 764, holding jurisdiction of Federal courts is defined and limited by the Constitution and the law; *Territory v. Ortiz*, 1 N. Mex. 13, holding legislature cannot extend original jurisdiction of Supreme Court.

**Dicta** ought not to control judgment in a subsequent suit, pp. 399-402.

Rule applied in *Carroll v. Carroll*, 16 How. 287, 14 L. 941, and *Matz v. Chicago, etc.*, R. R. Co., 85 Fed. 183, refusing to follow decision of State court, construing State statute, where such construction was not necessary to decide the case; *Northern Bank v. Porter Township*, 110 U. S. 615, 28 L. 261, 4 S. Ct. 257, holding Supreme Court has never intended to adjudge that recitals by officers in municipal bonds are conclusive as to legislative authority to issue them. The following citing cases refuse to be bound by dicta: *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 574, 39 L. 817, 15 S. Ct. 687, see dissenting opinion, p. 647, 39 L. 842, 15 S. Ct. 715; *United States v. Wong Kim Ark*, 169 U. S. 679, 42 L. 901, 18 S. Ct. 468; *United States v. Kendall*, 5 Cr. C. C. 260, F. C. 15,517; *Fidelity Trust Co. v. Gill Car Co.*, 25 Fed. 748; *Northern Pac. R. R. Co. v. Sanders*, 46 Fed. 244; dissenting opinion, *Northern Pac. R. R. Co. v. Barden*, 46 Fed. 617; *King v. McLean Asylum*, 64



Fed. 340, 21 U. S. App. 481, 26 L. R. A. 786; *U. S. v. Addyston, etc., Co.*, 85 Fed. 299; *Hovey v. Insurance Co.*, 10 Bank. Reg. 229, 12 Fed. Cas. 606; dissenting opinion, *Leisy v. Hardin*, 135 U. S. 135, 34 L. 141, 10 S. Ct. 693; *Hudson v. Schwab*, 18 N. B. R. 480, 12 Fed. Cas. 816; *Uhlfielder v. Levy*, 9 Cal. 615; *Hart v. Burnett*, 15 Cal. 598; *Ex parte Young Ah Gow*, 73 Cal. 448, 15 Pac. 81; *Norris v. Moody*, 84 Cal. 149, 24 Pac. 38; *In re Johnson*, 98 Cal. 542, 33 Pac. 463, 21 L. R. A. 383; *Wadsworth v. Ry. Co.*, 18 Colo. 610, 36 Am. St. Rep. 317, 33 Pac. 519; dissenting opinion, *Rupert v. People*, 20 Colo. 431, 38 Pac. 705; *Mayer v. Erhardt*, 88 Ill. 457; *Lake Shore, etc., R. R. v. Wilson*, 11 Ind. App. 493, 38 N. E. 345; *Express Co. v. Foley*, 46 Kan. 464, 26 Am. St. Rep. 112, 26 Pac. 668; *De Ende v. Moore*, 2 Mart. (La.) (N. S.) 351; *Decoster v. Wing*, 76 Me. 455; *Haines v. Lewiston*, 84 Me. 25, 24 Atl. 432; *Alexander v. Worthington*, 5 Md. 489; *Jameson's Appeal*, 1 Mich. 103; *Robinson v. Rice*, 3 Mich. 244; *St. Louis, etc., Co. v. Gas, etc., Co.*, 16 Mo. App. 60; *King v. Amy, etc., Co.*, 9 Mont. 574, 24 Pac. 205; *Coler v. Commissioners*, 6 N. Mex. 150, 27 Pac. 635; *Southard v. Curley*, 134 N. Y. 155, 30 Am. St. Rep. 648; dissenting opinion, *Coler v. Commissioners*, 6 N. Mex. 150, 27 Pac. 635; *Warren v. Wallis*, 42 Tex. 475; *State v. Doyle*, 40 Wis. 190, 22 Am. Rep. 695; *Olin v. Denver & R. G. R. R. Co.*, 53 Pac. 457. Cited in note, 27 Am. Dec. 632, 633, on this subject, collecting authorities.

Distinguished in *Hawes v. Contra Costa Water Co.*, 5 Sawy. 297, 298, F. C. 6,235, holding where the court determines two points upon either of which the decision might turn, the judgment is authoritative; *Clarke v. Figgins*, 27 W. Va. 671, following previous decisions without inquiring into the grounds for them.

**Jurisdiction.**—The Supreme Court must take jurisdiction, if it should; it can no more decline jurisdiction which is given than usurp it if not given, p. 404.

Cited in *Chicago v. Dey Co.*, 35 Fed. 872, 1 L. R. A. 749, holding law defining duties of railroad commissioners in order to prevent unjust discrimination, is constitutional; *Capital City G. Co. v. Des Moines*, 72 Fed. 838, taking jurisdiction; dissenting opinion, *Marks v. State*, 45 Ala. 43, majority holding the association was not authorized to award money by lot; *Mayor, etc., of Mobile v. Dargan*, 45 Ala. 318, holding provision in municipal charter in conflict with Constitution adopted afterwards is void; *Bailey v. Railroad Co.*, 4 Harr. (Del.) 403, 44 Am. Dec. 605, holding Supreme Court of State must decide on the constitutionality of its laws; as also in *Bank of St. Marys v. State*, 12 Ga. 499, ruling similarly; *In re Gunn*, 50 Kan. 187, 32 Pac. 478, 19 L. R. A. 527, Supreme Court may review action of house of representatives; *Davis, ex parte*, 41 Me. 50, holding judiciary must pronounce on the constitutionality of acts; *Rhodes v. Walsh*, 55 Minn. 548, 57 N. W. 213, 23 L. R. A. 635, on meaning of constitutional provision. Cited to this point in *United States v. Kendall*, 5 Cr. C. C. 277, F. C. 15,517, with no special application.

**Statutory construction.**—The phraseology of the eleventh amendment to the Constitution, providing that judicial power “shall not be construed” to extend to suits against a State, imports an absolute prohibition, p. 405.

Cited to this point and similar phraseology of an act similarly construed in *Ex parte Poulson*, 19 Fed. Cas. 1207; and dissenting opinion, *Livingston v. Story*, 11 Pet. 397, 9 L. 764.

A suit is the prosecution of some demand in a court of justice, p. 407.

The following citing cases affirm and variously apply this definition: *Holmes v. Jennison*, 14 Pet. 624, 10 L. 624, court dividing as to whether writ of habeas corpus is a suit, in a sense to justify removal from State to Federal court; *Ex parte Milligan*, 4 Wall. 113, 18 L. 293, holding proceeding for writ of habeas corpus is a “suit;” *King v. McLean A., etc.*, 64 Fed. 336, 21 U. S. App. 481, 26 L. R. A. 789, petition for habeas corpus, is a suit; *United States v. Inlots*, 26 Fed. Cas. 487, holding proceeding by United States to condemn land, is a “suit;” *Appleton v. Turnbull*, 84 Me. 76, 24 Atl. 593, construing “suit” in statute to include any action or bill brought by a judgment creditor against a corporation, or by any trustee, receiver, etc.; *State v. Newell*, 13 Mont. 305, 34 Pac. 29, holding that a habeas corpus proceeding is a special proceeding in the nature of an action; *Callen v. Ellison*, 13 Ohio St. 453, 82 Am. Dec. 449, holding trial court is judge of whether suit was properly commenced; *State v. Davis*, 12 S. C. 538, deciding that a defense interposed to an indictment, depending for its force upon the Constitution and laws of the United States, is not a case arising under them; *In re Jenckes*, 6 R. I. 22, holding application to be admitted to the poor debtor’s oath, is a civil suit; *Ex parte Towles*, 48 Tex. 433, holding that an ex parte proceeding is not a suit; *In re Booth*, 3 Wis. 39, holding prosecution claim to a fugitive from labor is a “suit;” *Porter v. Rich*, 70 Conn. 259, 39 Atl. 177, 39 L. R. A. 360, an inquest of insanity is not an “action.” Cited in *In re Kaine*, 14 How. 119, 14 L. 351, without special application.

Writ of error brings up the record and submits the judgment below to a re-examination, pp. 409, 410.

This holding is affirmed and applied by the following citing cases: *Suydam v. Williamson*, 20 How. 433, 437, 15 L. 980, 982, holding paper certified after the writ was issued to be no part of the record; *Nations v. Johnson*, 24 How. 205, 16 L. 632, holding writ of error is a continuation of the original litigation; *Pomeroy v. Bank of Indiana*, 1 Wall. 600, 17 L. 641, affirming judgment where case was brought upon writ of error but neither bill of exceptions, agreed statement, nor special verdict was brought up; *Rogers v. Burlington*, 3 Wall. 661, 18 L. 82, holding bill of exceptions is unnecessary, where error is apparent on face of the record; *New*



Orleans R. Co. v. Morgan, 10 Wall. 261, 19 L. 893, allowing writ of error where it was called a judgment in the record and treated as such by the court and the parties; Slaughter-House Cases, 10 Wall. 291, 19 L. 920, holding writ of error removes the record, and suspends jurisdiction of lower court; Insurance Co. v. Piaggio, 16 Wall. 386, 21 L. 359, holding where all the facts are apparent on the record, court could modify the judgment; Atherton v. Fowler, 91 U. S. 146, 23 L. 266, holding a writ of error acts on the court having the record, not the parties; as also in Kitchen v. Randolph, 93 U. S. 87, 23 L. 810; dissenting opinion, Underwood v. McVeigh, 131 U. S. 120, 122, App., 21 L. 953, 954, court dismissing writ of error because it should have been directed to the Court of Appeals of the State; Dower v. Richards, 151 U. S. 663, 666, 38 L. 307, 308, 14 S. Ct. 454, 455, holding Supreme Court upon a writ of error cannot review judgment of State court on question of fact; Hudson v. Parker, 156 U. S. 286, 39 L. 427, 15 S. Ct. 453, holding bail may be taken pending writ of error; In re Chetwood, 165 U. S. 461, 41 L. 788, 17 S. Ct. 392, holding Circuit Court cannot prevent parties applying for, or Supreme Court from granting a writ of error; Ricks v. Hall, 4 Port. 180, holding writ of error does not lie from decision of court of commissioners of revenue and roads; Ex parte Knight, 61 Ala. 484, holding writ of error may be granted for error of law apparent of record, and when granted suspends judgment; Chipman v. City of Waterbury, 59 Conn. 497, 22 Atl. 289, holding writ of error cannot be brought to the Supreme Court of a district, other than that in which the case was decided; State v. Costello, 61 Conn. 501, holding an appeal is not in itself a criminal proceeding; Carter v. Bennett, 5 Fla. 94, holding writ of error to State court operates as a supersedeas; Ex parte Henderson, 6 Fla. 289, distinguishing between an appeal and a writ of error; Townsend v. Davis, 1 Ga. 496, 44 Am. Dec. 676, holding no one but a party or privy can bring a writ of error to reverse a judgment; State v. Jones, 7 Ga. 423, holding a writ of error does not lie in a criminal case at the instance of the State; Bryan v. Bates, 12 Allen, 209, 210, holding writ of error from justice of United States Supreme Court operates as a supersedeas in a criminal case in which final judgment and sentence have been given; McLean v. Isbell, 44 Mich. 132, 134, holding certiorari to a justice is in the nature of an appeal; dissenting opinion, Day v. Holland, 15 Or. 470, 15 Pac. 858, as to the effect of an appeal; Fitzsimmons v. Johnson, 90 Tenn. 426, 17 S. W. 103, holding that a writ of error is not an original suit; dissenting opinion, Shorey v. Wyckoff, 1 Wash. Ter. 352, majority denying motion to amend precipe by assignment of errors, where none were assigned in lower court; Peck v. Truesdell, 51 Pac. 798, where suit is pending to reverse a judgment declaring a tax deed void, statute would not run against the claim for taxes. Cited in Sedgwick v. Dawkins, 16 Fla. 201, but not necessary to the decision.

Distinguished in *Nadenbousch v. Sharer*, 2 W. Va. 293, holding a supersedeas is in the sense of the statute a new suit; *Hughes v. The Dundee, etc., Co.*, 11 Sawy. 559, 560, 28 Fed. Rep. 44, 45, holding a writ of error is in the nature of a new suit, and does not suspend the judgment.

Writ of error from Supreme Court is not a suit and its issuance against a State does not violate the eleventh amendment, prohibiting suit against States, pp. 405-412.

Criticised in *Padelford v. Mayor, etc.*, 14 Ga. 499, as misconstruing the eleventh amendment.

Constitutional law.—No suit can be commenced or prosecuted against the United States, pp. 411, 412.

Cited and applied in *United States v. Eckford*, 6 Wall. 488, 18 L. 921, holding that defendant pleading a set-off against the United States cannot have affirmative judgment; *Hans v. Louisiana*, 134 U. S. 19, 33 L. 848, 10 S. Ct. 508, holding State cannot be sued in Circuit Court by one of its own citizens without its consent; *Lee v. Kaufman*, 3 Hughes, 126, F. C. 8,191, holding courts have cognizance of an action in ejectment against an officer or agent of the United States, though the government intervenes to assist such officer; *Hans v. Louisiana*, 24 Fed. 68, holding a citizen cannot sue his own State; *Virginia Coupon Cases*, 25 Fed. 657, holding State may withdraw offer to compromise any time before acceptance by the creditor; *Briggs v. Light-Boats*, 11 Allen, 176, holding lien cannot be enforced against boat belonging to the United States.

Distinguished in *United States v. Lee*, 106 U. S. 207, 27 L. 177, 1 S. Ct. 249, holding officers and agents of the United States may be sued, and in deciding the lawfulness of their possession of the property, the title of the United States may be adjudged; see dissenting opinion, 226, 27 L. 184, 1 S. Ct. 266; *St. Luke's Hospital v. Barclay*, 3 Blatchf. 264, F. C. 12,241, holding bill in equity to stay pending suit may be maintained, though court may not have jurisdiction over the parties for other relief.

Powers of United States.—The United States is for many purposes a nation and for all these objects it is supreme, pp. 413, 414.

The following citing cases affirm this doctrine, making various applications of it: *Legal Tender Cases*, 12 Wall. 533, 20 L. 306, holding legal tender laws constitutional and applicable to contracts made before and after their passage; *Claffin v. Houseman*, 93 U. S. 142, 23 L. 840, holding under the bankrupt act assignee might sue in State courts to recover assets, exclusive jurisdiction not having been given to Federal courts; *The Chinese Exclusion Case*, 130 U. S. 604, 32 L. 1075, 9 S. Ct. 629, holding that in relation to foreign governments the United States is a nation; dissenting opinion, *United States v. E. C. Knight*, 156 U. S. 20, 39 L. 332, 15



S. Ct. 257, majority holding that the creation of a monopoly bears no direct relation to interstate or foreign commerce, and cannot, be suppressed; *In re Debs*, 158 U. S. 579, 39 L. 1101, 15 S. Ct. 904, holding United States has full power over interstate commerce, and the transmission of mails; *Nashville, etc., Ry. Co. v. Taylor*, 86 Fed. 171, holding case involving right of equalization removable; *French v. Tumlin*, 9 Fed. Cas. 800, holding void a provision in State Constitution that courts cannot enforce a debt the consideration of which was a slave; *The Parkhill*, 18 Fed. Cas. 1188, holding when, because of war, its courts are closed, a government may enforce its authority in such modes as are lawful in foreign wars; *Warner v. Steamer Uncle Sam*, 9 Cal. 714, 718, holding that the United States are supreme within constitutional limits; *Lick v. Faulkner*, 25 Cal. 431, holding valid an act making treasury notes legal tender; *In re Pearson*, 8 Fla. 502, holding a court can enforce the attendance of its own members; *Padelford v. Mayor, etc., of Savannah*, 14 Ga. 510, as having laid down the rule that a State can be sued; dissenting opinion, *Ex parte Holman*, 28 Iowa, 137, majority holding State court cannot release, by writ of habeas corpus, one held under process of Federal courts; *Legal Tender Cases*, 52 Pa. St. 60, holding congress can make treasury note legal tender; *Commonwealth v. Railroad Co.*, 62 Pa. St. 292, 1 Am. Rep. 403, holding tonage tax law constitutional; *Calhoun v. Calhoun*, 2 S. C. 300, holding section of State Constitution declaring contracts for slaves void unconstitutional.

Contemporaneous exposition of Constitution relied on, in construing its provisions, p. 420.

The following citing cases rely upon this precedent: *Cooley v. Board of Wardens, etc.*, 12 How. 315, 13 L. 1003, holding State law constitutional, providing for forfeiture of half-pilot fees by vessel neglecting to take a pilot; dissenting opinion of Curtis, J., in *Dred Scott v. Sandford*, 19 How. 616, 15 L. 788, majority holding act forbidding master from taking slaves to a territory unconstitutional; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 733, 28 L. 1138, 5 S. Ct. 741, holding act passed by the first legislature, in executing a constitutional power, is a contemporary exposition, entitled to much weight; *The Laura*, 114 U. S. 416, 29 L. 148, 5 S. Ct. 883, holding that the granting of remissions of penalties by officers other than president, is not an invasion of the pardoning power; *Auffmordt v. Hedden*, 137 U. S. 329, 34 L. 680, 11 S. Ct. 109, determining the conclusive effect of appraisal of dutiable goods; *McElvain v. Mudd*, 44 Ala. 54, 4 Am. Rep. 110, holding act relating to fugitives from labor constitutional; *Warner v. Steamer Uncle Sam*, 9 Cal. 722, 723, holding Supreme Court of United States has appellate jurisdiction over State courts; *People v. Lowenthal*, 93 Ill. 200, construing State Constitution; *People v. Thompson*, 155 Ill. 485, 40 N. E.

317, sustaining validity of statute; Board of Comrs. v. Bunting, 111 Ind. 145, 12 N. E. 151, holding practical construction of statute equivalent to positive law; as also in State v. Harrison, 116 Ind. 308, 19 N. E. 150, and Bd. of Comrs. v. Gwin, 136 Ind. 572, 36 N. E. 241, 22 L. R. A. 409, holding same; Hovey v. State, 119 Ind. 388, 21 N. E. 890, holding practical exposition of Constitution of controlling force; dissenting opinion, Griswold v. Hepburn, 2 Duv. (Ky.) 55, majority holding congress cannot make treasury notes legal tender; Harrison v. Commonwealth, 83 Ky. 171, holding practical construction of a statute controlling; as also in Trustees of C. C. C. etc. v. Manning, 72 Md. 130, 19 Atl. 603, to same effect; Winchester v. Glazier, 152 Mass. 323, construing partnership articles; Detroit Ry. Co. v. Mills, 85 Mich. 647, 48 N. W. 1009, following practical construction of a statute; likewise in Franklin v. Kelley, 2 Neb. 88; State v. Holcomb, 46 Neb. 94, 64 N. W. 439, holding that contemporaneous exposition in doubtful cases is conclusive; Metropolitan Bank v. Van Dyck, 27 N. Y. 427, holding congress can make treasury notes legal tender; People v. Carr, 100 N. Y. 243, 3 N. E. 85, 53 Am. Rep. 165, holding that legislative action, so closely following the adoption of constitutional provision, is entitled to great weight in construing such provision; Tillman v. Cocke, 9 Baxt. 451, construing legislative powers; dissenting opinion, Trout, etc., Club v. Mather, 68 Vt. 354, 35 Atl. 329, 33 L. R. A. 574, as to "boat-able waters;" Bridges v. Shallcross, 6 W. Va. 576, and France v. Connor, 3 Wyo. 463, 27 Pac. 576, construing statutes. See also note on this point in 13 Am. St. Rep. 145. Cited, *arguendo*, in Prigg v. Pennsylvania, 16 Pet. 621, 10 L. 1091; *Ex parte Gist*, 26 Ala. 164.

Distinguished in State v. Wrightson, 56 N. J. L. 209, 210, 28 Atl. 65, 22 L. R. A. 559, holding contemporaneous construction will not abrogate the plain letter of a law.

**District of Columbia.**—Congress has power to exercise exclusive legislation over District of Columbia, p. 424.

Cited to this point in Mattingly v. District of Columbia, 97 U. S. 690, 24 L. 1099, holding congress may confirm the proceedings of a board in the District.

Congress has power to legislate exclusively over territory ceded to United States, p. 428.

Rule applied in United States v. Amcs, 1 Wood & M. 85, F. C. 14,441, holding State laws cannot be permitted to embarrass the object of the cession; United States v. Baum, 74 Fed. 45, holding Federal courts can punish crime committed in a territory since admitted as a State; Grether v. Wright, 75 Fed. 757, 758, 43 U. S. App. 770, holding congress has power to exempt bonds of District of Columbia from State or municipal taxes; United States v. Greiner, 26 Fed. Cas. 39, 40, holding the taking of a fort in Georgia, which had been ceded to the United States, to be treason.



**Act of congress** should not be so construed as to interfere with the penal laws of a State, unless its language renders such construction inevitable, p. 443.

Cited and applied in *Commonwealth v. Holbrook*, 10 Allen, 203, holding payment of license fee to United States, does not authorize sale of liquor in a State, in violation of its domestic laws; *Lacey v. Palmer*, 93 Va. 169, 57 Am. St. Rep. 802, 24 S. E. 932, 31 L. R. A. 826, holding State can pass law forbidding betting, though race is to be in another State.

**Charter of city of Washington** did not authorize the corporation to force the sale of lottery tickets in States whose laws prohibit such sales, p. 443-446.

Miscellaneous citations.—Citation in *Ex parte Crane*, 5 Pet. 206, 8 L. 98, and *Commonwealth v. Casey*, 12 Allen, 220, as to argument of counsel. Cited but apparently to no particular point decided, in *Bains v. The Schooner James*, 1 Bald. 561, F. C. 756; *Perry Mfg. Co. v. Brown*, 2 Wood. & M. 455, F. C. 11,015; *Poole v. Nixon*, 9 Pet. App. 771, 19 Fed. Cas. 993, 9 L. 305; *Tilton v. Railroad Co.*, 35 La. Ann. 1068; *Bledsoe v. Railroad Co.*, 40 Tex. 564, 569; *Horner v. United States*, 147 U. S. 462, 37 L. 242, 13 S. Ct. 414; *Draper v. Gorman*, 8 Leigh (Va.), 634; *Texas v. Lewis*, 12 Fed. 5; *In re Brinkman*, 7 Bank. Reg. 426, 4 Fed. Cas. 147; *Ex parte Andrews*, 40 Ala. 657; *Delafield v. Illinois*, 2 Hill, 169, 171; *Arapahoe Co. v. Railroad Co.*, 4 Dill. 280, F. C. 502, and *Ex parte Crane*, 5 Pet. 222, 8 L. 104. Cited erroneously in *Connoley v. Cheesborough*, 21 Ala. 168, and *Broadwell v. Swigert*, 7 B. Mon. 42. Cited in *Worcester v. Georgia*, 6 Pet. 566, 8 L. 503, as an instance of where records of State courts were certified by the court; *Trust Co. v. Maquillan*, 3 Dill. 380, F. C. 4,668, as illustrating tendency of State courts to cripple Federal jurisdiction; *People v. Taylor*, 3 Dcn. 94, as to what is a sufficient description in indictment for selling lottery tickets; *Wheeling v. Mayor*, 1 Hughes, 98, F. C. 17,502, to point that corporations have the powers expressly granted, and those necessary to carry these into effect; *Talcott v. Pine Grove*, 1 Flipp. 156, F. C. 13,735, to point that citizen has a right to rely upon the action of the sovereignty.

6 Wheat. 448-450, 5 L. 302, **GIBBONS v. OGDEN**.

**Final decree.**—A decree of highest State court, affirming order refusing to dissolve an injunction, is not a final decree from which an appeal lies to Supreme Court, p. 449.

Cited and applied in *The Palmyra*, 10 Wheat. 504, 6 L. 376, holding decree of restitution is not final, when damages are uncertain; *Verden v. Coleman*, 18 How. 86, 15 L. 272, under facts similar to main case; *The Nacoohee, etc., Co. v. Davis*, 40 Ga. 318, holding that granting or refusing injunction in pending cause, is

not a final judgment; Ringgold's Case, 1 Bland Ch. 17, holding there can only be an appeal from a final decree. See also note to Williams v. Field, 60 Am. Dec. 433, that an injunction pendente lite is not a final decree.

Distinguished in Poole v. Nixon, 9 Pet. Appx. 770, 19 Fed. Cas. 1000, holding Circuit Court has cognizance of a bill of review, after an appeal to the Supreme Court, if it is brought on newly-discovered evidence.

Miscellaneous.—Erroneously cited in Stoutenburgh v. Hennick, 129 U. S. 150, 32 L. 640, 9 S. Ct. 258.

6 Wheat. 450-452, 5 L. 302, SULLIVAN v. FULTON STEAMBOAT CO.

**Jurisdiction.**—Jurisdictional facts must appear on the record, p. 451.

Cited and applied in dissenting opinion, Marshall v. Baltimore & O. R. R. Co., 16 How. 340, 348, 350, 14 L. 964, 968, 969, majority holding that an averment that defendants are a Maryland corporation, will give jurisdiction; dissenting opinion, Dodge v. Woolsey, 18 How. 364, 15 L. 415, majority holding stockholder, being resident of another State, may file his bill against bank in Federal court; dissenting opinion, Dred Scott v. Sandford, 19 How. 473, 15 L. 728, majority holding Circuit Court has not jurisdiction of suit brought by a free negro, since he is not a citizen; Special opinion of Daniel, J., in Philadelphia, etc., R. R. Co. v. Quigley, 21 How. 216, 16 L. 78, deciding that under general issue, no question could be raised as to the capacity of parties to sue; Hornthail v. The Collector, 9 Wall. 565, 19 L. 562, holding suit could not be maintained where jurisdictional facts were not averred; Mail Co. v. Flanders, 12 Wall. 135, 20 L. 251, dismissing bill where both parties were citizens of same State; Grace v. Insurance Co., 109 U. S. 283, 284, 27 L. 934, 935, 3 S. Ct. 210, 211, holding an averment that parties reside in, or that a firm does business in, or is "of" a particular State, is insufficient to show citizenship; Chapman v. Barney, 129 U. S. 681, 32 L. 801, 9 S. Ct. 427, holding jurisdictional facts must clearly appear in the record; Shaw v. Mining Co., 145 U. S. 451, 36 L. 772, 12 S. Ct. 938, holding a corporation incorporated in one State cannot be compelled to answer in a Circuit Court held in another State; The Fideliter, 1 Abb. (U. S.) 579, 1 Sawy. 156, F. C. 4,755, holding District Court had no jurisdiction, where it did not appear that seizure was prior to the commencement of the action; Speigle v. Meredith, 4 Biss. 126, F. C. 13,227, holding bill must allege jurisdictional facts; as also in Donaldson v. Hazen, Hemp. 424, F. C. 3,984; United States v. Woolsey, 28 Fed. Cas. 767, and Blair v. Manufacturing Co. 7 Neb. 154, all to same effect; Merrill v. Jones, 8 Port. 557, holding consent of parties cannot confer jurisdiction not possessed. Cited, arguendo, in Parkhurst v. Kinsman, 3 Wood. & M. 174, F. C. 10,761.



## 6 Wheat. 452, 453, 5 L. 303, THE JONQUILLE.

**Admiralty suit** will be dismissed, where appeal has not been prosecuted, upon certificate to that effect from court below, p. 452.

No citations.

## 6 Wheat. 453-475, 5 L. 303, HUGHES v. BLAKE.

**Equity pleading.**—Positive denial in answer of matter in bill must be overcome by more testimony than that of one witness, and this applies to answer in support of a plea, p. 468.

Rule applied in *Tobey v. Leonards*, 2 Wall. 430, 17 L. 845, holding evidence sufficient to overcome answer; *Voorhees v. Bonesteel*, 16 Wall. 30, 21 L. 271, where evidence was insufficient; as also in *Godden v. Kimmell*, 99 U. S. 206, 25 L. 433; *Monroe C. Co. v. Becker*, 147 U. S. 54, 37 L. 76, 13 S. Ct. 220; *Clark v. Hackett*, 1 Cliff. 278, F. C. 2,823; *Delano v. Winsor*, 1 Cliff. 506, F. C. 3,754; *Tobey v. Leonard*, 2 Cliff. 51, F. C. 14,067, all holding evidence insufficient; *Parker v. Phetteplace*, 2 Cliff. 79, F. C. 10,746; *Hayward v. Bank*, 4 Cliff. 296, F. C. 6,273, and *Gilman v. Libbey*, 4 Cliff. 459, F. C. 5,445, holding evidence insufficient to overcome answer; as also in *Miles v. Miles*, 32 N. H. 166, 64 Am. Dec. 367; *Bellows v. Stone*, 18 N. H. 472, holding matter in answer, whether affirmative or negative, if responsive to the bill, must be so overcome. Cited approvingly in *Scammon v. Cole*, 3 Cliff. 479, F. C. 12,432, put decision on other grounds. Cited in the following cases to the point that answer is not evidence as to matter not set up in the bill: *Boone v. Chiles*, 10 Pet. 209, 211, 9 L. 399, refusing to admit deed not referred to in answer; *Tilghman v. Tilghman*, Bald. 491, 495; F. C. 14,045, holding a party must rely on case stated in his bill or answer; *Byers v. Fowler*, 12 Ark. 286, 288, 54 Am. Dec. 287, 289, holding, where answer failed to aver want of notice of fraud, he could not sustain his title; *Brown v. Welch*, 18 Ill. 346, 68 Am. Dec. 550, holding one defending against a previous unrecorded equitable title must prove payment of purchase money; *Heatherly v. Hadley*, 4 Or. 19, holding proof cannot aid an allegation of service.

Distinguished in *Hutson v. Jordan*, 1 Ware, 388, F. C. 6,959, holding there is no such rule in admiralty; *Barraque v. Siter*, 9 Ark. 550, holding, where answer gives a circumstantial account inconsistent with its denial, testimony of a single witness is sufficient; *Wright v. Cornelius*, 10 Mo. 186, holding declarations of one not a proper party is not evidence against the other defendant; *Busby v. Littlefield*, 33 N. H. 85, where answer set up affirmative allegations.

**Equity pleading.**—A replication to a plea admits its sufficiency in point of law, p. 472.

Cited in *Rhode Island v. Massachusetts*, 14 Pet. 257, 10 L. 445, applying the rule to similar facts; also *Myers v. Dorr*, 13 Blatchf.

26, F. C. 9,988, and *Cottle v. Krementy*, 25 Fed. 495, ruling similarly; *National, etc., Co. v. Beam Co.*, 83 Fed. 29, holding proper office of plea is to interpose some conclusive defense so suit may be determined without a hearing on the merits; *Reissner v. Anness*, 20 Fed. Cas. 513, holding if replication is found true in fact, bill is dismissed as a matter of course; *Denver v. Lobenstein*, 3 Colo. 219, holding same where plea was *res adjudicata*; *Rouskulp v. Kerschner*, 49 Md. 522, but plaintiff may controvert its truth; *Bassett v. Company*, 43 N. H. 253, discussing rules applicable to pleas in equity; *Hartman v. Evans*, 38 W. Va. 672, 18 S. E. 811, holding, after replication is filed, exceptions to answer are treated as abandoned; *Ely v. Wilcox*, 20 Wis. 528, 91 Am. Dec. 438, dismissing bill, though plea replied to was bad, on proof of facts as pleaded.

Distinguished in *Farley v. Kittson*, 120 U. S. 314, 30 L. 688, 7 S. Ct. 539, holding at the hearing upon plea and replication no fact is in issue but the truth of the matter pleaded; also *Pearce v. Rice*, 142 U. S. 41, 35 L. 930, 12 S. Ct. 135; *Horn v. Detroit, etc., Co.*, 150 U. S. 625, 37 L. 1203, 14 S. Ct. 218; *United States v. Land Co.*, 148 U. S. 40, 37 L. 359, 13 S. Ct. 461, holding defendant may set up some special matter by plea and thus defeat recovery; *Green v. Bogue*, 158 U. S. 500, 39 L. 1069, 15 S. Ct. 983, holding plaintiff may properly ask court to review decree of court below, sustaining the sufficiency of defendant's pleas; *Matthews v. Manufacturing Co.*, 18 Blatchf. 85, 87, 2 Fed. 233, 234, overruling plea where it merely denied an averment in the bill; *Seebold v. Lockner*, 30 Md. 137, holding upon record as amended it was necessary for appellate court to decide whether the pendency of prior suit was a bar; *Swayze v. Swayze*, 37 N. J. Eq. 186, holding rule not applicable to negative pleas; *Greene v. Harris*, 9 R. I. 409, allowing party to withdraw replication, in order to question the sufficiency of the plea. See also *Greene v. Harris*, 11 R. I. 33.

6 Wheat. 475-481, 5 L. 309, *BARTLE v. COLEMAN*.

**Bail.**—By Virginia law defendant may enter special bail and defend the suit, at any time before final judgment, but if he appears and pleads, or confesses, without giving special bail, the appearance bail is discharged, p. 478.

Cited in *Gilliam v. Allen*, 4 Rand. 502, holding clerk cannot, of his own motion, receive special bail.

**Joint judgment.**—If erroneous as to one, must be reversed as to the other, p. 481.

Cited to this point and applied in *Hamilton v. Knight*, 1 Blackf. (Ind.) 26, holding, if affidavit against two joint debtors be insufficient as to one, it will not authorize an attachment of the property of both.



6 Wheat. 481-514, 5 L. 311, *PREVOST v. GRATZ*.

**Trusts.**—To establish existence of trust onus probandi is on one alleging it, p. 494.

Cited and applied in *Hopkins v. Grimshaw*, 165 U. S. 352, 41 L. 742, 17 S. Ct. 404, and *Troll v. Carter*, 15 W. Va. 583, holding evidence insufficient to establish a trust; *Walker v. Carrington*, 74 Ill. 453, holding, after lapse of time, the most clear and satisfactory proof is required to prove fraud; *Rochester v. Levering*, 104 Ind. 570, 4 N. E. 208, holding that defendant need only make it certain to a common intent that price was fair, since so many years had elapsed; *Harris v. Bratton*, 34 S. C. 267, 13 S. E. 450, holding lapse of time should be considered in determining existence of a trust.

**Agent acquiring property through defect in title of principal holds as trustee for him**, p. 496.

Rule applied in *Michoud v. Girod*, 4 How. 555, 11 L. 1099, holding agent or trustee cannot purchase at his own sale; *White v. Ward*, 26 Ark. 447, holding any benefit derived from such a purchase inures to the benefit of the cestui que trust; *Arnold v. Cord*, 16 Ind. 178, holding if one verbally agreeing to bid in land for another at a sheriff's sale, takes title in his own name, he will be decreed a trustee; *MacGregor v. Gardner*, 14 Iowa, 337, treating as void conveyance by agent without consideration so he might acquire title himself; *Sypher v. McHenry*, 18 Iowa, 239, setting aside sale where trustee was interested in the purchase; *Coffee v. Ruffin*, 4 Cold. 512, upholding purchase by trustee of trust property where transaction was shown to be fair; *Lamar v. Hale*, 79 Va. 158, holding partners can acquire partnership property only for benefit of the firm.

**Limitation of suit.**—Where fraud is concealed, lapse of time is no bar to enforcement of a trust, p. 497.

Cited approvingly in *Michoud v. Girod*, 4 How. 561, 11 L. 1102, holding that within what time a constructive trust will be barred depends upon the circumstances of the case; *McIntire v. Pryor*, 173 U. S. 55, holding gross fraud did away with defense of laches; *Philippi v. Philippe*, 115 U. S. 157, 29 L. 340, 5 S. Ct. 1184; *Kirby v. Railroad Co.*, 120 U. S. 136, 30 L. 572, 7 S. Ct. 433, and *Dugan v. O'Donnell*, 68 Fed. 989, all holding time runs from when fraud was or should have been discovered; *Baker v. Whiting*, 3 Sumn. 486, F. C. 787, applying rule where trust was not repudiated; *Naddo v. Bardon*, 47 Fed. 789 (see 51 Fed. 498, 4 U. S. App. 642); *Merrill v. Monticello*, 66 Fed. 166, and *Hayden v. Thompson*, 71 Fed. 69, 36 U. S. App. 361, holding implied trust barred by lapse of time unless there had been a concealment of the cause of action; *Snyder v. McComb*, 39 Fed. 298, holding express trust not barred

by lapse of time; *Kelley v. Boettcher*, 85 Fed. 63, 56 U. S. App. 376, holding no time runs as long as a fraud is concealed; *Bunuel v. Stoddard*, 4 Fed. Cas. 683, holding time not a bar to fraud of trustee; *McKneely v. Terry*, 61 Ark. 543, 33 S. W. 957, holding action not barred, where defendant was guilty of fraud; *Farwell v. Telegraph Co.*, 161 Ill. 596, 44 N. E. 914, holding time does not run until discovery of fraud; *Pratt v. Thornton*, 28 Me. 362, 48 Am. Dec. 496, holding the trust could not be barred; *McDowell v. Goldsmith*, 2 Md. Ch. 390, holding statute of limitations runs from time of discovery of fraud or mistake; *Manaudas v. Mann*, 22 Or. 531, 30 Pac. 424, holding statute of limitations has no application to an express trust; *Wood v. Fox*, 8 Utah, 401, 32 Pac. 52, holding time started to run from disavowal of trust. Approved in *Johnston v. Smith*, 21 Tex. 730, putting decision on other grounds. Cited in valuable notes, 12 Am. Dec. 373, 99 Am. Dec. 389, 2 Am. St. Rep. 799, 801, on this subject, authorities being collected. Cited approvingly in *Robinson v. Hook*, 4 Mason, 153, F. C. 11,956, placing decision on other grounds.

Distinguished in *Badger v. Badger*, 2 Wall. 92, 17 L. 838, refusing to give relief where the trust was not clearly established, nor the facts shown to have been fraudulently concealed; *Clarke v. Boorman*, 18 Wall. 506, 21 L. 907, where there was no intentional fraud on part of trustee; *Speidel v. Henrici*, 120 U. S. 386, 30 L. 719, 7 S. Ct. 611, and *Bruner v. Finley*, 187 Pa. St. 406, 41 Atl. 340, holding this rule not applicable where trust had been openly disavowed; *De Mares v. Gilpin*, 15 Colo. 83, 24 Pac. 570, holding time runs in resulting trust from when fraud should have been discovered; *Humbert v. Trinity Church*, 24 Wend. 617, holding fraud is no excuse for negligence in bringing action.

**Limitation of suit in equity.**—By analogy to rule of law, lapse of time raises presumption of extinguishment of a trust, payment of debt or surrender of deed, p. 504.

Cited to this point and applied by the following cases: *Piatt v. Vattier*, 9 Pet. 417, 9 L. 178; *Bowman v. Wathen*, 1 How. 194, 11 L. 99, and *Badger v. Badger*, 2 Cliff. 155, F. C. 718, holding various actions barred on this ground; *Fisher v. Boody*, 1 Curt. 219, F. C. 4,814, refusing to rescind a deed, where plaintiff was guilty of laches; *Bowman v. Wathen*, 2 McLean, 396, F. C. 1,740, holding claim barred; *Ferson v. Sanger*, 1 Wood. & M. 148, F. C. 4,752, holding long occupation, without complaint, should bar relief for mistake; *Hinchman v. Kelley*, 54 Fed. 66, 7 U. S. App. 481, refusing to enforce a trust because of laches; *Duncan v. Williams*, 89 Ala. 349, 7 So. 418, holding, after lapse of time, court will presume almost any fact to sustain decree; *James v. James*, 41 Ark. 305, refusing to enforce resulting trust; *Perkins v. Cartmell*, 4 Harr. 280,



42 Am. Dec. 761, holding trust extinguished; *Akins v. Hill*, 7 Ga. 579, holding bill barred; *Carpenter v. Carpenter*, 70 Ill. 465, refusing to enforce a State claim; *McDearmon v. Burnham*, 158 Ill. 63, 41 N. E. 1097, holding right to redeem from foreclosure sale barred by laches; *Reynolds v. Sumner*, 126 Ill. 71, 9 Am. St. Rep. 528, 18 N. E. 337, 1 L. R. A. 330, lapse of time only one of many circumstances from which conclusion of laches may be drawn; *Valentine v. Wysor*, 123 Ind. 59, 23 N. E. 1080, 7 L. R. A. 796, and n., refusing to open up account, though there was irregularity; *Salmon v. Clagett*, 3 Bland Ch. 142, holding defendant may have the benefit of the presumption arising from lapse of time, though not mentioned in his pleading; *Steiger v. Hillen*, 5 Gill & J. 130, rejecting claim of widow for damages against alienee of husband; *Gregg v. Gregg*, 15 N. H. 198, refusing to make guardian account; *Starkey v. Fox*, 52 N. J. Eq. 768, 29 Atl. 215, refusing to grant relief; *Jackson v. Schaubert*, 7 Cow. 199 (reversed, 2 Wend. 47), holding mortgage on which no interest has been paid for years, will not bar ejectment by mortgagor; *Clark v. Potter*, 32 Ohio St. 59, and *Bargamin v. Clarke*, 20 Gratt. 551, holding equity of redemption barred; *White v. Loring*, 24 Pick. 322, and *Townsend v. Downer*, 32 Vt. 206, holding grant may be presumed from long possession; *Houston v. Matthews*, 1 Yerg. 121, presuming location of boundary. Cited in *Beard v. Smith*, 6 T. B. Mon. 491, discussing reason for and universality of laws of limitations. Approved in *Ambler v. Warwick*, 1 Leigh (Va.), 194, but not necessary to decision. Cited notes in 11 Wheat. 318, 6 L. 485, 54 Am. Dec. 130, 99 Am. Dec. 389, 393, on this subject, collecting authorities.

Distinguished in *James v. Atlantic D. Co.*, 3 Cliff. 621, F. C. 7,177, refusing to apply rule in case of trust; *Blake v. Ward*, 20 Ohio, 242, holding that no conveyances could be presumed in that case; *Paschall v. Hinderer*, 28 Ohio St. 578, 579, 581, holding claim not a stale one.

Miscellaneous.—Cited erroneously in *Kennedy v. Kennedy*, 2 Ala. 588. Cited in *Pipes v. Hardesty*, 9 La. Ann. 153, 61 Am. Dec. 203, and 37 Am. Rep. 263, to point that alterations are presumed to have been made after the execution and delivery of a deed; in *Magill v. Brown*, 16 Fed. Cas. 420, to point that a known usage forms the law of the case and controls statutes and common law.

6 Wheat. 514-519, 5 L. 319, *BOWIE v. HENDERSON*.

**Bankruptcy.**—Under District of Columbia bankruptcy act of 1803, an insolvent is not a trustee for creditors in respect to his future property, p. 518.

Distinguished in *In re Eldridge*, 2 Hughes, 262, F. C. 4,331, 12 Bank. Reg. 546, holding assignee as to property in his hands is a trustee for creditors.

**Statute of limitations.**—Recording a demand in an insolvent's schedule of debts, is sufficient acknowledgment of the debt to take it out of the statute, p. 519.

Cited and rule applied in *In re Eldridge*, 2 Hughes, 258, F. C. 4,331, 12 Bank. Reg. 342, holding filing of petition by bankrupt will bar statute; *Denny v. Henderson*, 2 Cr. C. C. 121, F. C. 3,806, holding discharge of insolvent does not stop statute.

6 Wheat. 519, 520, 5 L. 320, *SPRING v. SOUTH CAROLINA INS. CO.*

**Equity practice.**—The res in litigation may be sold by order of the court and proceeds invested, notwithstanding pendency of appeal, p. 520.

Cited and applied in *May v. Printup*, 59 Ga. 135, holding, where the proceeding is against property, court may preserve it by interlocutory orders, during and after appeal; *Latimer v. Hanson*, 1 Bland Ch. 56, holding court may order trustee to invest proceeds of a sale, and, if he falls or refuses, may hold him for compound interest; *Williams' Case*, 3 Bland Ch. 217, holding trustee could be ordered to rent estate; *Moran v. Johnston*, 26 Gratt. 110, holding pending appeal, receiver may be appointed to rent property; likewise in *Beard v. Arbuckle*, 19 W. Va. 148, notwithstanding case is pending upon a supersedeas.

6 Wheat. 520-528, 5 L. 321, *UNITED STATES v. SIX PACKAGES OF GOODS.*

**Customs duties.**—Making correct post entry does not bar forfeiture for prior fraudulent entry under act of 1799, p. 523.

Cited erroneously in *Our House v. State*, 4 G. Greene, 175.

6 Wheat. 528-541, 5 L. 322, *BRASHIER v. GRATZ.*

**Equity.**—Time is not generally of the essence of the contract of sale in equity, but court may, where equitable, refuse specific performance on that ground, p. 533.

The following citing cases affirm and apply this doctrine: *Taylor v. Longworth*, 14 Pet. 175, 10 L. 406, giving specific performance, where party made out a case free from all doubt; *Davisou v. Davis*, 125 U. S. 95, 31 L. 637, 8 S. Ct. 827, refusing specific performance where party waited several years before filing bill; *Garnett v. Macon*, 2 Brock, 247, 249, F. C. 5,245; S. C., 6 Call (Va.), 347, 349, holding, where time is material, specific performance may depend on it; *Prentice v. Betteley*, 2 Low. 295, F. C. 11,381, refusing specific performance; as also in *Mundy v. Davis*, 20 Fed. 355, ruling similarly; *Green v. Covillaud*, 10 Cal. 329, 70 Am. Dec. 735, where value of land had increased, and *Durant v. Comegys*, 2 Idaho, 944,



28 Pac. 428, where plaintiff did not make out a case free from doubt; *Hunter v. Marlboro*, 2 Wood. & M. 203, F. C. 6,908, and *Bishop v. Newton*, 20 Ill. 180, giving specific performance, though there had been delay; *Avery v. Kellogg*, 11 Conn. 571, holding, time waived by conduct of defendant; *Steele v. Branch*, 40 Cal. 11, 13, holding time would not work a forfeiture; *Longworth v. Taylor*, 1 McLean, 401, F. C. 8,490, not considering time essential; *Steele v. Biggs*, 22 Ill. 654, holding, where time is of the essence, part payment of purchase money will not excuse nonperformance; *Emmons v. Kiger*, 23 Ind. 488, holding conduct of defendant waived time; in *Mathews v. Gilliss*, 1 Iowa, 254; *Young v. Daniels*, 2 Iowa, 130, 63 Am. Dec. 480, and *Kercheval v. Clift*, 6 T. B. Mon. 366, 368, holding time not of the essence of the contract and decreeing specific performance; *Lacey v. McMillen*, 9 B. Mon. 526, refusing rescission, where party with full knowledge of facts acquiesces for a long time; *Getchell v. Jewett*, 4 Me. 362, decreeing specific performance; *Rogers v. Saunders*, 16 Me. 99, 33 Am. Dec. 641, refusing specific performance where party delayed, dissenting opinion of same case, p. 110; *Jones v. Robbins*, 29 Me. 353, 50 Am. Dec. 595, and *Barnard v. Lee*, 97 Mass. 94, decreeing specific performance; *Bomier v. Caldwell*, 8 Mich. 471, holding variance between bill and proof as to time of payment not material; *Davidson v. Moss*, 5 How. (Miss.) 686, refusing rescission, where vendor removed incumbrance on land at time of sale; *Lake v. Lewis*, 16 Nev. 97, holding acceptance of money a waiver of default in payment, and purchaser entitled to a deed; *Ewing v. Gordon*, 49 N. H. 462, decreeing specific performance; *Seymour v. Delancy*, 3 Cow. 519, 15 Am. Dec. 284, holding lapse of time, together with inadequacy of consideration, justify court in refusing specific performance; *Attorney-General v. Purmort*, 5 Paige Ch. 629, to the effect that neglect to pay at specified times was not a forfeiture of his rights; *Edgerton v. Peckham*, 11 Paige Ch. 360, and *Wilson v. Tappan*, 6 Ohio, 174, holding time not of the essence of the contract and decreeing specific performance; *Wiswall v. McGowan*, 1 Hoff. Ch. 134, holding time for performance may be extended orally; *Smith v. Christmas*, 7 Yerg. 605, refusing specific performance; *Abbott v. L'Hommedieu*, 10 W. Va. 712, holding time is not generally of the essence of a contract for the sale of land; *Johnson v. Burdett T. Co.*, 53 Pac. 88, refusing specific performance, where time was expressly made the essence of the contract, and there was a long delay. See also note to 50 Am. Dec. 678, and 54 Am. Dec. 133, on this subject, where authorities are collected; note to 74 Am. Dec. 660, as to within what time rescission must be exercised. Approved in *Tufts v. Tufts*, 3 Wood. & M. 474, F. C. 14,233, but not necessary to decision. Cited, *arguendo*, in *Eakin v. Raub*, 12 S. & R. 376.

Distinguished in *Sneed v. Wiggins*, 3 Ga. 99, holding time of the essence because of the nature of the contract; *Falls v. Carpenter*, 1

Dev. & B. Eq. 281, 28 Am. Dec. 612, decreeing specific performance, where party neglected to pay purchase money, but continued in possession.

**Specific performance.**—Mutuality of obligation is essential to, p. 539.

Cited and principle applied in *Almy v. Wilbur*, 2 Wood. & M. 384, F. C. 256, holding the transaction a debt in equity, though one party was "at liberty" to pay the money; *Rogers v. Saunders*, 16 Me. 100, refusing specific performance. Cited approvingly in *Tufts v. Tufts*, 3 Wood. & M. 472, F. C. 14,233, but without application of the rule.

**Specific performance of contract of sale of land** will be refused after great lapse of time, and change in value and title, to one who has totally failed to perform, pp. 539-541.

Miscellaneous citations.—Cited in *Manning v. Brown*, 8 Bush (Ky.), 699, apparently not in point; also in *Potter v. Titcomb*, 10 Me. 52; *Finucane v. Kearney*, 1 Freem. Ch. 68, holding part payment of purchase money and entering into possession take contract out of the statute of frauds.

6 Wheat. 542-549, 5 L. 326, UNITED STATES v. DANIELL.

**Certificate of division.**—Division of Circuit Court, on motion for new trial, cannot be certified to Supreme Court, under act of 1802, p. 548.

Cited and applied in dissenting opinion, *Ex parte Crane*, 5 Pet. 206, 8 L. 98, majority holding Supreme Court has power to issue mandamus commanding Circuit Court to sign a bill of exceptions; *Davis v. Braden*, 10 Pet. 289, 9 L. 429, holding division on motion to rescind order to revive suit could not be brought up on certificate of division; approving the rule; *Daniels v. Railroad Co.*, 3 Wall. 255, 18 L. 225, dismissing case, where certificate of division presented questions of fact and law; *Ex parte Milligan*, 4 Wall. 111, 18 L. 292, holding allowance or refusal of writ of habeas corpus may be certified to Supreme Court; *United States v. Rosenburgh*, 7 Wall. 581, 19 L. 263, holding court without jurisdiction of certificate of division of opinion, upon a motion to quash an indictment; *United States v. Sanges*, 144 U. S. 321, 36 L. 449, 12 S. Ct. 613, giving history of manner of bringing up criminal cases upon certificate of division of opinion; *United States v. Rider*, 163 U. S. 135, 136, 41 L. 102, 103, 16 S. Ct. 984, holding certificates under new statute are governed by same general rules as were formerly applied to certificates of division; *Lanning v. London*, 4 Wash. 333, F. C. 8,075, applying rule and holding division of opinion on motion for new trial cannot be certified to the Supreme Court; *Taylor v. Carpenter*, 2 Wood. & M. 3, F. C. 13,785; *Ayres v. Bensley*, 32 Cal. 633, holding



division on question of granting a rehearing is a denial of it; *Bagg v. Detroit*, 5 Mich. 69, holding Supreme Court has jurisdiction of questions of law reserved in equity causes; *State v. Crocker*, 5 Wyo. 398, 40 Pac. 684, holding questions reserved before judgment may come within the appellate jurisdiction of the Supreme Court. Cited approvingly in *Brown v. Clarke*, 4 How. 15, 11 L. 835, but not specially applied.

Distinguished in *Life, etc., Ins. Co. v. Wilson*, 8 Pet. 303, 8 L. 954, issuing mandamus directing district judge to sign judgment; *Jones v. Van Zaudt*, 5 How. 224, 12 L. 126, where none of the points certified embraced things, urged merely as reasons for a new trial; *United States v. Chicago*, 7 How. 191, 12 L. 663, where the question occurred before a final decision, and involved the right of the debtor, even though one of discretion; *United States v. Gilbert*, 2 Sumn. 61, F. C. 15,204, holding Supreme Court cannot grant a new trial in a capital case, after a verdict regularly rendered on a sufficient indictment; *Goddard v. Coffin*, 2 Ware (Day.), 386, F. C. 5,490, holding rendering of judgment is a judicial act and must be done by the court.

Miscellaneous citations.—Cited in *Baker v. Biddle*, 1 Bald. 406, F. C. 764, to point that jurisdiction of Federal courts must be exercised in prescribed mode.

6 Wheat. 550-565, 5 L. 328, *KERR v. WATTS*.

**Equity pleading — Parties.**—No one need be made a party whose rights will not be affected, p. 559.

Cited and applied in *Carueal v. Banks*, 10 Wheat. 188, 6 L. 299, holding joinder of improper parties will not affect the jurisdiction of Circuit Courts in equity, as between proper parties; *Bouaparte v. Railroad Co.*, 1 Bald. 217, F. C. 1,617, holding agents of a corporation may be sued in this court, though corporation not suable here; *Society for F. of G. v. Hartland*, 2 Paine, 541, F. C. 13,155, holding decree cannot affect those not parties to action; *Hickok v. Elliott*, 10 Sawy. 427, 22 Fed. 21, holding in suit to set aside an assignment or conveyance, if grantor of assignor has parted with all his interest he is not a necessary party; *New Chester W. Co. v. Manufacturing Co.*, 53 Fed. 26, 3 U. S. App. 264, holding joinder of unnecessary parties will not oust jurisdiction; *Elliott v. Armstrong*, 2 Blackf. (Ind.) 207, holding in bill by grantee of cestui que trust against trustee, grantor need not be made a party; *Haggerty v. Wagner*, 148 Ind. 639, 48 N. E. 371, 39 L. R. A. 389, cotenant's wife not necessary party to partition suit; *Wright v. Min. Assn.*, 12 Md. 449, holding one without interest not a necessary party; as also in *Bourne v. Hall*, 10 R. I. 152, and *Burrill v. Garst*, 19 R. I. 39, 31 Atl. 436.

**Rule of equity as to bona fide purchaser, without notice, is not applicable to purchasers of military land warrants, under laws of**

Virginia; they are considered as affected with notice by the record of the entry, p. 560.

Rule applied in *Sherett v. Presb. Soc.*, 41 Ohio St. 630, holding person making first entry has the superior equity, although other party was a purchaser without notice.

Distinguished in *Brush v. Ware*, 15 Pet. 109, 10 L. 679, holding doctrine of constructive notice is applicable to military titles, except where a notorious entry is required or where entry is not specific as to the land.

Miscellaneous.—Cited in *So. Life Ins., etc. v. Cole*, 4 Fla. 363, not in point.

6 Wheat. 565-572, 5 L. 332, *LEEDS v. MARINE INS. CO.*

Equity will compel one obtaining judgment to deduct therefrom an amount which should have been allowed as set-off in the action at law in which the judgment was obtained, pp. 566-572.

Cited and applied in *North Chicago Rolling Mill Co. v. St. Louis, Ore., etc., Co.*, 152 U. S. 615, 616, 38 L. 572, 14 S. Ct. 715, 716, holding insolvency of person against whom set-off is claimed is a sufficient ground for equitable interference; *Hulbert v. Insurance Co.*, 2 Summ. 479, F. C. 6,919, holding underwriters cannot set off debts due from agent against loss claimed by him for his principal, except the premium on the policy. Cited, *arguendo*, *Davis v. Davis*, 72 Fed. 84, 30 U. S. App. 723, holding equitable defenses may not be pleaded in Federal courts in actions at law, although State statute sanctions it.

6 Wheat. 572-576, 5 L. 333, *UNION BANK v. HYDE.*

Negotiable paper.—Protest of inland bill or of promissory note is not necessary, nor is it evidence of the facts stated in it, p. 575.

Cited and principle applied in dissenting opinion, *Musson v. Lake*, 4 How. 282, 11 L. 975, majority holding if notarial protest does not set forth fact of presentation, it is not competent evidence; *Bay v. Church*, 15 Conn. 17, 18, holding notarial protest of promissory note not necessary, though note be indorsed to an inhabitant of another State; *Johnson v. Bank*, 29 Ga. 260, holding notarial fees cannot be recovered, whenever protest is not required; *Kaskaskia B. Co. v. Shannon*, 1 Gil. (Ill.) 24, holding notarial protest of inland bill not evidence of demand of payment, as also in *Taylor v. Bank*, 7 T. B. Mon. 580; *Carter v. Burley*, 9 N. H. 564, 565, 566, holding protest not competent evidence of the dishonor of an inland bill; *Burk v. Shreve*, 39 N. J. L. 216, construing strictly a statute making certificate of notary competent evidence of presentment of bill; *Smedes v. Bank*, 20 Johns. 384, holding notice to indorser insufficient; *Case v. Heffner*, 10 Ohio, 183, where bill was drawn in one State and indorsed to a citizen of another, a



protest was necessary; dissenting opinion, *Hall v. Bank*, 6 Whart. 613, majority allowing notarial fees in action against bank on notes; *Corbin v. Bank*, 87 Va. 664, 24 Am. St. Rep. 675, 13 S. E. 99, applying rule and holding notarial certificate is not evidence of dishonor of inland bill. See also notes, 43 Am. Dec. 219, and 96 Am. Dec. 603, 604, on this subject. Cited also in note, *Turner v. Rogers*, 8 Ind. 142.

Distinguished in *Doughty v. Hildt*, 1 McLean, 334, F. C. 4,027, holding payees entitled to recover costs of protest, the note being of that character which makes a protest evidence of demand of payment; *Simpson v. White*, 40 N. H. 543, holding, under statute, protests are evidence of facts stated therein.

**Negotiable paper.**—Undertaking of indorser held a waiver of demand and notice, p. 576.

Cited and principle applied in *Freeman v. O'Brien*, 38 Iowa, 409, holding agreement was not a waiver; *Baker v. Scott*, 29 Kan. 137, 44 Am. Rep. 629, holding words "protest waived" amounted to a waiver; *Wall v. Bry*, 1 La. Ann. 314; *Bird v. Le Blanc*, 6 La. Ann. 470, and *Wilkins v. Gillis*, 20 La. Ann. 539, 96 Am. Dec. 425, construing agreement strictly and holding waiver of protest did not waive notice; *Stone v. Bradbury*, 14 Me. 193, admitting parol testimony to show "bond" in contract included any instrument in writing; *Lane v. Steward*, 20 Me. 103, admitting parol evidence to prove waiver of demand; *Shove v. Wiley*, 18 Pick. 562, holding where clerk produces a printed form and testified to his belief that notices in question were in that form, the paper was admissible; *Taunton Bank v. Richardson*, 5 Pick. 447, holding jury from acts of indorser could infer a waiver; *Farwell v. Trust Co.*, 45 Minn. 498, 22 Am. St. Rep. 745, 48 N. W. 327, rejecting evidence of verbal agreement to waive demand and notice at time of indorsement; *Coddington v. Davis*, 3 Den. 22, 23, holding notice and protest waived; *Bell v. Martin*, 18 N. J. L. 169, admitting parol evidence to identify note declared upon; *Windham Co. Bk. v. Kendall*, 7 R. I. 85, holding firm bound by waiver of partner to person without notice; *Walker v. Popper*, 2 Utah, 98, holding a waiver of notice and protest is also a waiver of demand; *Broun v. Hull*, 33 Gratt. 32, holding though protest is waived, party must use due diligence. See note, 57 Am. Dec. 665, on this subject.

6 Wheat. 577-580, 5 L. 334, **CLARK v. GRAHAM.**

**Conflict of laws.**—A title to land can only be acquired and lost according to the laws of the State where situated, p. 579.

Cited and rule applied in dissenting opinion, *Burbank v. Conrad*, 96 U. S. 298, 24 L. 726, majority holding conveyance of land in Louisiana valid without registration; *Brine v. Insurance Co.*, 96 U. S. 635, 24 L. 861, holding State statute as to redemption from

foreclosure sale obligatory on Federal courts; *Schley v. Pullman Co.*, 120 U. S. 580, 30 L. 791, 7 S. Ct. 732, holding deed of feme covert to have been sufficiently acknowledged; *Langdon v. Sherwood*, 124 U. S. 82, 31 L. 346, 8 S. Ct. 431, holding under code of Nebraska, a decree of Circuit Court is evidence of a transfer of title; *De Vaughn v. Hutchinson*, 165 U. S. 570, 41 L. 829, 17 S. Ct. 462, applying rules of descent and alienation of land of Maryland as they were before the District of Columbia was separated from it; *Berry v. Seawall*, 65 Fed. 747, 31 U. S. App. 30, as to parol partition followed by acquiescence; *Summers v. White*, 71 Fed. 108, 36 U. S. App. 395, holding invalid an assignment not properly witnessed according to State statute; *Missouri, etc., T. Co. v. Krumseig*, 77 Fed. 40, 40 U. S. App. 620, holding State statute as to usury binding on Federal courts; *Magill v. Brown*, 16 Fed. Cas. 447, holding decree could not authorize sale of lands situate in another State; *In re Zug*, 10 N. B. R. 280, 30 Fed. Cas. 948, holding Federal courts are bound by local laws and local decisions of State where land is; *Hendon v. White*, 52 Ala. 605, where acknowledgment was insufficient; *Neal v. Gregory*, 19 Fla. 368, holding deed not under seal void; *Key v. Harlan*, 52 Ga. 477, refusing to admit to probate a will sufficiently witnessed in another State, but not under our statute; *Doyle v. McGuire*, 38 Iowa, 412, holding transfer valid; *Sneed v. Ewing*, 5 J. J. Marsh. 465, 22 Am. Dec. 47, holding that foreign will to pass title must be executed according to our laws; *Galpin v. Abbott*, 6 Mich. 37, holding deeds not acknowledged according to our statute were not entitled to be recorded; *Crane v. Reeder*, 21 Mich. 61, 4 Am. Rep. 434, holding deed invalid; as also in *Dodge v. Hollinshead*, 6 Minn. 12 (25), 80 Am. Dec. 439, and *Roode v. State*, 5 Neb. 176, 25 Am. Rep. 476; *Bentley v. Whittemore*, 18 N. J. Eq. 373, holding preferential assignment in another State void as to lands here; *Tarpey v. Salt Co.*, 5 Utah, 212, 14 Pac. 340, holding deed void as to stranger without notice. Cited in *Hoadley v. Stephens*, 4 Neb. 436, holding deed properly excluded, there being no evidence of its acknowledgment according to laws of State where executed; dissenting opinion, *Shell v. Duncan*, 31 S. C. 573, 10 S. E. 339, 5 L. R. A. 831.

Distinguished in *Storman v. Cravens*, 29 Ark. 558, holding unacknowledged deed confers an equitable interest; *Ross v. Ross*, 129 Mass. 245, 37 Am. Rep. 322, holding status of one to inherit is to be ascertained according to the law of the domicile; *Moore v. Thomas*, 1 Or. 202, declaring mortgage attested by one witness will be upheld in chancery; *Wood, etc., Co. v. Lee*, 4 S. D. 501, 57 N. W. 240, holding personal property mortgage valid, though not witnessed; *Linton v. Cooper*, 53 Neb. 408, where statute was different.

**Power** to convey lands must possess the same requisites and observe the same solemnities as a deed, p. 578.

Cited and principle applied in *Williams v. Paine*, 169 U. S. 65, 42 L. 663, 18 S. Ct. 283, holding power properly executed; *Connell*



v. Galligher, 36 Neb. 762, 55 N. W. 233, holding description in power sufficient; Gage v. Gage, 30 N. H. 424, holding power invalid; as also in Gee v. Bolton, 17 Wis. 612. Cited in note, 81 Am. Dec. 776, on this subject, collecting authorities.

A parol exchange of lands, or parol evidence that a conveyance was intended so to operate, will not convey any estate, p. 580.

6 Wheat. 580-583, 5 L. 336, PRESTON'S HEIRS v. BOWMAR.

**Boundaries.**— Courses and distances yield to natural and ascertained objects, but where these are wanting, courses or distances yield according to the circumstances, p. 382.

Cited and applied in Doe v. Mobile, 9 How. 469, 13 L. 219, holding distance must yield to the other boundary line; as also in Higuera v. United States, 5 Wall. 836, 18 L. 471, holding arroyo, etc., controlling; County of St. Clair v. Lovington, 23 Wall. 62, 23 L. 62, reprinted in 16 Am. Rep. 524, note, holding birch tree controlling; Koons v. Brysons, 69 Fed. 300, 25 U. S. App. 368, holding courses or distances must yield to a certain ascertained tree; Garrard v. Mines, 82 Fed. 585, holding a certain post controlled; Belden v. Seymour, 8 Conn. 25; Gaveney v. Hinton, 2 G. Greene, 349, and Campbell v. Clark, 8 Mo. 558, holding fixed monuments will control courses and distances; Cleveland v. Smith, 2 Story, 291, F. C. 2,874, where birch tree controlled; Higley v. Bidwell, 9 Conn. 452, holding white oak tree controlling; Benedict v. Gaylord, 11 Conn. 336, 29 Am. Dec. 301, holding courses and distances being of more certainty, controlled; Riley v. Griffin, 16 Ga. 149, 60 Am. Dec. 730, holding marked trees controlling; Evans v. Temple, 35 Mo. 498; White v. Gray, 9 N. H. 131, holding metes and bounds will control the call for quantity; Rix v. Johnson, 5 N. H. 524, 22 Am. Dec. 474, declaring a river the boundary; Jackson v. Camp, 1 Cow. 612, holding river, etc., controlling; likewise in Jackson v. Moore, 6 Cow. 717; Jackson v. Wendell, 5 Wend. 147, holding courses and distances must be respected as far as possible; Lewis v. Lewis, 4 Or. 180, holding measurements must yield to the "stake;" Hunter v. Hume, 88 Va. 30, 13 S. E. 307, holding quantity must yield to description by boundaries. Cited, arguendo, in Wells v. Compton, 3 Rob. (La.) 188; Ruffner v. Hill, 31 W. Va. 436, 7 S. E. 18, allowing courses to control in part, and distances in part. See also note, 40 Am. Dec. 110, on descriptions.

Distinguished in Doe v. Cullum, 4 Ala. 581, holding whether a monument referred to in a conveyance is identical with that found on the ground is a question for the jury; Bowman v. Farmer, 8 N. H. 403, where the brook was not designated with sufficient certainty to control.

**Statutory construction.**—Federal courts follow State courts' construction of State law, where not unreasonable or founded in clear mistake, p. 583.

Distinguished in *Burgess v. Seligman*, 107 U. S. 34, 27 L. 365, 2 S. Ct. 22, collecting authorities and refusing to follow State construction of State statute where decision was rendered subsequently to and contrary to Circuit Court construction.

**Ejectment.**—In case of doubt claim of party in possession ought to be maintained, p. 582.

Cited and rule applied in *McKinney v. Daniel*, 90 Va. 704, 19 S. E. 881, and *Bradley v. Ewart*, 18 W. Va. 606, holding plaintiff must recover on the strength of his own title, not on the weakness of the defendant's.

6 Wheat. 583-592, 5 L. 336, *OTIS v. WALTER*.

**Under embargo act of 1808**, if a vessel not actually arriving at port of original destination excites an honest suspicion that her demand of a permit to land was merely colorable, this is not a termination of the voyage so as to preclude the right of detention, pp. 590-592.

**Landing of cargo** is not necessarily a conversion, if collector thinks cargo can thus be best preserved, p. 592.

No citations.

6 Wheat. 593-598, 5 L. 339, *GOSZLER v. GEORGETOWN*.

**Corporation** can make only such contracts as are allowed by its charter, p. 597.

Cited and applied in dissenting opinion, *Southern, etc., Co. v. Lanier*, 5 Fla. 171, majority holding where charter authorized sale of stock for cash to be invested in bonds and mortgages, that a sale for bond and mortgage could not be avoided by purchaser; *Welland Canal Co. v. Hathaway*, 8 Wend. 484, 24 Am. Dec. 55, holding one entering into a contract with a corporation is not estopped from denying it to be a body corporate; *Dow v. Northern R. R. Co.*, 36 Atl. 534, holding where corporation, chartered to operate a railroad, leased it, this lease is invalid against dissenting stockholders.

**Municipal corporations.**—Power to grade streets given to municipality of Georgetown by act of Maryland, 1797, is a continuing power and corporation may, from time to time, alter the gradation so made, pp. 596-598.

This holding has been applied in the following citing cases and in making the following holdings: *East Hartford v. Hartford B. Co.*, 10 How. 535, 13 L. 528, holding act discontinuing a ferry constitutional; *Wabash R. R. Co. v. Defiance*, 167 U. S. 98, 42 L. 92, 17 S.



Ot. 752, holding common council could change grade of streets; *Charles River Bridge v. Warren Bridge*, 11 Pet. 569, 9 L. 832, holding valid a grant of a second franchise, rendering first valueless; dissenting opinion, *Baltimore T., etc., Co. v. Baltimore*, 64 Fed. 163, majority holding ordinance giving leave to construct tracks on certain streets constituted a contract and was irrepealable; *Winter v. Montgomery*, 83 Ala. 594, 3 So. 238, holding municipal authorities can tear down and remove obstructions on sidewalks built under license of former council without giving compensation; *Shaw v. Crocker*, 42 Cal. 438, and *Quincy v. Jones*, 76 Ill. 243, 20 Am. Rep. 250, holding city has right to raise the grade of a street without being responsible for damages, if contractor does the work with proper skill; *Reardon v. San Francisco*, 66 Cal. 500, 56 Am. Rep. 111, 6 Pac. 321, holding municipality liable for such special consequential damage above the common injury to the other abutters on the street; *Fellowes v. New Haven*, 44 Conn. 251, 26 Am. Rep. 450, dismissing injunction to restrain city from working on street; *Markham v. Atlanta*, 23 Ga. 406, holding remedy for injury by re-grading of street is not by injunction; *Wright v. Nagle*, 48 Ga. 391, holding inferior County Court could not grant exclusive right to build a bridge; *Bloomington v. Pollock*, 141 Ill. 350, 31 N. E. 147, holding ordinances fixing grade of streets are not in the nature of contracts; *Macy v. Indianapolis*, 17 Ind. 269, holding consequential damage, resulting from change of grade of street, cannot be recovered from city; *Kokomo v. Mahan*, 100 Ind. 244, allowing city to collect assessment for a subsequent improvement of a street; *Welch v. Bowen*, 103 Ind. 257, 2 N. E. 725, holding power to regulate the running at large of animals, not exhausted by being exercised once; *Commissioners v. Fullen*, 111 Ind. 413, 12 N. E. 299, holding commissioners can levy an additional assessment to pay for road, if necessary; *Creal v. Keokuk*, 4 G. Greene, 53, and *Church v. Wyandotte*, 31 Kan. 724, 3 Pac. 529, holding city not liable for prudent exercise of the power to change grade of street; *Reynolds v. Shreveport*, 13 La. Ann. 428, holding presumption is that a municipality executed a lawful power with propriety and good faith; *Binney's Case*, 2 Bland Ch. 128, holding power of condemnation given to company, not being a continuing one, was exhausted by being once exercised; *Peddicord v. Railroad Co.*, 34 Md. 474, 483, holding railroad company not liable for change in grade of road; *Mayor v. Willison*, 50 Md. 148, 33 Am. Rep. 308, holding city not liable for injuries caused by obstructions to mill-race by acts done to improve streets; *Green v. Railway Co.*, 78 Md. 302, 44 Am. St. Rep. 292, 28 Atl. 628; *Pontiac v. Carter*, 32 Mich. 167, and *Hoffman v. St. Louis*, 15 Mo. 654, holding established grade could be changed; *St. Louis v. Gurno*, 12 Mo. 424, holding corporation not liable for damages consequential upon the grading and paving of a street; *Thurston v. St. Joseph*, 51 Mo. 514, 11 Am. Rep. 466, overruling *St. Louis v. Gurno*, 12 Mo. 424,

and holding city liable for damages arising from negligent construction of sewer; dissenting opinion, *Rychlicki v. St. Louis*, 98 Mo. 508, 11 S. W. 1004, 4 L. R. A. 597, majority denying city's right to discharge accumulated water in a body upon adjacent lands; *Radcliff v. Mayor*, 4 N. Y. 204, 53 Am. Dec. 363, holding municipality not liable for change of grade of street not negligently done; *Crawford v. Delaware*, 7 Ohio St. 465, holding if erections are made on a lot in accordance with an established grade, city is liable for injury caused by change of grade; *Gas, etc., Co. v. Columbus*, 50 Ohio St. 71, 40 Am. St. Rep. 652, 33 N. E. 294, 19 L. R. A. 513, municipality not liable to gas company for damages for injury caused by change of grade; dissenting opinion, *Parke v. Seattle*, 5 Wash. St. 20, 32 Pac. 86, 34 Am. St. Rep. 848, n., 20 L. R. A. 74, municipality held liable for damages to abutting lands in grading street. See also valuable note, 66 Am. Dec. 438, on this subject; also, 26 Am. Rep. 457. Cited, arguendo, in dissenting opinion, *Piqua Branch, etc. v. Knoup*, 16 How. 403, 14 L. 991.

Municipal corporation cannot abridge its future legislative power, p. 598.

Principle applied in *Illinois, etc., Co. v. St. Louis*, 2 Dill. 89, F. C. 7,007, holding ordinance giving persons right to occupy a wharf for fifty years, void; *State v. Graves*, 19 Md. 354, 373, 81 Am. Dec. 646, holding city council could not pass an irrevocable ordinance; *Lake, etc., Ry. v. Mayor*, 77 Md. 375, 26 Atl. 514, 20 L. R. A. 132, ordinance authorizing laying of double tracks, may be repealed and company restricted to one track; *State v. Murphy*, 134 Mo. 575, 56 Am. St. Rep. 531, holding St. Louis has no power to grant privilege of constructing electrical subways for private gain of its grantee; *State v. Hayes*, 61 N. H. 332, holding provision that the sense of the voters shall be taken on a law, and if their decision is favorable it shall become a law, was a delegation of legislative power, and void; *Milhau v. Sharp*, 27 N. Y. 622, 84 Am. Dec. 318, holding municipal authorities could not give a franchise for an indefinite period to operate a railroad in the public streets; *Johnson v. Philadelphia*, 60 Pa. St. 452, holding a bond given to comply with existing regulations, cannot be construed to be binding engagement on part of the city to make no other regulations; *Burroughs v. Peyton*, 16 Gratt. 489, holding congress could not enter into a contract to exempt from subsequent calls to military service all those providing substitutes; *Roanoke G. Co. v. Roanoke*, 88 Va. 813, 814, 14 S. E. 666, 667, holding power to grade streets cannot be delegated by a municipality. Cited in *Selma v. Muller*, 46 Ala. 414, to point that a corporation can enter into a contract.

Distinguished in *Armstrong v. St. Louis*, 3 Mo. App. 158, holding a city may be enjoined from establishing a grade, where it would not be beneficial to the public and would render the street impass-



able; *Goodall v. Milwaukee*, 5 Wis. 50, holding city liable for changing grade of street, when ordinance had been passed declaring grade would not be changed without compensating owners.

Miscellaneous.—Cited in *Bauman v. Ross*, 167 U. S. 568, 587, 42 L. 280, 287, 17 S. Ct. 974, 981, as an instance where the act of 1809 had been brought into court without a doubt of its constitutionality being expressed; In re *Brinkman*, 7 N. B. R. 426, 4 Fed. Cas. 146, apparently not in point.

6 Wheat. 598-605, 5 L. 840, *McCLUNG v. SILLIMAN*.

**Mandamus.**—State courts have no authority to issue a writ of mandamus to an officer of the United States, p. 604.

Cited and applied in dissenting opinion, *Ex parte Crane*, 5 Pet. 206, 207, 210, 8 L. 98, 99, 100, majority holding Supreme Court can issue writ of mandamus to judge of Circuit Court, commanding him to sign a bill of exceptions; dissenting opinion, *Kendall v. United States*, 12 Pet. 633, 646, 647, 649, 652, 9 L. 1224, 1229, 1230, 1231; 1232, 13 Pet. 608, App., 10 L. 317, majority holding Circuit Court of District of Columbia could issue a writ of mandamus to the postmaster-general, compelling him to do a ministerial act; *Territory v. Lockwood*, 3 Wall. 239, 18 L. 49, holding proceeding in the nature of quo warranto to test the right of a judge of the Supreme Court of a territory to exercise the power, must be in the name of the United States, and not in the name of the territory; *Rigg v. Johnson County*, 6 Wall. 189, 198, 18 L. 774, 777, holding writ of mandamus from Circuit Court will lie against the county officers to levy a tax; *Bath Co. v. Amy*, 13 Wall. 249, 20 L. 541, holding mandamus does not lie from Circuit Court in favor of a holder of county bonds to make the county levy a tax; *Rosenbaum v. Bauer*, 120 U. S. 454, 30 L. 745, 7 S. Ct. 634, holding Circuit Court cannot acquire jurisdiction by removal from a State court of original proceedings to obtain a mandamus; *Ex parte Van Orden*, 3 Blatchf. 169, F. C. 16,870, holding District Court has no power to issue a writ of certiorari to court commissioner to review proceedings before him; *Van Antwerp v. Hulburd*, 7 Blatchf. 433, F. C. 16,826, holding this court has no jurisdiction of a suit in equity to control the administration of the duties of the comptroller of currency of the United States; *United States v. Pearson*, 24 Blatchf. 454, 32 Fed. 310, holding District Court cannot, by mandamus, compel a postmaster to transmit through mails a certain publication as second-class matter; *The Celestine*, 1 Biss. 12, F. C. 2,541, holding when jurisdiction of State court has attached, creditors cannot in Federal court obtain any control of the property; *United States v. Plumer*, 3 Cliff. 61, F. C. 16,056, holding Circuit Court has no authority to re-examine by writ of error rulings of District Court in criminal cases; *Wheeling v. Baltimore*, 1 Hughes, 94, F. C. 17,502, and *Smith v. Jackson*, 1 Paine, 456, F. C. 13,064, holding power of Circuit Courts to issue mandamus is

confined to cases in which it is necessary to the exercise of their jurisdiction; *Ladd v. Tudor*, 3 Wood. & M. 332, F. C. 7,975, query, whether mandamus lies from Federal courts to judges of State courts; *Litchfield v. The Register*, Woolw. 312, F. C. 8,388, refusing to interfere by injunction with executive officers in the exercise of discretionary power; *In re Forsyth*, 78 Fed. 301, holding District Court has no power to issue mandamus in an original proceeding; *United States v. Judges*, 85 Fed. 179, 56 U. S. App. 35, 36, collecting authorities and holding mandamus may not be invoked to direct a court or officer to reverse a judicial decision; *Ex parte Hill*, *In re Willis v. Confederate States*, 38 Ala. 438, holding State courts cannot, on writ of habeas corpus, discharge enrolled conscript from custody of Confederate officer; *Ex parte Hill*, *In re Armistead v. Confederate States*, 38 Ala. 461, 462, 464, 471, holding State court has jurisdiction to determine, whether placing a substitute in his stead exempted petitioner from liability to service; dissenting opinion of same case, p. 485; *State v. Curtis*, 35 Conn. 383, 95 Am. Dec. 268, holding an information in the nature of quo warranto will not lie in State court to try right to the office of director of a national bank; dissenting opinion, *Swift v. Richardson*, 7 Houst. (Del.) 365, 32 Atl. 148, majority holding that a stockholder of a private corporation may procure an inspection of the books by mandamus; *Commissioner v. Smith*, 5 Tex. 478, and *Meyer v. Carolan*, 9 Tex. 253, declaring mandamus will not issue to an officer to perform a discretionary duty; *Bledsoe v. Railroad Co.*, 40 Tex. 556, holding court had no power to compel an officer of the government to perform an official duty; dissenting opinion, *Kuechler v. Wright*, 40 Tex. 665, majority holding mandamus will lie to compel commissioner of land office to perform a ministerial duty; *State v. Cunningham*, 81 Wis. 503, 51 N. W. 736, 15 L. R. A. 574, same as to ministerial acts of secretary of State. Cited in *Decatur v. Paulding*, 14 Pet. 601, 606, 10 L. 610, 613, and *In re Brinkman*, 7 N. B. R. 426, 4 Fed. Cas. 147; *Baker v. Biddle*, Bald. 403, 406, F. C. 764, but without special application of the rule.

Distinguished in *Kendall v. United States*, 12 Pet. 615, 617, 624, 9 L. 1217, 1218, 1221, holding Circuit Court of District of Columbia could issue a writ of mandamus to the postmaster-general, compelling him to do a ministerial act; *Heine v. Commissioners*, 19 Wall. 660, 22 L. 226, holding mandamus may be issued after judgment to compel levy of tax to pay bonds; *United States v. Schurz*, 102 U. S. 393, 26 L. 170, holding Supreme Court of District of Columbia can issue mandamus as an original process, where at common law the petitioner would be entitled to it; dissenting opinion, *Louisiana v. Jumel*, 107 U. S. 762, 763, 27 L. 466, 2 S. Ct. 170, 171, maintaining under act of 1875 that Circuit Court can by mandamus compel the performance of a purely ministerial act; *United States v. Kendall*, 5 Cr. C. C. 172, 243, 245, 246, 247, 250, 255, F. C. 15,517, holding



Circuit Court of District of Columbia could issue a writ of mandamus to the postmaster-general, compelling him to do a ministerial act; affirmed in 12 Pet. 615, 9 L. 1217, *supra*.

**Appeal.**—The question before the appellate court is whether the judgment was correct, not the ground on which it was given, p. 603.

Cited and applied in dissenting opinion, *Ex parte Crane*, 5 Pet. 204, 8 L. 98, majority holding writ of mandamus can be issued by Supreme Court to circuit judge; *Davis v. Packard*, 6 Pet. 48, 8 L. 315, holding Supreme Court can notice nothing unless it appears on the record of lower court; *Ladd v. Tudor*, 3 Wood. & M. 328, 332, F. C. 7,975, holding action may be removed to Circuit Court though the diverse citizenship does not appear on the face of the writ; *Polhemus v. Bank*, 27 Mich. 50, holding that the real subject of complaint is the final result and not the reason which led to it; *State v. Bowen*, 8 S. C. 408, holding court is not restricted to the grounds urged by the defendants, but may give weight to any insuperable objection to its jurisdiction; *Shrewsbury v. Miller*, 10 W. Va. 122, holding the question in the appellate court is whether the judgment to be reviewed is correct. Cited, *arguendo*, in *Poole v. Nixon*, 9 Pet. App. 771, 9 L. 305, 19 Fed. Cas. 994.

**Jurisdiction.**—Legislation is necessary to vest in the inferior Federal courts their judicial power, p. 604.

Cited in dissenting opinion, *Ex parte Crane*, 5 Pet. 202, 8 L. 97, majority holding Supreme Court could issue writ of mandamus to circuit judge; *In the Matter of Barry*, 136 U. S. 609, 610, 34 L. 508, note, 42 Fed. 122, F. C. 1,059, refusing to grant writ of habeas corpus, in order to determine as between parents living apart the right to the custody of a child; *In re Heath*, 144 U. S. 95, 36 L. 360, 12 S. Ct. 616, holding Supreme Court has no jurisdiction over judgments of Supreme Court of District of Columbia in criminal cases.

**Miscellaneous.**—Cited generally in *Davis v. Seneca*, Gilp. 39, F. C. 3,651, *Boatner v. Ventress*, 8 Mart. (N. S.) 651, 20 Am. Dec. 269.

6 Wheat. 606-608, **MUTUAL ASSURANCE SOCIETY v. FAXON.**

**Insurance.**—Virginia law respecting the Mutual Assurance Society construed.

No citations.













# REPORTS

OF

## CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of The United States,

IN FEBRUARY TERM, 1822.

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BY HENRY WHEATON,

Counselor at Law.

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VOLUME VII.





JUDGES  
OF THE  
SUPREME COURT OF THE UNITED STATES,  
DURING THE TIME OF THESE REPORTS.

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The Hon. JOHN MARSHALL, *Chief-Justice.*  
The Hon. BUSHROD WASHINGTON, *Associate Justice.*  
The Hon. WILLIAM JOHNSON, *Associate Justice.*  
The Hon. BROCKHOLST LIVINGSTON, *Associate Justice.*  
The Hon. THOMAS TODD, *Associate Justice.*  
The Hon. GABRIEL DUVAL, *Associate Justice.*  
The Hon. JOSEPH STORY, *Associate Justice.*  
WILLIAM WIRT, Esq., *Attorney-General.*





# RULES OF PRACTICE

FOR THE

## COURTS OF EQUITY OF THE UNITED STATES.

UNDER the authority given to this court, by the act of May 8th, 1792, c. 137, s. 2, the following rules were ordered by the court, at the present term, to be the Rules of Practice for the Courts of Equity of the United States:

**RULE I.** Rules shall be held monthly in the clerk's office on the first Monday in every month, for the purpose of entering all proceedings and orders which may be entered at the rules, and which are not taken or made in open court. The rules shall be held under the direction of the clerk; but either of the judges of the court may make or allow any special orders in any cause, not inconsistent with the regulations herein prescribed, which shall be entered in the rule book, and take effect accordingly.

**RULE II.** All process shall be made returnable to the next succeeding term, or to any intermediate rule day, at the election of the party praying the same, and the return of the said process "executed" shall be effectual whereon to ground any subsequent proceedings. If the party be not found, a copy served by the person leaving the same shall be left with his wife, or any free white person who is a member of his or her family, at his or her dwelling-house or usual place of abode, and the truth of the case shall be returned; and where such process shall not be executed, the clerk is directed to issue other similar process, if the same be required by the party at whose instance the original process was sued out; and if upon such second process the party be not found, a copy shall be again left in like manner as is hereinbefore directed, and upon a second return that the party is not found, and that a copy has been left as herein directed, the same proceedings may be had as on process returned executed.

**RULE III.** Where any person, either plaintiff or defendant, in any suit, shall be dead, it shall be lawful for the clerk, during the recess of the court, upon application, to issue process to bring into court the representative of such deceased person.

**RULE IV.** The plaintiff shall file his bill before or at the time of taking out the subpoena.

**RULE V.** The plaintiff may amend his bill before the defendant or his attorney or solicitor hath taken out a copy thereof, or in a small  
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matter afterwards, without paying costs; but if he amend in a material point after such copy obtained, he shall pay the defendant all costs occasioned thereby.

**RULE VI.** The day of appearance shall be the rule day after the process is returned executed, or after the second return of a copy left if the process shall not be executed, when the process is returnable to the rules, or the rule day next succeeding the term, where the process shall be returnable to a term of the court; and if the defendant shall not appear and file his answer within three months after the day of appearance, and after the bill shall have been filed, the plaintiff may proceed to take his bill for confessed, and the matter thereof shall be decreed accordingly; which decree shall be absolute, unless cause be shown at the term next succeeding that to which the process shall be returned executed.

**RULE VII.** If the defendant cannot be found, it shall be sufficient service of any decree *nisi*, to leave a copy thereof with his wife, or any free white person who is a member of his or her family; and if no such person be found, then it shall be sufficient service to publish the same in such paper of the district as may be designated by the court for such time, as the court shall direct.

**RULE VIII.** All process shall be executed by a sworn officer, or affidavit must be made of the service thereof, when executed by any other person.

**RULE IX.** Every defendant may swear to his answer before any justice or judge of the United States, or a commissioner or master, or other person appointed by the court, or judge of any court of a state or territory, or a justice of the peace, or notary public of any state or territory.

**RULE X.** If the defendant does not file his answer within three months after the subpoena be returned executed, or after a second return of a copy left having been made at least three months, the plaintiff may either proceed on his bill as confessed, or have a general commission to take depositions, or he may move the court for an attachment to bring in the defendant to answer interrogatories, at his election, and may proceed to a hearing in the two last cases as if the answer had been filed and the cause was at issue. Provided that the court may, on cause



shown, allow the answer to be filed, and grant a further day for such hearing. And when a party is in custody on such writ of attachment, he shall be detained in custody until he shall file his answer, or be discharged by order of the court or one of the judges thereof.

**RULE XI.** No special replication to an answer shall be filed but by leave of the court, or one of the judges thereof, for cause shown; and if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without costs at the discretion of the court.

**RULE XII.** When a cross bill shall be exhibited, the defendant or defendants to the first bill shall answer thereto, before the defendant or defendants to the cross bill shall be compelled to answer such cross bill.

**RULE XIII.** The complainant shall put in the general replication, or file exceptions within two calendar months after the answer shall have been put in. If he fails so to do, the defendant may leave a rule to reply with the clerk of the court, which being expired, and no replication or exceptions filed, the suit may be dismissed with costs; but the court may, for cause, order the same to be retained on payment of costs.

**RULE XIV.** If the plaintiff's attorney or solicitor shall except against any answer as insufficient, he may file his exceptions, and leave a rule with the clerk to make a better answer within two calendar months; and if within that time the defendant shall put in a sufficient answer, the same shall be received without costs; but if any defendant insists on the sufficiency of his answer, or neglects or refuses to put in a sufficient answer, or shall put in another insufficient answer, the plaintiff may set down his exceptions to be argued at the next term; and after the expiration of that rule, or any second insufficient answer put in, no farther or other answer shall be received but on payment of costs.

**RULE XV.** If upon argument the plaintiff's exceptions shall be overruled, or the defendant's answer adjudged insufficient, the plaintiff shall pay to the defendant, or the defendant to the plaintiff, such costs as shall be allowed by the court.

**RULE XVI.** Upon a second answer being adjudged insufficient, costs shall be doubled by the court, and the defendant may be examined upon interrogatories, and committed until he or she answer them; or the plaintiff may move the court to take so much of his bill as is not answered for confessed, and may file his replication, obtain commissions, and proceed to hearing in the usual manner.

**RULE XVII.** Rules to plead, answer, reply, rejoin, or other proceedings not before particularly mentioned, when necessary, shall be given from month to month with the clerk in his office, and shall be entered in a rule book for the information of all parties, attorneys, or solicitors concerned therein, and shall be considered as sufficient notice thereof.

**RULE XVIII.** The defendant may at any time before the bill is taken for confessed, or afterwards with the leave of the court, demur or plead to the whole bill, or part of it, and he may demur to part, plead to part, and answer as to the residue; but in any case in which the bill charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the fact on which the charge is founded.

**RULE XIX.** The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

**RULE XX.** If a plea or demurrer be overruled, no other plea or demurrer shall be thereafter received, but the defendant shall proceed to answer the plaintiff's bill; and if he fail to do so within two calendar months, the same, or so much thereof as was covered by the plea or demurrer, may be taken for confessed, and the matter thereof be decreed accordingly.

**RULE XXI.** If the plaintiff shall not reply to, or set for hearing any plea or demurrer, before the second term of the court after filing the same, the bill may be dismissed with costs.

**RULE XXII.** Upon a plea or demurrer being argued and overruled, costs shall be paid as where an answer is adjudged insufficient; but if adjudged good, the defendant shall have his costs.

**RULE XXIII.** The defendant, instead of filing a formal demurrer or plea, may insist on any special matter in his answer, and have the same benefit thereof, as if he had pleaded the same matter, or had demurred to the bill.

**RULE XXIV.** After any bill filed, and before the defendant hath answered, upon oath made that any of the plaintiff's witnesses are aged, infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk may issue a commission for taking the examination of such witness or witnesses *de bene esse*, the party praying such commission giving reasonable notice to the adverse party of the time and place of taking such deposition.

**RULE XXV.** Testimony may be taken according to the acts of Congress, or under a commission. Whenever a general commission shall be issued for taking depositions upon answer and replication, six months from the time of the replication shall be allowed the parties for taking their depositions; and either party at the expiration of the said six months may set the cause for hearing, and no deposition taken after that time shall be read as evidence on the hearing, unless the same was taken by consent of parties, by special order of the court, or out of the district.

**RULE XXVI.** Commissions to take depositions may be executed by any person qualified to take testimony according to the laws of the

state, or by any person or persons, not exceeding three, appointed or named in the commission by order of the court, or by any judge thereof in vacation. All testimony taken under a commission shall be taken on interrogatories and cross-interrogatories filed in the cause, unless the parties shall dispense therewith, which interrogatories shall be filed in the clerk's office ten days previous to a rule day, after which the defendant shall be allowed five days to file his cross-interrogatories, unless he waives his right.

**RULE XXVII.** Orders for the admission of a guardian *ad litem*, to defend a suit, may be made either by the court or one of the judges thereof.

**RULE XXVIII.** Witnesses who live within the district may, upon due notice of the opposite party, be summoned to appear before the commissioners appointed to take testimony, or before a master or examiner appointed in any cause by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioners, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear, or to give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioners, master, or examiner, an attachment may issue thereupon by order of the court, or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court.

**RULE XXIX.** When a matter is referred to a master to examine and report thereon, he shall assign a day and place therefor, and give reasonable notice thereof to the parties, or to the attorney or solicitor of such party as may not reside within the district, and if either party shall fail to attend at the time and place, the master may adjourn the examination of the

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matter to some future day, and give notice thereof to the parties, in which notice it shall be expressed that if the party fail again to appear, the master will proceed *ex-parte*; and if after receiving such notice the party shall again fail to appear, the master may proceed to examine the matter to him referred, and to report the same to the court, that such proceedings may be had thereon as to the court shall seem equitable and right.

**RULE XXX.** The courts in their sittings may regulate all proceedings in the office, and may set aside any dismissals, and re-instate the suits on such terms as may appear equitable.

**RULE XXXI.** Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, it may be admitted at any time before the end of the next term of the court.

**RULE XXXII.** The circuit courts may make further rules and regulations, not inconsistent with the rules hereby prescribed, in their discretion.

**RULE XXXIII.** In all cases where the rules prescribed by this court, or by the Circuit Court, do not apply, the practice of the circuit courts shall be regulated by the practice of the High Court of Chancery in England.

Ordered by the court, that the foregoing rules be the rules of practice for the courts of equity of the United States, from and after the first day of July next, and the clerk of the court is directed to have the same printed, and to transmit a printed copy thereof, duly certified, to the clerks of the several courts of the United States, and to each of the judges thereof.





## MEMORANDUM.

DIED, on Monday, the 25th of February, in the city of Washington, William Pinkney, in the fifty-eighth year of his age. He was one of the board of commissioners for settling the claims under the British treaty of 1794, and had represented the government of this country, as its minister plenipotentiary, successively, at the courts of London, Naples, and St. Petersburg, with dignity and ability; he had held, with the highest reputation, the office of Attorney-General of the United States; and at the time of his death was a senator in Congress from his native state of Maryland, and a distinguished ornament of this bar. His funeral took place on the ensuing Wednesday, in the forenoon, under the direction of the senate, and was attended with all those public solemnities and that reverential sorrow due to his exalted talents and station.

To extraordinary natural endowments, Mr. Pinkney added deep and various knowledge in his profession. A long course of study and practice had familiarized his mind with the science of the law, in every department; and his attainments in the auxiliary branches of learning, essential to the jurist and advocate, were of the most profound and elegant character. For many years he was the acknowledged leader at the head of the bar of his native state; and during the last ten years of his life—the principal period of his attendance in this court—he enjoyed the reputation of having been rarely equalled, and perhaps never excelled, in eloquence and the power of reasoning upon legal subjects. His mind was acute and subtle; rapid in its conceptions, and singularly felicitous in the exposition of the truths it was employed in investigating. Mr. Pinkney had the command of the greatest variety of the most beautiful and peculiarly appropriate diction, and the faculty of adorning and illustrating the driest and most intricate discussions. His favorite mode of reasoning was from the analogies of the law; and whilst he delighted his auditory by his powers of amplification and rhetorical ornament, he instructed the court by tracing up the technical rules and positive institutions of jurisprudence to their historical source and first principles. He was profoundly versed in the ancient learning of the common law; its technical peculiarities and feudal origin, its subtle distinction and artificial logic, were familiar to his early studies, and enabled him to expound, with admirable force and perspicuity, the rules of real property. To this, and his other legal attainments, he superadded, at a later period of life, an extensive acquaintance with the theory and administration of public law.

In the various questions of constitutional law which have been recently discussed in this high tribunal, it may be said, it is hoped, without irreverence, that Mr. Pinkney's learning and

powers of investigation have very much contributed to enlighten and fix its judgments. In the discussion of that class of causes especially, which, to use his own expressions, "presented "the proud spectacle of a peaceful judicial review of the conflicting sovereign claims of "the government of the Union and of the "particular states, by this more than Amphictyonic council," his arguments were characterized by a fervor, earnestness, gravity, eloquence, and force of reasoning, which convinced all who heard him that he delivered his own sentiments as a statesman and a citizen, and was not merely solicitous to discharge his duty as an advocate. He exerted an intellectual vigor proportioned to the magnitude of the occasion. He saw in it "a pledge of the "immortality of the Union; of a perpetuity of "national strength and glory, increasing and "brightening with age; of concord at home, "and reputation abroad." And in his argument on the constitutionality of the charter of the Bank of the United States, he stated, that "the consideration which the question involved "imparted to it a peculiar character of importance; and this tribunal, distinguished as it is "for all that can give to judicature a title to "reverence, is in deliberating and adjudicating "upon it, in the exercise of its most exalted, "its most awful functions. The legislative faculties of the government of the Union, for "the prosperity of the Union, are in the lists "against the imputed sovereignty of a particular state; and you are the judges of the lists; "not, indeed, upon the romantic and chivalrous principles of tilts and tournaments, but "upon the sacred principles of the constitution. "In whatever direction you look, you cannot "but perceive the solemnity, the majesty of "such an occasion. In whatever quarter you "approach the subject you cannot but feel that it "demands from you the firm and steady exertions of all those high qualities which the "universal voice ascribes to those who have "devoted themselves to the ministry of this "holy sanctuary."

That intense application to his professional and public labors, for which Mr. Pinkney was so remarkably distinguished, continued to animate his exertions to the last moments of his life; and as he held up a high standard of excellence in this honorable career, he pursued it with unabated diligence and ardor, and still continued to speak as from the impulse of youthful ambition. His example was therefore of the greatest utility in exciting the emulation of the profession. But it is as an enlightened defender of the national constitution against the attacks which have been made upon it under the pretext of asserting the claims of state sovereignty, that his loss is most to be lamented by the public. It is known to his friends that he was, a short time before his death, engaged



in the investigations preparatory to making a great effort in the senate upon this interesting subject. The loss of such a commentary upon the constitution, by one who had so profoundly meditated its principles, may be regarded as a public calamity. It is also to be regretted that the great fame of his eloquence must rest mainly in tradition; as it is believed that no perfect memorials of his most splendid efforts in the senate or at the bar have been preserved, and it is obviously impossible to form any adequate notions of the powers of an advocate from the sketches of the arguments of counsel contained in the books of reports.

The following proceedings of the court and bar took place upon the occasion of Mr. Pinkney's decease:

Feb. 26.—On the meeting of the court, this morning, Mr. Harper rose, and addressed the judges thus:

"On the part of the bar, may it please your Honors, I am about to address a request to the court, which I am sure will accord with its feelings, and I hope will not be considered as inconsistent with its duty.

"A great man has fallen in Israel.' The bar has lost one of its brightest ornaments; the court one of its ablest and most enlightened advisers.

"When such men fall, it seems fit that some expression of public regret should attend them to the tomb. It cannot be useful or pleasing to them, but it tends to increase the effect of their example to those who survive, and to soothe the sorrow of their afflicted relatives.

"Nowhere can such a tribute more properly be paid to the memory of our departed brother than here; where the pre-eminent talents and acquirements by which he adorned our profession have been so often displayed; and he has taken so large a part in fixing those great legal and constitutional landmarks by the establishment of which this court has conferred the most solid and extensive benefits on the nation.

"To express our deep sense of this great public and private loss, and as the most appropriate tribute now in our power to offer to the

memory of the deceased, I request the court to allow this day for the uninterrupted indulgence of our feelings, and for that purpose now to adjourn."

Mr. Chief Justice MARSHALL replied in the following words:

"I am very confident that I may say in the name of all my brethern, that we participate sincerely in the sentiments expressed at the bar. We all lament the death of Mr. Pinkney, as a loss to the profession generally, and especially to that part of it which is assembled in this room. We lament it, too, as a loss to our country. We most readily assent to the motion which has been made, and shall direct an adjournment till to-morrow at twelve."

The following entry was directed to be made on the minutes of the court:

"The court being informed that Mr. Pinkney, a gentleman of this bar, highly distinguished for his learning and talents, departed this life last night in this city, the judges have determined, as a mark of their profound respect for his character, and sincere grief for his loss, to wear crape on the left arm for the residue of the term; and to adjourn for the purpose of paying the last tribute to his remains, by attending them from the place of his death."

After the adjournment of the court, the members of the bar assembled in the court-room; Mr. Clay was called to the chair, and Mr. Winder appointed secretary.

On motion of Mr. Harper, seconded by Mr. Webster, it was unanimously resolved, that the members of this bar, as a mark of their regret for the memory of their deceased brother, the Hon. William Pinkney, and of their deep sense of the loss which the public and the profession have sustained in his death, will attend his funeral in a body, and wear a crape on the left arm during the present term.

On motion of Mr. Wheaton, seconded by Mr. D. B. Ogden, it was unanimously resolved, that the proceedings of this meeting be signed by the chairman and secretary, and published in the National Intelligencer.

The meeting then adjourned.

H. CLAY, Chairman.

W. H. WINDER, Secretary.

Wheat. 7.

## REPORTS OF THE DECISIONS

OF THE

# Supreme Court of the United States.

FEBRUARY TERM, 1822.

1\*] [\*LOCAL LAW. CHANCERY.]

MILLER ET AL. v. KERR ET AL.

A warrant and survey authorize the proprietor of them to demand the legal title, but do not, in themselves, constitute illegal title; until the consummation of the title by a grant, the person who acquires an equity holds a right, subject to examination.

Where the register of the land-office of Virginia, had, by mistake, given a warrant for military services in the continental line, on a certificate authorizing a warrant for services in the state line, and in recording it, pursued the certificate, and not the warrant, it was held that this court could not support a prior entry and survey, on a warrant thus issued by mistake, against a senior patent.

Where the plaintiffs seek to set aside the legal title, because they have the superior equity, it is consistent with the principles of the court to rebut this equity by any circumstances which may impair it; and the legal title cannot be made to yield to an equity founded on the mistake of a ministerial officer.

THIS cause was argued and determined at the last term, but omitted to be reported.

2\*] \*Mr. Justice TODD delivered the opinion of the court:

On the 29th of May, 1783, Seymour Powell, heir of Thomas Powell, obtained a military land warrant from the register's office in Virginia, No. 679, for 2,663½ acres of land "due in consideration of services for three years, as a lieutenant of the Virginia continental line, agreeable to a certificate from the governor and council, received into the land-office." A part of this warrant was entered in the military district reserved for the officers and soldiers of the Virginia continental line, on the 16th of June, 1795; and, on the 30th of October, 1796, 789 acres, part thereof was surveyed in the name of the said Seymour Powell, which survey was on the 1st of March, 1797, recorded in the office of the surveyor-general. On the 10th of July, 1800, Justus Miller purchased this land, and took an assignment of the entry and

survey, and obtained a patent therefor in February, 1808.

John Neville made an entry on the same land in May, 1806, on a military land warrant, for services in the Virginia continental line; and his heirs, the respondents, obtained a patent therefor on the 30th of April, 1807.

They have brought an ejectment against the heirs of Justus Miller, who having, as they say, the elder equitable, though the junior legal title, have filed this bill to enjoin proceedings at law, and compel Neville's heirs to convey the legal title to them.

In their answer, Neville's heirs assert that Thomas Powell never served in the Virginia continental line, but that his service was [\*3 performed in the state line, and that the certificate of the governor and council, on which the warrant was issued, was expressed to be given for services in the state line, so that the warrant issued fraudulently, or by mistake. They further insist, that as the officers of the state line could not enter their warrants in the district reserved for the continental line, the plaintiffs ought not to be permitted to avail themselves of a title founded in mistake, to defeat their legal title.

The testimony taken in the cause, shows that the records of the office of the executive council of Virginia have been examined, and that no certificate has ever been granted to Seymour Powell, as the heir of Thomas Powell, for services in the Virginia continental line, but that a certificate was granted to him for military services for three years in the state line.

In the land-office, too, records are to be preserved of all the warrants which issue, and of the certificates on which they issue. This office also has been searched, and no certificate is found of any military service rendered by Thomas Powell, in the Virginia continental line, nor is there on record any warrant for such service; but there is a certificate given to Seymour Powell, for his military service as a

NOTE.—Letters patent for conveying real estate may be set aside in equity, if obtained by fraud. *Atty.-Gen. v. Vernon*, 1 Vern. 277; *Jackson v. Lawton*, 10 John. R. 25, 26; *Jackson v. Hart*, 12 John. R. 77; 2 Bl. Com. 348.

Where a patent for lands is granted by the general government, the court may go behind the patent, on allegations of fraud in the patentee in obtaining the patent, and may examine into the equities of other persons entitled or claiming to be entitled to the patent, and may set aside the same if fraudulently obtained. *Brush v. Ware*, 15 Pet. 93; *Boldly v. Taylor*, 5 Cranch, 196; *Polk v. Wendell*, 5 Cranch, 93; 5 Wheat. 293; *Hoffnagle v. Anderson*, post, 213; 2 N. Y. Rev. St. 578, s. 12; *The People v. Clark*, 10 Barb. 120; N. Y. Code of Prac. s. 1957.



lieutenant in the state line; and a warrant on record for those services, bearing the same date and number with that on which the land now in controversy was entered.

There is no proof, and no reason to believe, that Thomas Powell ever performed any military service \*in the Virginia line on continental establishment.

It is, then, apparent that the register of the land-office has, by mistake, given a warrant for military services in the continental line, on a certificate authorizing a warrant for service in the state line; and that, in recording it, he has pursued the certificate, and not the warrant.

The question is, can this court support a prior entry and survey, on a warrant thus issued by mistake, against a senior patent?

It has been urged, on the part of the appellants, that the title of Thomas Powell, for services in the state line, is precisely to the same quantity of land as if those services had been rendered in the continental line; his claim on the state of Virginia is the same. That, had the warrant been properly issued, it might have been satisfied in the district set apart for the officers and soldiers of the state line, which district is in the state of Kentucky, and can no longer be appropriated by the holders of warrants for military services in the Virginia state line. Thus the rights under Powell are sacrificed, without any fault of his, in consequence of a mistake committed by the register of the land-office. They say that they are purchasers, without notice, of a title apparently good, and ought not to be affected by the mistake of a public officer. They insist that in the hands of a purchaser, a warrant ought to be liable to no objection founded on circumstances anterior to its date.

5\*] \*There is great force in these arguments; and, if the military district had remained a part of Virginia until Mr. Powell's warrant was entered, they would, perhaps, be unanswerable. But, in 1784, this district, with all the territory claimed by Virginia north-west of the Ohio, was ceded to the United States, with a reservation in favor of the legal bounties of the Virginia troops on continental establishment only. There is no reservation whatever in favor of the bounties in land, to the state troops. Provision for them was made elsewhere.

After this cession, no title could be acquired under Virginia, which was not included within the reservations. The same principle was asserted by this court in the case of *Polk's Lessee v. Wendell*,<sup>1</sup> and is, we think, too clear to be controverted. The great difficulty in this case consists in the admission of any testimony whatever, which calls into question the validity of a warrant issued by the officer to whom that duty is assigned by law. In examining this question, the distinction between an act which is judicial, and one which is merely ministerial, must be regarded. The register of the land-office is not at liberty to examine testimony, and to exercise his own judgment respecting the right of an applicant for a military land warrant. He was originally directed to grant warrants to the officers or soldiers "producing to him a certificate of their claims respectively from the Commissioner of War, and not other-

wise." When the office of Commissioner of War was put \*down, this duty devolved [\*6 on the executive department, whose certificate was as obligatory on the register, as that of the Commissioner of War had been. The question of right, then, was tried before the executive council, and the register is a mere ministerial officer carrying the judgment of the executive into execution by issuing his warrant in pursuance of their certificate. This certificate is filed and preserved in the office as the document on which the warrant issued. It is as much a part of the record as the warrant itself.

A warrant and survey authorize the proprietor of them to demand the legal title, but do not, in themselves, constitute a legal title. Until the consummation of the title by a grant, the person who acquires an equity holds a right subject to examination. The validity of every document is then open to examination, whatever the law may be after the emanation of a patent.

If this be correct, and the objection to the warrant delivered to Mr. Powell can be considered, he is shown, by the clearest testimony, to be the holder of a warrant issued by mistake. As an officer in the state line, he was not entitled to a warrant which could appropriate lands lying in the military district north-west of the Ohio."

As the plaintiffs are endeavoring to set aside the legal title, because they have the superior equity, we think it consistent with the principles of the court to rebut this equity by any circumstance which may impair it.

\*The case is a hard one on the part of [\*7 the plaintiffs; and they may have strong claims on the liberality and justice of the United States, or of Virginia; but we do not think the legal title can be made to yield to an equity founded in the mistake of a ministerial officer.

*Decree affirmed, each party paying his own costs.*

Cited—7 Wheat. 218; 6 Pet. 676; 12 Pet. 299; 15 Pet. 106; 3 How. 665; 1 McLean, 535.

#### [LOCAL LAW.]

#### NEWSOM v. PRYOR'S LESSEE.

Where plats are returned and grants made, without an actual survey, the rule of construction which has been adopted, in order to settle the conflicting claims of different parties, is, that the most material, and most certain calls shall control those which are less material and less certain.

A call for a natural object, as a river, a known stream, a spring, or even a marked line, shall control both course and distance.

There is no distinction between a call to stop at a river, and a call to cross a river.

Where a grant was made for 5,000 acres of land "lying on both sides of the two main forks of Duck River, beginning, &c., and running thence west 894 poles, to a white oak, thence south 894 poles, to a stake crossing the river, thence east 894 poles to a stake, thence north 894 poles to the beginning, crossing the south fork:" it was held, that it must be surveyed so as to extend the second line of the grant such a distance on the course called for as would cross Duck River to the opposite bank.

1.—5 Wheat. Rep. 293.

**8\*]** THIS cause was argued by *Mr. Law*<sup>1</sup> for \*plaintiff in error, and by *Mr. White*<sup>2</sup> for the defendant in error.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court;

This is a writ of error to a judgment given in the Circuit Court for the District of West Tennessee, in an ejectment brought by the defendants in error against the present plaintiff. The plaintiffs in the court below claimed under the elder patent, to the validity of which there was no objection. Of consequence, the only question in the cause was, whether the lines of their grant comprehended the land in contest. The grant was made for 5,000 acres of land, "lying on both sides of the two main forks of Duck River, beginning, &c., and running thence west 894 poles, to a white oak tree; south, 894 poles, to a stake crossing the river; thence east, 894 poles to a stake; thence north, 894 poles, to the beginning, crossing the south fork."

It is apparent that a survey was not made in fact, but that, after marking a beginning corner, the surveyor made out and returned a plat, which he supposed would comprehend the land intended to be acquired. It is now too late to question the validity of grants made on such plats and certificates of survey. From the extraordinary circumstances of the country, they were frequent, and, in consequence of those circumstances, have received the sanction of \*courts. An immense number of titles, believed to be perfectly secure, depend upon the maintenance of such grants. The extent of the mischief which would result from unsettling the principle, cannot be perceived; and is certainly too great now to be encountered. The patent, therefore, must be considered as if the survey had been actually made.

In consequence of returning plats where no actual surveys had been made, and where the country had been very imperfectly explored, the description contained in the patent often varies materially from the actual appearances of the land intended to be acquired. Natural objects are called for in places where they are not to be found; and the same objects are found where the surveyor did not suppose them to be. In a country of a tolerably regular surface, no considerable inconvenience will

result from this circumstance. The course and distance of the patent will satisfy the person claiming under it, and seldom interfere with the rights of others. But in a country where we find considerable water-courses and mountains there must be more difficulty. The surveyor calls for some known object, but totally miscalculates its courses, distances, or both, from some given point which he has made the beginning of his survey; and there is a variance in the different calls of his survey, and of the patent founded on it. As in this case, the second line is to run south 894 poles, to a stake, crossing the river. This distance will not reach the river; and must be continued to 1,222 poles to cross the river. The distance must be disregarded, and this line so extended \*as to [\*10 cross the river, or the distance must control the call for crossing the river. These difficulties have occurred frequently, and must be expected to occur frequently where grants are made without an actual survey. Some general rule of construction must be adopted; and that rule must be observed, or the conflicting claims of individuals must remain forever uncertain.

The courts of Tennessee, and all other courts by whom causes of this description have been decided, have adopted the same principle, and have adhered to it. It is, that the most material and most certain calls shall control those which are less material and less certain. A call for a natural object, as a river, a known stream, a spring, or even a marked tree, shall control both course and distance. These decisions are founded on two considerations. Generally speaking, it is the particular intention of the purchaser to acquire the land lying on the stream called for, as being more valuable than other land; and, in every case where a natural object is mentioned, it designates the land surveyed had there been an actual survey, much more certainly than course and distance can designate it. In this case, for example, the surveyor says that he has run south 894 poles, to a stake crossing the river. Now, it is much more probable that he should err in the distance, than in the fact of crossing the river. The conclusion, therefore, had an actual survey been made, would be, that the line did cross the river.

The general effect of this principle undoubtedly is, that the purchaser acquires more land than is expressed \*in his grant, and more [\*11 than he has paid for. Where this has been thought an object worthy of legislative attention, provision has been made for it. Courts cannot now shake a principle so long settled, and so generally acknowledged.

1.—He cited 1 Cooke's Tenn. Rep. 146; 1 Heyw. Rep. 253; 2 Heyw. Rep. 75, 138, 179; 4 Wheat. Rep. 448.

2.—Who cited 5 Cranch, 234; 2 Binney, 520; 1 Cooke's Tenn. Rep. 462; 2 Tenn. Rep. 154, 200, 302; 2 Heyw. Rep. 237, 238, 258, 253, 496; 1 Hen. & Munf. 125; 3 Call. 252.

NOTE.—See note to *McIver's Lessee v. Walker*, 9 Cranch, 173.

Course and distance yield to monuments, or natural objects, in determining boundaries of land. *McIvor v. Walker*, 4 Wheat. 444; *Cleveland v. Smith*, 2 Story, C. C. 278; *Chinoweth v. Haskell*, 3 Pet. 92; *Barclay v. Howell*, 6 Pet. 198; *Wakefield v. Ross*, 5 Mas. 16; *Robinson v. Moore*, 4 McLean, 279; *McPherson v. Foster*, 4 Wash. C. C. 45; *Cleveland v. Smith*, 2 Story, C. C. 278; *Granger v. Swart*, 1 Woolf. 88; *White v. Williams*, 48 N. Y. 344; *Belden v. Seymour*, 8 Conn. 19; 8 Conn. 304; *Chatham v. Branard*, 11 Conn. 60; *Higley v. Bidwell*, 9 Conn. 447; *Howe v. Bass*, 2 Mass. 380; *Pernam v. Wead*, 6 Mass. 131; *Gerrish v. Bearce*, 11 Mass. 193; *Aiken v. Sanford*, 5 Mass. 494; *Davis v. Rainsford*, 17 Mass. 207; *Mayhew Wheat*, 7.

*v. Norton*, 17 Pick. 357; *Frost v. Spaulding*, 19 Pick. 445; *Dawes v. Prentice*, 16 Pick. 435; *Flagg v. Thurston*, 13 Pick. 145.

If there be nothing to control the course and distance, the line is run by the needle.

*Jackson v. Staats*, 2 John. Cas. 350; *Trammell v. Nelson*, 2 Harr. & McH. 4; *Penam v. Wead*, 6 Mass. 131; *Howe v. Bass*, 2 Mass. 380; 4 Kent's Comm. 466; *Higley v. Bidwell*, 9 Conn. 447; *Benedict v. Gaylord*, 11 Mass. 335; *Doe v. Porter*, 3 Atk. 18, 57; *White v. Gay*, 9 N. H. R. 126; *McIvor v. Walker*, 9 Cranch, 173; *Preston v. Bawmar*, 6 Wheat. 580; *Colclough v. Richardson*, 1 McCord, 167; *Welch v. Philips*, 1 McCord, 215; *Brooks v. Tyler*, 2 Vt. 318; *Clark v. Wethey*, 19 Wend. 320; *Wyckoff v. Stephenson*, 14 Ohio, 13, 15, 17; *Schultz v. Young*, 3 Ired. N. C. 385.



In this case, the counsel for the defendant in the court below seems to have admitted the rule, but to deny its application to this case. He founds his application to the court on a supposed distinction between a call to stop at a river, and a call to cross a river. After stating the testimony, "he required the judges to instruct the jury, that if they believed there was no testimony to prove the making of any other corner than the beginning corner, the correct mode of running the said grant would be to go the course and distance from the beginning corner, which would form the termination of the first line, and run from thence the course and distance called for in the second line; and if the course and distance will not reach across the river that the call in the grant for crossing the river ought to be considered as a mistake in the surveyor, and be rejected; and the second line should terminate at the end of the distance, and from thence run the third line according to the course and distance, and from thence to the beginning. And the said counsel requested the judges to instruct the jury that such call as is in this grant, for a line to pass a river or other object, will be different in principle from what it would be if said call had been for said river, at the termination of the line or boundary; and although, in the latter case the law is, that such natural object shall be the **12\***] \*boundary, disregarding distance, yet in the present case, the distance shall be the criterion of boundary, disregarding the call for crossing the river."

The judges refused to give this instruction, and charged the jury "that the second line of the said grant must be extended such a distance on the course called for as will cross Duck River to the opposite bank.

To this opinion an exception was taken; and the jury having found a verdict for the plaintiff in ejectment, the defendant, in the Circuit Court, has brought the cause into this court by writ of error.

We can perceive no sound reason for the distinction between a call for a river at the end of a line, and for a river in the course of a line. There is as much reason in the one case for supposing the surveyor intended the line should cross the river, or, in case of actual survey, for supposing he did cross the river, as in the other, for supposing an intention to stop at the river, or an actual termination of the line at the river.

Whether the motives for the call were that the acquisition of the land on the river was an object with the purchaser, or that the call for the river conducted more certainly to the designation of the land intended to be acquired, the motives for considering it as the controlling call in the patent, to which distance must be subordinate, seems to be precisely the same whether the call be to cross the river, or to terminate at it.

It has been urged as an objection to the mode of surveying the land directed by the court, that **13\***] the \*last line will not cross the south fork, and that the land will not be "on both sides of the two main forks of Duck River."

But this objection will not be removed or diminished by the instruction required by the plaintiff in error. Nor can the land be so surveyed as that the last line shall cross the south fork. From the termination of the third line,

it is necessary to proceed to the beginning, and the plat shows us that the south fork does not run between the two points. It cannot be brought between them, if at all, without extending the third line an immense distance, and changing the whole figure of the plat, or entirely disregarding the act of Assembly which directs lands to be taken up by lines running with the cardinal points, except in particular cases, of which this is not one.

*Judgment affirmed with costs.*

Cited.—11 Pet. 413; 21 How. 321; 5 Wall. 836; 23 Wall. 62; 2 Story, 290.

#### [COMMON LAW.]

#### TAYLOE v. T. & S. SANDIFORD.

In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, and not as liquidated damages. *A fortiori*, when it is expressly reserved as a penalty.

Thus, where in a building contract, the following covenant was contained: "The said houses to be completely finished on or before the \*24th of [\*14 December next, under a penalty of \$1,000, in case of failure;" it was held, that this was not intended as liquidated damages for the breach of that single covenant only, but applied to all covenants made by the same party in that agreement; that it was in the nature of a penalty, and could not be set-off in an action brought by the party to recover the price of the work.

An agreement to perform certain work within a limited time, under a certain penalty, is not to be construed as liquidating the damages which the party is to pay for the breach of his covenant.

The case of *Fletcher v. Dycke* (2 Term Rep., 32), commented on, and distinguished from the present.

A person owing money under distinct contracts, has a right to apply his payments to whichever debt he may choose, and this power may be exercised without any express direction given at the time.

A direction may be evidenced by circumstances, as well as by words; and a positive refusal to pay one debt and an acknowledgement of another, with a delivery of the sum due upon it, would be such a circumstance.

THIS cause was argued by *Mr. Jones* and *Mr. Hay*<sup>1</sup> for the plaintiff in error, and by *Mr. Key*<sup>2</sup> for the defendants in error.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court:

1.—They cited 2 Comyn on Contracts, 528-539, and the cases there collected. *Fletcher v. Dycke*, 2 T. R. 32.

2.—He cited 4 Cranch, 317; 6 Cranch, 9; Dennis v. Cummins, 3 Johns. Cas. 297; Smith v. Dickinson, 3 Bos. & Pull. 630; Bank of Columbia v. Patterson, 7 Cranch, 299.

NOTE.—As to application of payments, see note to *Field v. Holland*, 6 Cranch, 9.

*Liquidated Damages.*—As to whether a sum agreed to be paid as damages for the violation of an agreement shall be considered as liquidated damages, or only a penalty, is held to depend upon the meaning and intent of the parties as gathered from a full view of the provisions of the contract, the terms used to express the intent, and the peculiar circumstances of the subject-matter of the agreement. *Dakins v. Williams*, 17 Wend. 447; *S. C.* affirmed, 22 Wend. 201; *Shute v. Hamilton*, 3 Daly, N. Y. 462; *Perkins v. Lyman*, 11 Mass. 76; *Streep v. Williams*, 48 Penn. St. 450; *Chase v. Allen*, 13 Gray,

Wheat. 7.

This is a writ of error to a judgment of the Circuit Court of the County of Alexandria, rendered in an action of *assumpsit*, brought by T. & S. Sandiford against John Tayloe. It appeared on the trial of the cause, that on the 13th of May, 1816, the parties entered into a written <sup>15\*</sup> contract, by which the defendants in error undertook to build for the plaintiff three houses on the Pennsylvania avenue in the city of Washington. On the 18th day of the same month, the parties entered into a contract, under seal, for the building of three additional houses, at a stipulated price. This contract contains the following covenant: "The said houses to be completely finished on or before the 24th day of December next, under a penalty of \$1,000, in case of failure."

The parties entered into a third verbal contract for some additional work, to be measured, and paid for according to measurement.

These three houses were not completed by the day, and the plaintiff in error claimed the sum of \$1,000, as stipulated damages, and retained it out of the money due to the defendants in error. This suit was thereupon brought; and, on the trial of the cause, the defendant in the Circuit Court claimed to set off in this action \$1,000, as in the nature of stipulated damages; but the court overruled this claim, and decided that the said sum of \$1,000 had been received in the nature of a penalty, and could not be set off in this action.

The defendant then moved the court to instruct the jury, that "upon the evidence offered, if believed, the plaintiffs were not entitled to recover in this action the said sum of \$1,000, inasmuch as the same, if due at all, was due under a contract under seal, and that the declarations of the defendant, and the understanding between the parties as to the reservation of <sup>16\*</sup> the said \$1,000, given in evidence \*as aforesaid, was competent and sufficient evidence of the defendant's intention to apply his payment to the extinguishment, in the first instance, of such parts of the said moneys as were due by simple contract, and to reserve the \$1,000 out of the money due under the said

original contract." This instruction the court refused to give; and did instruct the jury "that it was competent to the plaintiffs to recover the said \$1,000 in this action, unless they should be satisfied by the evidence that the defendant, at the time of paying the money, had expressly directed the same, or a sufficient part thereof, to the payment of the \$1,500 due on the simple contract."

To both these opinions the defendant excepted; and the jury having given a verdict for the plaintiff in the Circuit Court, this writ of error was brought to the judgment rendered thereon.

It is contended, by the plaintiff in error, that the Circuit Court erred.

1st. In overruling the claim to offset the \$1,000 mentioned in the agreement.

2d. In declaring that the plaintiff in that court might so apply the payments made, as to discharge the contract under seal, and leave the sum retained by the defendant in that court, to be demanded under the simple contract.

1. Is the sum of \$1,000 mentioned in the agreement of the 13th of May, to be considered as a penalty, or as stipulated damages?

The words of the reservation are: "The said house to be completely finished on or before the 24th day \*of December next, under the [\*<sup>17</sup> penalty of \$1,000, in case of failure."

In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, the legal operation of which is, to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of contract by the opposite party. It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims them as such, to show that they were so considered by the contracting parties. Much stronger is the inference in favor of its being a penalty, when it is expressly reserved as one. The parties themselves denominate it a penalty; and it would require very strong evidence to authorize the court to say that their own words do not express their

42; Dennis v. Cummins, 3 John. Cas. 297; Knapp v. Waltby, 13 Wend. 587; Pearson v. Williams, 26 Wend. 630; S. C. 24 Wend. 244; Hasbrouck v. Tappan, 15 John. 200; Gray v. Crosby, 13 John. 219; Ayers v. Pease, 12 Wend. 393.

The contract is to govern; and the true question is, what was the contract? Whether it was folly or wisdom for the contracting parties thus to bind themselves, is of no consequence, if the intention is clear. If there be no fraud, circumvention, or illegality in the case, the court is bound to enforce the agreement. Kemble v. Farren, 6 Bingh. 141; Slosson v. Beadle, 7 John. 72; Spence v. Tilden, 5 Cow. 144, and note; Noble v. Bates, 7 Cow. 307; Hosmer v. True, 19 Barb. 106; Cushing v. Drew, 97 Mass. 445; Bagley v. Peddie, 16 N. Y. 469; Astley v. Welton, 2 Bos. & Pull. 346; Barton v. Glover, Holt's N. P. R. 43, and note; Reilly v. Jones, 1 Bing. 302; Davies v. Penton, 6 Barn. & C. 216; Crisdee v. Bolton, 3 Car. & P. 240; Randall v. Everest, 2 Car. & P. 577.

The mere use of the term "penalty," or the term "liquidated damages," does not determine this intention, if on the whole the instrument discloses a different intention. Dimech v. Corlett, 12 Moore, P. C. 199; Chamberlain v. Bagley, 11 N. H. 284; Davies v. Penton, 6 B. & C. 216, 224; Davis v. Freeman, 10 Mich. 188.

It is the tendency and preference of the law to regard a sum stated to be payable if a contract is not fulfilled, as a penalty, and not as liquidated damages; for by treating such sum as a penalty, Wheat. 7. U. S., Book 5.

the recovery can be apportioned to the actual damages, or loss actually sustained. Cheddie v. Marsh, 21 N. J. (Law), 463; Wallis v. Carpenter, 13 Allen, 19; Baird v. Tolliver, 6 Humph. Tenn. 186; Hoag v. McGinness, 22 Wend. 163, 164; Cowen v. Gerrish, 3 Shep. 273; Watts v. Shepherd, 2 Ala. 425; Owen v. Hodges, 1 McMull 106; Moore v. Platte County, 8 Misso. 467; Bright v. Rowland, 3 How. Miss. 398; Hamilton v. Overton, 6 Blaekt. 206; Hodges v. King, 7 Met. 583; Gammon v. Howe, 2 Shep. 250; Brown v. Bellows, 4 Pick. 179; Richards v. Edick, 17 Barb. 260; Leggett v. Mut. L. Ins. Co., 53 N. Y. 394.

Where the damages would be wholly uncertain and incapable of being ascertained except by conjecture, independently of the stipulation, they will be considered as liquidated, if they are so denominated in the instrument. Williams v. Dakin, 22 Wend. 201; Holmes v. Holmes, 12 Barb. 137; Sedg. on Dam. 422; Bayley v. Peddie, 16 N. Y. 427; Lange v. Week, 2 Ohio St. 519; Esmond v. VanBenschoten, 12 Barb. 366; Bright v. Rowland, 4 Miss. 398; Leighton v. Wales, 3 M. & W. 545; Pierce v. Fuller, 8 Mass. 223; Streeter v. Rush, 25 Cal. 67; Cushing v. Drew, 97 Mass. 445; Crisdee v. Bolton, 3 C. & P. 240; Noble v. Bates, 6 Cow. 309; Smith v. Smith, 4 Wend. 468; Pierce v. Jung, 10 Wis. 30; Townsend v. Fisher, 2 Hilt. N. Y. 47; Morse v. Rathburn, 42 Mo. 594; Hodges v. King, 7 Met. Mass. 583; Gobble v. Linder, 76 Ill. 157; Williams v. Green, 14 Ark. 315.

If the instrument provide that a larger sum shall



own intention. These writings appear to have been drawn on great deliberation; and no slight conjecture would justify the court in saying that the parties were mistaken in the import of the terms they have employed.

The counsel for the plaintiff in error supposes that the contract furnishes clear evidence that the parties intended this sum as liquidated damages. The circumstance, that it is annexed to the single covenant, stipulating the time when the work shall be completed, is considered as showing that it was intended to fix the damages, for the breach of that covenant.

Without deciding on the weight to which this argument would be entitled, if supported by the fact, the court cannot admit that it is so supported. The engagement, that the said **18\*** houses shall be completely \*finished on or before the 24th day of December next, is as much an engagement for the manner, as for the time of finishing the work, and covers, we think, all the covenants made by the defendants in error in that agreement. The case, therefore, presents the single question, whether an agreement to perform certain work by a limited time, under a certain penalty, is to be construed as liquidating the damages which the party is to pay for a breach of his covenant. This question seems to have been decided in the case of *Smith v. Dickenson*, reported in 3 Bos. & Pull., 630.

The plaintiff in error relies on the case of *Fletcher v. Dycke*, reported in 2 T. R., 32, in which an agreement was entered into to do certain work within a certain time, and if the work should not be done within the time specified, "to forfeit and pay the sum of £10 for every week," until it should be completed.

But the words "to forfeit and pay," are not

so strongly indicative of a stipulation in the nature of a penalty, as the word "penalty" itself; and the agreement to pay a specified sum weekly during the failure of the party to perform the work, partakes much more of the character of liquidated damages than the reservation of a sum in gross.

The court is well satisfied that this stipulation is in the nature of a penalty, and, consequently, that there was no error in rejecting it as a set-off in this case.<sup>1</sup>

\*The second objection goes entirely to [**\*19** the form of the action. The declaration is in *assumpsit*; and the plaintiff contends that the money claimed was due on a sealed instrument. It is admitted that all the money for the whole work performed by the defendants in error was paid, except the sum of \$1,000, which was retained by the plaintiff in error, expressly on account of that sum which he supposed himself entitled to under the contract of the 18th of May, on account of the failure to complete the buildings by the 24th of December. If this money was due on the simple contract, then this action was clearly sustainable; if it was due under the sealed instrument, then it could be recovered only by an action on that instrument. Its being due on the one or the other depends on the application of the payments made by the plaintiff to the defendants in error. The court instructed the jury, that it was competent to the plaintiff to recover the said \$1,000 \*in this action, "unless they [**\*20** should be satisfied by the evidence that the defendant, at the time of paying the money had expressly directed the same, or a sufficient part thereof, should be applied to the extinguishment of the \$1,500 due on the simple contract."

This instruction of the court is given in

1.—This subject is discussed, with his usual ability and acuteness, by Mr. Evans, in the Appendix to his Translation of Pothier on Obligations (Vol. II., p. 93-98). He thinks that the penalty ought, in general, to be regarded as stated damages; and his observations are calculated to excite doubts as to the correctness of some of the decisions on this subject. In addition to the cases collected by him, and those cited in the argument of the above case, in the text (*Talloe v. Sandford*), the following cases may be

referred to: *Ponsonby v. Adams*, 6 Bro. Parl. Cas. 418; *Harrison v. Wright*, 13 East, 343; *Rolfe v. Peterson*, 6 Bro. Parl. Cas. 470; *Sloman v. Walter*, 1 Bro. Ch. Rep. 418; *Hardy v. Martin*, Ib. 419; *Love v. Peers*, 4 Burr. 2229; *Cotterel v. Hook*, Doug. 101; *Wilbeam v. Ashton*, 1 Campb. N. P. Rep. 78; *Barton v. Glover*, 1 Holt's N. P. Rep. 43. The learned reader will also find the supposed result of all the English cases summed up by Mr. Holt, in a note to the last-mentioned case. 1 Holt's N. P. Rep. 45.

be paid, on the failure of the party to pay a less sum, the larger sum is a penalty. *Haldemann v. Jennings*, 14 Ark. 329; *Bagley v. Peddie*, 5 Sandf. N. Y. 192. So, where the agreement imposes several distinct duties or obligations of different degrees of importance, and the same sum is named as damages for a breach of either indifferently, the sum is to be regarded as a penalty. *Carpenter v. Lockhart*, 1 Ind. 434; *Thoroughgood v. Walker*, 2 Jones, N. C. Law, 15; *Kemble v. Farren*, 6 Bing. 141; *Sedgwick Lead. Cas. on Dam.* 432; *Astley v. Weldon*, 2 Bos. & Pull. 346; *Shreve v. Brereton*, 51 Penn. St. 175; *Berry v. Wisdom*, 3 Ohio St. 241; *Boys v. Ansell*, 5 Bing. N. C. 390; *Lampman v. Cochran*, 16 N. Y. 275; *Hoagland v. Segur*, 38 N. J. 230.

Where the agreement is made for the attainment of another object or purpose, to which the stipulated sum is wholly collateral, such sum will be treated as a penalty. *Bearden v. Smith*, 11 Rich. S. C. L. 554; *Laubenheimer v. Mann*, 19 Wis. 519; *Long v. Towl*, 42 Mo. 545; *Merrill v. Merrill*, 15 Mass. 488; *Perkins v. Lyman*, 11 Mass. 76; *Moore v. Platte County*, 8 Mo. 467; *Sloman v. Walter*, 1 Bro. Ch. R. 418; *Jaquith v. Hudson*, 5 Mich. 123; *Ricketson v. Richardson*, 19 Cal. 330; *Fisk v. Gray*, 11 Allen, 132.

Where the damages are capable of being known and estimated, the sum fixed upon as damages will be treated as a penalty, though declared to be intended as liquidated damages. *Graham v. Bickham*, 4 Dall. 150; *Spencer v. Tilden*, 5 Cow. 144, 150,

note; *Davies v. Penton*, 6 B. & C. 216; *Pinkerton v. Caslon*, 2 B. & Ald. 704; *Colwell v. Laurence*, 38 Barb. 643; *Affirmed*, 38 N. Y. 71; *Goldsbrough v. Baker*, 3 Cranch, C. C. 48.

Where the parties have agreed on the amount of damages, ascertained by fair calculation and adjustment, and have expressed this agreement in clear and explicit terms, the amount so fixed will be treated as the true damages, and not as a penalty. *Mott v. Mott*, 11 Barb. 127; *Gammon v. Howe*, 14 Me. 250; *Fisk v. Fowler*, 10 Cal. 512; *Leland v. Stone*, 10 Mass. 459; *Westerman v. Means*, 2 Penn. St. 97; *Springdale Ass. v. Smith*, 24 Ill. 480; *Hardee v. Howard*, 33 Ga. 533; *Leggett v. Mut. Ins. Co.*, 53 N. Y. 394; *Slosson v. Readle*, 7 John. 72; *Farrant v. Olmins*, 3 B. & Ald. 692; *O'Donnell v. Rosenberg*, 11 Abb. N. S., N. Y. 59; *Pettis v. Bloomer*, 21 How. Pr. N. Y. 317; *Brahan v. Pope*, 1 Stew. Ala. 135; *Brooks v. Hubbard*, 3 Conn. 58; *Tingley v. Cutler*, 7 Conn. 291.

But if the agreement be unconscionable, the court will not be bound by its terms, as the rule of damages. *Cutler v. Howe*, 8 Mass. 257; *Baxter v. Wales*, 12 Mass. 365; 53 N. Y. 894.

See also the following cases:

*Ponsonby v. Adams*, 6 Bro. Parl. Cas. 418; *Harrison v. Wright*, 13 East, 343; *Rolfe v. Peterson*, 6 Bro. Parl. Cas. 470; *Love v. Peers*, 4 Burr. 2229; *Milbeam v. Ashton*, 1 Camp. N. P. R. 78; *Burton v. Glover*, 1 Holt's N. P. R. 43.

terms, the correctness of which cannot be entirely admitted. It would exclude an application of the money made by the creditor himself, with the assent of the debtor to the simple contract debt; for, in such case, it would not appear that the debtor had "expressly directed" the application.

Thus, among the accounts exhibited at the trial, is a receipt for the whole sum due for extra work performed under a verbal contract. It was not proved that the application of this money to the discharge of the verbal contract was "expressly directed." Yet no person will say that the creditor was at liberty to controvert this application, or to change it.

A person owing money under distinct contracts has undoubtedly a right to apply his payments to whichever debt he may choose; and, although prudence might suggest an express direction of the application of his payments at the time of their being made; yet there may be cases in which this power would be completely exercised without any express direction given at the time. A direction may be evidenced by circumstances as well as by words. A payment may be attended by circumstances which demonstrate its application as completely as words could demonstrate it. 21\*] A positive refusal to pay one \*debt, and an acknowledgment of another, with a delivery of the sum due upon it would, we think, be such a circumstance. The inquiry, then, in this case, will be, whether the payments made by the plaintiff, to the defendants in error, were accompanied with circumstances which amount to an exercise of his power to apply them.

A circumstance of no light import was given in evidence by the creditor himself. It was that, at the time of discharging the account for the extra work, the debtor confessed "that he had retained in his hands \$1,000, as the forfeiture under the original contract for not finishing the houses in the time stipulated by contract, and that he would hold it, unless compelled by law to pay it." This \$1,000 was the penalty stipulated in the agreement under seal; and when all the residue of the money was paid, the inference is very strong that this sum was reserved out of the money stipulated by the same agreement, and that the payments were made in discharge of the sums acknowledged to be due for other work.

The final payment was made by Tayloe, through the hands of a third person. His original purpose seems to have been, to insist on a receipt in full before he would pay the sum, which remained due, independent of the sum in contest. But on a representation of the peculiar pressure under which the Sandifords labored, they having a note in bank, which had become due, he agreed to pay the whole money due, under all the contracts, except the sum of \$1,000 which he claimed a right to retain, 22\*] \*under the stipulation of the sealed instrument. There existed no objection to the payment of the money due, under the simple contract. The whole objection was to the payment of that under the sealed instrument, out of which he claimed a right to deduct \$1,000, on account of a failure in the performance of that contract. Under these circumstances, we think that the money retained must be consid-

ered as reserved out of the sum due on that contract, and that the simple contract was discharged.

The court erred, then, in this direction to the jury, and the judgment must be reversed and the cause remanded for a new trial.

**CERTIFICATE.**—This cause came on to be heard on the transcript of the record of the Circuit Court for the District of Columbia, in the county of Washington, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the said Circuit Court erred in instructing the jury, "that it was competent to the plaintiff to recover the said \$1,000 in this action, unless they should be satisfied by the evidence, that the defendant, at the time of paying the money, had expressly directed the same, or a sufficient part thereof, to be applied to the extinguishment of the \$1,500, due on simple contract."

It is therefore adjudged and ordered that the judgment of the said Circuit Court, in this case be, and the same is hereby reversed and annulled, and it is further ordered, that the said cause be remanded to the said Circuit Court with directions to issue a *venire facias de novo*.

Cited—5 Pet. 310; 1 Wood. 304; Deady, 80; 1 Paine, 345; 1 Bond, 325.

[\*LOCAL LAW.]

[\*23

#### TAYLOR'S LESSEE v. MYERS.

The owner of a survey made in conformity with his entry, and not interfering with any other person's right, may abandon his survey after it has been recorded.

The proviso in the act of March 2, 1807, c. 76, s. 1, which annuls all locations made on lands previously surveyed, applies to subsisting surveys, to those in which an interest is claimed; not to those which have been abandoned, and in which no person has an interest.

THIS cause was argued at the last term, by Mr. Doddridge and Mr. Scott for the plaintiff in error, and by Mr. Brush for the defendant.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

This case comes on upon two questions, certified by the Circuit Court for the District of Ohio, in which the judges of that court were divided in opinion. The following is stated as the case on which the question arose:

"The plaintiff's claim is founded on an entry dated the 17th of February, 1817, surveyed the 19th of February, 1817, and on a patent founded thereon, dated the 18th of July, 1818, covering the premises in question.

"The defendant showed that the plaintiff, on the 27th of February, 1797, made an entry on the premises in question on another warrant, surveyed the \*same the 15th of [24 April, 1797, and recorded the plat on the 20th of June of the same year.

"That before making the entry on which his patent is founded, he had withdrawn his said first entry and survey, by a marginal note on the record thereof, made on the surveyor's



book (if a survey so circumstanced could be so withdrawn), and located the warrant elsewhere.

"The parties further agreed, that such withdrawals were customary ever since the year 1799."

The questions are:

1. Can the owner of a survey, made in conformity with his entry, and not interfering with any other person's right, abandon his survey after it has been recorded?

2. Can the defendant, upon these facts, protect himself, at law, under the act of Congress, passed on the 2nd of March, 1807, entitled, "An act to extend the time for locating Virginia military warrants, for returning surveys thereon to the office of the secretary of the department of war, and appropriating lands, for the use of schools in the Virginia military reservation, in lieu of those heretofore appropriated;" and the several subsequent acts on the same subject?

The military warrants, to which these questions refer, originate in the land law of Virginia. The question, whether a warrant completely executed by survey, can be withdrawn and so revived by the withdrawal as to be located in another place, has never, so far as is known, been decided in the courts of that state. In **25\*** Kentucky, where the same law governs, it has been recently determined, that a warrant once carried into survey with the consent of the owner, cannot be re-entered and surveyed in any other place. In Ohio, it is not understood that the question has been decided.

The first question, however, does not involve the right of the owner of a warrant, which has been surveyed, to enter and survey it elsewhere; but his right to abandon it entirely.

It draws into doubt the right of an individual, to refuse to consummate a title once begun.

In this respect no coercive principle is to be found in the act. An entry is forfeited, if not surveyed within a limited time. A survey is forfeited if not returned to the land-office by a specified time. In these cases, the right of abandonment is recognized. An individual may abandon his survey, by not returning it to the land-office within the time prescribed by law. Why may he not abandon it by any other unequivocal act? This is not prescribed as a single mode by which a right is to be exercised; but is annexed as a penalty for not proceeding to complete a title. The legislature determined, that no man should be allowed to lock up land from others, without such an appropriation as would subject it to the common burdens of society. He was at liberty to perfect his title, or to lose it; but was required to do the one or the other.

It seems to be an ingredient in the character of property, that a person who has made some advances towards acquiring it, may relinquish it, provided the rights of others be not affected **26\*** by such relinquishment. \*This general principle derives great strength from usage which has prevailed among these military surveys. The case states, that it has been customary, ever since the year 1799, to withdraw surveys after they have been recorded. The place surveyed has, of course, been considered as having again become vacant, and has been appropriated by other warrants, which have

been surveyed and carried into grant. It would be a serious mischief, the extent of which cannot be calculated, to declare these grants void. No subject requires to be treated with more delicacy than the land titles of a country, where a law has been explained by usage. Upon the general principle, which has been stated, and upon the custom of the country in this respect, the court is of opinion, that the owner of a survey, under the circumstances stated in the first question, may abandon it; but by doing so he will not cancel the rights of others.

If the plaintiff was at liberty to withdraw his survey, the defendant could not protect himself, under the act of Congress, to which the second question refers. The proviso of that act, which annuls all locations made on lands previously surveyed, applies to subsisting surveys, to those in which an interest is claimed; not to those which have been abandoned, and in which no person has an interest. A certificate is to be given in conformity with these principles.

CERTIFICATE.—This cause came on to be heard on the facts agreed by the parties, and on the question on which the judges of the Circuit Court were \*divided, and was [**\*27** argued by counsel; on consideration whereof this court doth order, that it be certified to the Circuit Court of the United States for the District of Ohio:

1. That the owner of a survey, made in conformity with his entry, and not interfering with any other person's right, may abandon his survey after it has been recorded.

2. That the defendant, on the facts stated in the case, cannot protect himself at law, under the act of Congress, passed the 2d of March, 1807, entitled, "An act to extend the time for locating Virginia military warrants, for returning surveys thereon to the office of the secretary of the department of war, and appropriating lands for the use of schools in the Virginia military reservation, in lieu of those heretofore appropriated," and the several subsequent acts on the same subject.

Cited—1 Pet. 631, 637; 4 Pet. 337; 6 Pet. 678; 7 How. 264, 269; 1 McLean, 34.

#### [COMMON LAW.]

#### GREEN v. WATKINS.

In a writ of right, the tenant cannot give in evidence the title of a third person, with which he has no privity, unless it be for the purpose of disproving the demandant's seisin.

Therefore, where the demandant proves an actual seisin, by a *pedis positio*, the tenant cannot be permitted to prove a superior outstanding title since it does not disprove the demandant's seisin.

But where the demandant relies for proof of seisin, solely upon a constructive \*actual [**\*28** seisin, in virtue of a patent from the state, of vacant lands, the tenant may show that the land has been previously granted by the state, for that divests the title of the state, and disproves the demandant's constructive seisin.

A writ of right brings into controversy only the titles of the parties to the suit, and is a comparison of those titles; and either party may therefore prove any fact which defeats the title of the other,

Whcat. 7.

or shows it never had a legal existence, or has been parted with.

The case of *Green v. Litter*, 8 Cranch, 229, commented on, and explained.

THIS cause was argued by *Mr. Montgomery* for the plaintiff in error, and by *Mr. B. Hardin* for the defendant.

*Mr. Justice Story* delivered the opinion of the court:

The record in this case presents a great variety of facts, out of which several important questions have arisen; but as the merits of the cause may, in the opinion of the court, be completely disposed of by the decision of a single point, the facts which illustrate that point will alone be mentioned.

This is a writ of right, originally brought by the plaintiff in error, against the defendant in error, to recover a certain tract of land in Kentucky, described in the writ. Issue being joined on the mere right between the parties, the demandant, to sustain his suit, gave in evidence a patent of the land in question, granted to him by the commonwealth of Virginia, and dated the 28th day of January, 1784, and offered proof of the boundary. But he offered no proof, other than his patent, that he was ever seized of the land in question. According [\*29\*] to the decision of this court, in *Green v. Litter* (8 Cranch, 229), a patent of vacant lands of the state conveys to the grantee a constructive actual seisin, sufficient to maintain a writ of right; and therefore the demandant in this case entitled himself *prima facie*, upon this evidence, to a recovery. To rebut this conclusion, the tenants offered in evidence, as well for the purpose of proving title in themselves, as to show that the demandant was never seized of the premises, certain patents from the commonwealth of Virginia, which included the premises, to wit, a patent to John Lewis and Richard May, dated the first of June, 1782; a patent to Edmund Eggleston, dated the same day and year; and a patent to John Gratton, dated the same day and year; and a patent to Isham Watkins of the same date; under which patents the tenants endeavored to derive by mesne conveyances a good title to themselves in severalty. To the regularity of the title of the tenants so derived, the demandant took several objections, which were overruled by the court, and the conveyances were admitted in evidence; and if, in point of law, the patents so offered in evidence by the tenants were admissible, for the purpose of showing that the demandant never had any constructive actual seisin in the premises, which was the only seisin on which he relied, the regularity of these mesne conveyances to the tenant becomes wholly immaterial, since, if these patents were still outstanding in strangers, they would, if admissible, all establish the same defect of seisin in the demandant. The question, then, which meets us at the threshold of this cause [\*30\*] is, whether it be competent for the tenants, in a writ of right, where the demandant shows no seisin by a *pedis positio*, but relies wholly on a constructive actual seisin, in virtue of a patent of the land, as vacant land, to disprove that constructive seisin, by showing that the state had previously granted the same land to other persons, with whom the tenants claim

no privity. In other words, whether the tenants can set up title and seisin in a stranger, to disprove the seisin of the demandant; and, upon the fullest consideration, we are all of opinion that they may. The reasoning on which our opinion is founded, is this: The mise joined in a writ of right, necessarily involves the titles of both parties to the suit, and institutes a comparison between them. It is consequently the right of each party to give any fact in evidence which destroys the title of the other; for the question in controversy is, which hath the better mere right to hold the demanded premises. It has been already decided by this court, and is indeed among the best established doctrines of the common law, that seisin in deed either by possession of the land, and perception of profits, or by construction of law, is indispensable to enable the demandant to maintain his suit. The tenant may therefore show, in his defense, that the demandant had no such actual seisin; for the seisin of the freehold by the tenant, which is admitted by the bringing of the suit against him, is a sufficient title for the tenant, until the demandant can show a better title. The tenant may thus defeat the demandant, by proving that he never had any such seisin in deed, or if he once had it, that he has parted with his whole estate, by [\*31] a conveyance competent to convey, and actually conveying it.

To apply this doctrine to the present case. The demandant here relies, not on a seisin in deed, by a *pedis positio*, but on a seisin in deed by construction of law, in virtue of his patent. If the land included in the grant belonged, at the time of the conveyance, to the state, and was vacant, upon the principles already asserted by this court, it conveyed, by operation of law, a seisin in deed to the demandant. But if the state had already granted the land by a prior patent, it was already, upon the same principles, in the adverse seisin of another grantee, and, consequently, the patent to the demandant could not convey either title or seisin. It is, therefore, manifest, that for this purpose, to disprove the seisin of the demandant, the tenants in this case were entitled to introduce the four patents above stated (even if they failed to establish a privity of estate in themselves), since these patents were all prior to that of the demandant, included the land, and, if admitted, would show that the seisin in deed, by mere construction of law upon the grant of his patent, never had a real existence.

It has been supposed, however, at the bar, that the case of *Green v. Litter* establishes a different doctrine on this point. In our opinion, that case does not justify any such conclusion; and certainly was not understood by the court to require it. It will be recollected, that the case of *Green v. Litter* came before this court upon a division of opinion of the judges of the Circuit Court upon certain questions of law, stated in the record. To those [\*32] questions, in the form in which they were stated, and to those questions only, could the opinion of this court properly extend. In answer to the fifth question, which involved the inquiry, whether actual seisin, or, as it is commonly expressed, seisin in deed, is necessary to maintain a writ of right, and whether a patent from the state, of its vacant lands, conferred,



by construction of law, a seisin in deed to the grantee, this court expressed an unhesitating opinion in the affirmative on both points. It follows, therefore, by necessary inference from this doctrine, that the tenant may disprove the demandant's seisin in deed by any evidence competent for this purpose; and if he succeeds in establishing the fact, the demandant must fail in his suit. That the proof of a prior patent of the same lands to another person would be sufficient for this purpose, in a case where the demandant relied exclusively upon a constructive seisin in deed, in virtue of the grant of his patent, has been already asserted. The eighth question propounded to the court, in *Green v. Lister*, is that, however, upon which the difficulty at the bar has arisen. It is in these words: "Can the defendant defend himself by an older and better existing title than the demandants in a third person?" Now, it is material to consider, that this question does not purport to inquire whether the tenant may disprove the defendant's seisin in a writ of right; nor does it purport to inquire whether the tenant may not show that the demandant has no title, or a title defective in point of legal operation. It supposes that the demandant has **33\*** a title *per se*, sufficient for a recovery, and then asks if a better title may be shown in a third person to defeat such recovery. The answer of the court is in the following words: "We are of opinion that a better subsisting adverse title in a third person is no defense in a writ of right. That writ brings into controversy only the mere rights of the parties to the suit." It is most manifest, that in this answer the court proceed upon the supposition that the demandant has, *prima facie*, a good title, upon which he may maintain his suit; and that he has established a seisin sufficient, in point of law, to entitle him to a recovery. And the point then is, whether a superior adverse title and seisin in a stranger can be given in evidence to dispute such recovery. The very reason assigned against the admission of such evidence shows the understanding of the court to be precisely what we now assert. It cannot be admitted, because a writ of right does not bring into controversy the right of the demandant as against all the world, but the mere right of the parties to the suit. But it does bring into controversy the mere right between these parties; and if so, it, by consequence, authorizes either party to establish, by evidence, that the other has no right whatsoever in the demanded premises, or that his mere right is inferior to that set up against him.

If, in the case at bar, the demandant had established an actual seisin by occupation of the land, and taking the esplees, the case would then have presented precisely the point which was understood to be presented in *Green v. Lister*; and from the opinion **34\*** given in that case, on that point, there is not the slightest inclination in this court to depart. We think that the decision in the present case may well be made upon the principles which have been already expounded, without, in any degree, breaking in upon the doctrines of that case.

If we are right in this view of the subject, it is unnecessary to enter into a minute examination of the points made in the court below,

since the evidence which was objected to, was, under the circumstances of the case, clearly admissible, for the purpose of disproving the seisin of the demandant.

As to the instructions prayed for by the demandant, in the close of the evidence, and refused by the court and as to the instructions actually given by the court to the jury, it does seem necessary to pass them in minute review. Several of them turn altogether upon the deduction of title by the tenant, from the original patentee, whose patents they set up in defense. And as to the others, they may be disposed of by the single remark, that no error has been shown by them, in the argument here, and no error is perceived by the court.

*Judgment affirmed.*

Cited—3 Pet. 133, 172; 1 McLean, 482.

[\*COMMON LAW.]

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## PAGE'S ADMINISTRATOR'S

v.

## THE BANK OF ALEXANDRIA.

A bill, or note, is *prima facie* evidence, under a count for money had and received, against the drawer or indorser.

But the presumption, that the contents of the bill or note have been received by the party sued, and for the use of the plaintiff, may be rebutted by circumstances; and a recovery cannot be had, in such a case, where it is proved that the money was actually received by another party.

**E**RROR to the Circuit Court of the District of Columbia, for the County of Alexandria. This was an action of *assumpsit*, brought by the defendants in error, the Bank of Alexandria, against the plaintiffs in error, the administrators of William Byrd Page, deceased. The declaration contained two counts. The first was on a promissory note, which was set forth, as made by William Hodgson, and payable on demand to the intestate, Page, who indorsed it to the Bank of Alexandria, where it was discounted, and the money paid to Hodgson. In support of this count, a note was given in evidence, drawn by Hodgson, in favor of, and indorsed by Page, payable fifty-four days after date.

The other counts were for money lent and advanced by the plaintiffs below to the intestate, Page, and for money had and received by him for their use. Evidence was also given to show that the bank had **36\*** used due diligence in demanding payment of the maker, and in giving notice of non-payment to the indorser; and that Page, in his life-time, frequently promised the bank payment of the note, after it became due. Judgment was given for the plaintiffs below, on a demurrer to the evidence, and the cause was brought to this court by writ of error.

This cause was argued by *Mr. Swann* and *Wheat*. 7.

*Mr. Lee*<sup>1</sup> for the plaintiffs in error, and by *Mr. Taylor*<sup>2</sup> for the defendants in error.

*Mr. Justice LIVINGSTON* delivered the opinion of the court, and after stating the case, proceeded as follows:

Whether due diligence were used by the holder of the note, is immaterial now to inquire, as this court is of the opinion, that a note payable any number of days after date, could not be applied to a count describing it as one payable on demand.

The only remaining question is, whether this note were sufficient proof of the count for money lent and advanced, and for money had and received. There are certainly cases in which a promissory note or an indorsement of **37\*** such note, may be offered in evidence, against the maker or indorser, under a count of this nature, and if unconnected with other circumstances, may be sufficient proof, in itself to charge the defendant. This proceeds on the ground that such note warrants a fair presumption or inference that the maker or indorser has received the contents of such note. But the court is not satisfied that, in this case, the mere production of this note was sufficient proof of Page's having borrowed money of the bank, or of his having received moneys for their use. Although a note or an indorsement be *prima facie* evidence of a receipt of money from the holders, by the maker, or indorser, yet, when all the other testimony in the cause produced by the plaintiffs themselves, shows unequivocally that the money for which the note was made was paid, not to the indorser, but to the maker himself, and for his sole use, the presumption arising from the mere act of indorsement is destroyed, and the party, in such case, ought not to be permitted to abandon his count on the written contract of the party, and apply it to the general money counts. It is admitted or proved, that this was a note made and indorsed for the accommodation of Hodgson, and that this fact was known to the directors of the bank, who received and discounted it as such, and for his sole use, and that he, and not Page, received the avails thereof. What pretense, then, is there, that this money was lent to Page, or that he received it for the use of the bank?

There was also proof in the cause that "Page, in his life-time, frequently promised the bank payment of the said note, after it be **38\*** came due. This promise \*must be regarded as applying exclusively to the note which was offered in evidence, and was payable in fifty-four days after date; and if that note had been declared on, its influence on the cause would deserve serious consideration; but it cannot be used in support of the other count, for the testimony, in terms, confines this promise to payment of the note, and says not a word of his undertaking to repay the money which the bank had loaned to him or which he had received for their use.

The opinion of the court, then, is, that the

bank can only recover from the administrators of Page, if at all, on his indorsement; but that, having set forth the note incorrectly, and there not being sufficient evidence to support the second count, the present action cannot be sustained. The judgment of the Circuit Court is therefore reversed, and judgment is to be entered for the defendants below.

Cited—6 How. 37; 2 Wood. & M. 78; 4 Cranch, C. 12; 2 McLean, 237.

#### [CONSTITUTIONAL LAW.]

#### *Ex-parte* KEARNEY.

This court has authority to issue a *habeas corpus*, where a person is imprisoned under the warrant or order of any other court of the United States.

But this court has no appellate jurisdiction in criminal cases, confided to it by the laws of the United States, and cannot revise the judgments of the circuit courts, by writ of error, in any case where a party has been convicted of a public offense.

\*Hence the court will not grant a *habeas* [**\*39** *corpus* where a party has been committed for a contempt adjudged by a court of competent jurisdiction.

In such a case, this court will not inquire into the sufficiency of the cause of commitment.

The case of Crosby, Lord Mayor of London (3 Wils. 188), commented on, and its authority confirmed.

**MR. JONES** moved for a *habeas corpus* to bring up the body of John T. Kearney, now in jail, in the custody of the marshal, under a commitment of the Circuit Court for the District of Columbia, for an alleged contempt. The petition stated, that on the trial of an indictment in that court, the petitioner was examined as a witness, and refused to answer a certain question which was put to him, because he conceived it tended materially to implicate him, and to criminate him as a *particeps criminis*. The objection was overruled by the court, and he having persisted in refusing to answer the question, was committed to jail for the supposed contempt; and for no other cause.

*Mr. Jones*, for the petitioner, now argued, 1. That this court has power to issue the writ of *habeas corpus* in every case where the personal liberty of the citizen is restrained under the judicial authority of the Union. The jurisdiction is settled by a uniform series of decisions. It had been exercised in a case of treason;<sup>3</sup> in a case where the warrant of commitment was defective, in not showing a good cause certain, on \*oath or affirmation;<sup>4</sup> and, at last the [**\*40** case of *Bollman and Swartwout*<sup>5</sup> settled the power of the court to be universal, and co-extensive with the general judicial power of the Union. 2. He insisted that a fit case was made out to justify the exercise of the jurisdiction upon the present application. The jurisdiction of this court cannot depend upon the nature of the commitment by the other court. The writ of

1.—They cited *Sheehy v. Mandeville*, 7 Cranch, 209; 1 H. Bl. 602; *French's Adm. v. the Bank of Alex.*, 4 Cranch, 141; 2 H. Bl. 609; *Macky v. Davis*, 2 Wash. Rep. 219; *Goodhall v. Stewart*, 2 Hen. & Munf. 105.

2.—He cited *Tatlock v. Harris*, 3 T. R. 174; 3 Wheat. 7.

*Burr*. 1516; 2 Wash. Rep. 233, 265; 6 Munf. 392; 5 Cranch, 144; 5 Cranch, 49; 1 Cranch, 290.

3.—*The United States v. Hamilton*, 3 Dall. 17.

4.—*Ex-parte Burford*, 3 Cranch, 448.

5.—4 Cranch, 75.



*habeas corpus* is a writ of right, and the nature and grounds of the commitment are to be looked into on the return. This court must have power to issue the writ where an inferior court commit even for a contempt; because if the process of contempt be a branch of criminal judicature, considered as a punishment for an offense, this court has authority to control all inferior courts and magistrates. In England, the court of common pleas, although a tribunal of original and civil jurisdiction only, has, from the earliest times, exercised the authority of issuing the writ of *habeas corpus* to inquire into the cause of commitments by other jurisdictions.<sup>1</sup>

Mr. Swann (*District-Attorney*), contra, admitted that this court had a general power of issuing the writ of *habeas corpus ad subjiciendum* to all the other courts and officers of the United States, but insisted that this was not a case in which the court could exercise the authority. Because the Circuit Court for the District of Columbia was an inferior tribunal, it did not therefore follow that an appeal lies to this court from its judgment in criminal cases. This court has no appellate jurisdiction in criminal cases. It can only revise the decisions of the Circuit Court in such cases where there is a certificate of a division of opinion of the judges below. Here there was no doubt the court had jurisdiction of the case in which the party was committed for refusing to answer a question put to him, and which the court had determined he was bound to answer. This court cannot revise the principal case by an appellate process, neither can it revise that which has incidentally arisen out of it. Every court of justice must have a discretionary power of punishing contempts; and if an appeal were allowed upon every interlocutory judgment of this sort, there would be the greatest possible embarrassment and confusion.

Mr. Justice STORY delivered the opinion of the court, and after stating the case, proceeded as follows :

Upon the argument of this motion, two questions have been made: First, whether this court has authority to issue a *habeas corpus*, where a person is in jail, under the warrant or order of any other court of the United States; secondly, if it have, whether, upon the facts stated, a fit case is made out to justify the exercise of such an authority.

**42\*** As to the first question, it is unnecessary to say more than that the point has already passed in *rem judicatam* in this court. In the case of *Bollman and Swartwout* (4 Cranch, 75) it was expressly decided, upon full argument, that this court possessed such an authority, and the question has ever since been considered at rest.

The second point is of much more importance. It is to be considered, that this court has no appellate jurisdiction confided to it in criminal cases, by the laws of the United States. It cannot entertain a writ of error, to revise the

judgment of the Circuit Court, in any case where a party has been convicted of a public offense. And undoubtedly the denial of this authority proceeded upon great principles of public policy and convenience. If every party had a right to bring before this court every case, in which judgment had passed against him, for a crime or misdemeanor or felony, the course of justice might be materially delayed and obstructed, and, in some cases, totally frustrated. If, then, this court cannot directly revise a judgment of the Circuit Court in a criminal case, what reason is there to suppose that it was intended to vest it with the authority to do it indirectly?

It is also to be observed, that there is no question here, but that this commitment was made by a court of competent jurisdiction, and in the exercise of an unquestionable authority. The only objection is, not that the court acted beyond its jurisdiction, but that it erred in its judgment of the law applicable to the case. If, then, we are to give any relief in this case, it is by a revision of the opinion of the court, **43** given in the course of a criminal trial, and thus asserting a right to control its proceedings, and take from them the conclusive effect which the law intended to give them. If this were an application for a *habeas corpus*, after judgment on an indictment for an offense within the jurisdiction of the Circuit Court, it could hardly be maintained that this court could revise such a judgment, or the proceedings which led to it, or set it aside, and discharge the prisoner. There is, in principle, no distinction between that case and the present; for when a court commits a party for a contempt, their adjudication is a conviction, and their commitment, in consequence, is execution; and so the law was settled upon full deliberation, in the case of *Brass Crosby*, Lord Mayor of London (3 Wilson, 188).

Indeed, in that case the same point was before the court as in this. It was an application to the Court of Common Pleas for a *habeas corpus* to bring up the body of the Lord Mayor, who was committed for contempt by the House of Commons. The *habeas corpus* was granted, and upon the return, the causes of contempt for which the party was committed, were set forth. It was argued, that the House of Commons had no authority to commit for a contempt; and if they had, that they had not used it rightly and properly, and that the causes assigned were insufficient. But the whole court were of opinion that the House of Commons had a right to commit for a contempt, and that the court could not revise its adjudication. Lord Chief Justice De Grey, on that occasion said: **44** "When the House of Commons adjudged anything to be a contempt, or a breach of privilege, their adjudication is a conviction, and their commitment, in consequence, is execution; and no court can discharge, on bail, a person that is in execution by the judgment of any other court. The House of Commons, therefore, having an authority to commit, and that commitment being an execution, what can this court do? It can do nothing, when a person is in execution by the judgment of a court having a competent jurisdiction. In such a case this court is not a court of appeal." Again: "The

Wheat. 7.

1.—Wood's case, 3 Wils. 173; Scroggs v. Coleshill, Dyer, 175; 4 Inst. 290; Bushell's Case, Sir T. Jones's Rep. 12; 2 W. Bl. 745; 2 Hale's P. C. 144; Moor, 838; 1 Hale P. C. 399, 406, 446.

courts of K. B. or C. B. never discharged any person committed for a contempt, in not answering in the Court of Chancery, if the return was for a contempt. If the admiralty commits for a contempt, or one be taken up on *excommunicato capiendo*, this court never discharges the persons committed." Mr. Justice Blackstone said. "All courts, by which I mean to include the two Houses of Parliament, and the courts of Westminster Hall, can have no control in matters of contempt. The sole adjudication of contempt, and the punishment thereof, belongs exclusively, and without interfering, to each respective court. Infinite confusion and disorder would follow if courts could, by writs of *habeas corpus*, examine and determine the contempt of others."

So that it is most manifest from the whole reasoning of the court in this case, that a writ of *habeas corpus* was not deemed a proper remedy, where a party was committed for a contempt by a court of competent jurisdiction; \*and that, if granted, the court could not inquire into the sufficiency of the cause of commitment. If, therefore, we were to grant the writ in this case, it would be applying it in a manner not justified by principle or usage; and we should be bound to remand the party, unless we were prepared to abandon the whole doctrine, so reasonable, just, and convenient, which has hitherto regulated this important subject. We are entirely satisfied to administer the law as we find it, and are all of opinion, that upon the facts of this case, the motion ought to be denied.

The argument of inconvenience has been pressed upon us with great earnestness. But where the law is clear, this argument can be of no avail; and it will probably be found, that there are also serious inconveniences on the other side. Wherever power is lodged, it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the legislature, and is not to be devised by courts of justice. This argument was also used in the case already cited, and the answer of the court to it is so satisfactory that it would be useless to attempt any farther refutation.

Upon the whole, it is the opinion of the court that the motion be overruled.

*Writ denied.*<sup>1</sup>

Cited—3 Pet. 208; 5 Pet. 210; 7 Pet. 572, 581; 14 Pet. 600, 603, 604, 623, 626, 628; 5 How. 190; 14 How. 119, 129, 130, 132; 18 How. 317; 18 Wall. 185, 187, 206; 20 Wall. 392; 3 Otto, 23; 10 Otto, 23, 283; 12 Otto, 122; 1 Wood. & M. 440; 4 Biss. 499; 2 Sawy. 409; 7 Blatchf. 25; 8 Blatchf. 94; 2 Cranch, C. C. 248, 392.

1.—*Vide Ante*, Vol. VI., p. 204, *Anderson v. Dunn*, where it was determined, that an action could not be maintained against the Sergeant-at-Arms of the House of Representatives for imprisoning the plaintiff on a warrant for a contempt adjudged by the House. See also the case of *J. V. N. Yates*, 4 Johns. Rep. 317; *Yates v. Lansing*, 9 Johns. Rep. 395; *Yates v. The People*, 6 Johns. Rep. 337; *Burdett v. Abbott*, 14 East's Rep. 1, S. C.; 5 Dow. Parl. Rep. 165.

Wheat. 7.

[\*CHANCERY.]

[\*46

BAYLEY v. GREENLEAF AND OTHERS.

The vendor of real property, who has not taken a separate security for the purchase money, has a lien, for it, on the land as against the vendee and his heirs.

This lien is defeated by an alienation to a *bona fide* purchaser without notice.

Nor can it be asserted against creditors holding under a *bona fide* conveyance from the vendee.

*Quære*, Whether the lien can be asserted against the assignees of a bankrupt, or other creditors coming in under the purchaser by act of law.

The *dictum* of Sugden in his *Law of Vendors*, 364, examined and questioned.

APPEAL from the Circuit Court for the District of Columbia.

This suit was brought by the appellant in the Circuit Court for the county of Washington, for the purpose of subjecting a tract of land, lying within that county, which was sold by the plaintiff, Bayley, to the defendant, Greenleaf, to the payment of so much of the purchase money as still remains due. It appeared by the proceedings in the cause that in the year 1792 William Bayley purchased from William B. Worman \*the land which is [\*47 the subject of this suit, which he afterwards sold to James Greenleaf, to whom the title was made by Worman. A bond was given by Greenleaf to Bayley for the purchase money, which, in March, 1796, was surrendered to Greenleaf on his accepting bills drawn in favor of Clement Biddle for its amount. Some of these bills were alleged to be unpaid, and were produced by the plaintiffs.

On the 30th day of September, 1796, James Greenleaf, being then greatly indebted, conveyed sundry estates, and among others, the land in controversy, to George Simpson, in trust for the security of Edward Fox, who had entered into engagements for the said Greenleaf, to a very large amount. The deed was also made to secure the said Fox for any further advances he might make to, or engagements he might enter into, on account of the said Greenleaf.

On the 23d of March, 1797, George Simpson conveyed this land to the defendants, Pratt, Francis and others, as trustees for the uses and purposes mentioned in the deed from Greenleaf to Simpson. On the 26th of June 1797, a

NOTE—Lien for purchase money. The vendor of real estate who has not taken a separate security for the purchase money, has a lien for it on the land, as against the purchaser and his heirs, and privies in estate. This lien is, in some respects, analogous to an equitable mortgage. *Randall v. Jaques*, 4 Quart. Law J. 218; *Chilton v. Braiden*, 2 Black, 458; *Nairn v. Prouse*, 6 Ves. 752, 760; *Hughes v. Kearney*, 1 Sch. and Lefr. 132; *English v. Russell*, *Hempst.* 35; 4 Kent's Comm. 151, 154; *Burgess v. Wheat*, 1 W. Bl. 150; S. C. 1 Eden, 210; *Champion v. Brown*, 6 John. Ch. 402; *Daniels v. Davison*, 16 Ves. 249; S. C. 17 Ves. 433; 1 Fonbl. Eq. B. 1, ch. 3, s. 3, note (c); 2 Madd. Ch. 105, 106; *McLean v. McLelland*, 10 Pet. 625; *Sugden on Vendors*, Vol. III., p. 182; 6 Am. ed. p. 117; *Irvine v. Campbell*, 6 Binn. 118; *Williams v. Price*, 5 Munf. 507; *Stouffers Les. v. Coleman*, 1 Yeates, 393; *White v. Casanave*, 1 Har. & J. 106; *Ridgley v. Curey*, 4 Har. & McH. 167; *Hatcher v. Hatcher*, 1 Rand. 53; *Cox v. Fenwick*, 3 Bibb, 183; *Kennedy v. Woolfolk*, 3 Hayw. 197; *Wragg v. Compt. Gen.* 2 Des. 509; *Reeves v. Kimbal*, 40 N. Y. 299; *Phyfe v. Wardwell*, 5 Paige, 268; 2 Edw. 47; *Crafts v. Aspinwall*, 2 N. Y. 289; *Ross v. Whitson*, 6 Yerg.



general deed was made to the same persons by Robert Morris, John Nicholson, and the said James Greenleaf, conveying to them the property mentioned in the deeds of the 30th of September, 1796, and of the 23d of March, 1797, with an immense mass of other property, for the payment of debts to a very great amount due from the said M. N. and G., which were enumerated in the said deed.

Some doubts having been entertained respecting the recording of these deeds, an attachment was sued out by the trustees against the said Greenleaf, in the county in which the said lands then lay, on which judgment was obtained on the 8th of February, 1798; and on the 28th day of the same month the land was sold under the judgment, purchased in for the trustees, and afterwards conveyed to them to the same uses and trusts as had been expressed in the original conveyance by deed dated in 1803.

In March, 1798, James Greenleaf took the benefit of the insolvent law of the state of Pennsylvania; and in November of the same year, he was also discharged under the insolvent law of the state of Maryland. In November, 1803, he was declared a bankrupt under the laws of the United States. The plaintiff, William Bayley, also became a bankrupt under the laws of the United States in July, 1802.

The trustees alleged they had contracted to sell the land in controversy to James Green-

leaf; but that he had not paid the purchase money, in consequence of which they retained the legal title.

This suit was brought in this year 1812, by William Bayley, and by James S. Morrell, as trustee for the creditors of the said Bayley, and executor of the original assignee of the bankrupt, who is dead.

*Mr. Law* and *Mr. Key*, for the appellants, insisted that they had an equitable, subsisting, unwaived lien upon the land sold to the defendant, Greenleaf, for the amount of the purchase money. The law on the subject has been settled by a long and uniform current of decisions. The lien exists between vendor and vendee, and against subsequent purchasers from the vendee with notice that the money remains unpaid, unless the parties, by some unequivocal act, waive the lien.<sup>1</sup> It may also be asserted against purchasers, coming in by act of law, as assignees of a bankrupt, and against creditors claiming under a conveyance for their benefit; they are considered as volunteers.<sup>2</sup> Nor has the lien, in this case, been waived. Taking a covenant, bond, or note, is no waiver of the lien, if taken as a mode of payment, and not as a distinct security.<sup>3</sup>

1.—Brown v. Gilman, 4 Wheat. Rep. 255, and cases collected in note *a.*; *Ib.* 292, 297.

2.—Sugd. Vend. 364, and the cases there cited; 2 Madd. Ch. 105; Chapman v. Tanner, 1 Vern. 267.

3.—Sugd. Vend. 353; 1 Sch. and Lefr. 105.

50; Outcon v. Mitchell, 4 Bibb. 329; Enbank v. Poston, 5 Mon. 287; Graves v. McCall, 1 Call. Va. 414; Galloway v. Hamilton, 1 Dana. 576; Hundley v. Lyons, 5 Munf. 342; Wynne v. Alston, 1 Dev. Eq. 163; Henderson v. Strong, 1 Bibb. 590; Meek v. Ealy, 2 J. J. Marsh. 330; Voorhies v. Instone, 4 Bibb. 354; Clark v. Hunt, 3 J. J. Marsh. 557; Roberts v. Salisbury, 3 Gill. & J. 425; Blight v. Bank, 6 Mon. 193; Warner v. VanAlstyne, 3 Paige, 513; Pierce v. Gates, 7 Blackf. 162.

The assignee of a bond for the purchase money has a lien where the assignor had. Kennedy v. Collins, 4 Litt. 289; Enbank v. Poston, 5 Mon. 287; Eskridge v. McClure, 2 Yerg. 84; Edwards v. Bohannon, 2 Dana. 99. But the assignee of a promissory note given for purchase money has no lien. Brush v. Kinsley, 14 Ohio. 20; *Contra* White v. Stevor, 10 Ala. 441; Roper v. McCook, 7 Ala. 318; *sed vide* Hall v. Click, 5 Ala. 363.

*Prima facie* the unpaid purchase money is a lien on the land, and the burden of proof is on the vendee to show that the vendor agreed to rest on other security, and to waive the lien, notwithstanding the conveyance recites that the consideration has been paid. The death of the vendee does not alter the claim. Cood v. Pollard, 9 Price, 544; Cood v. Cood, 10 Price, 109; Garson v. Green, 1 John. Ch. 309; Clark v. Hall, 7 Paige, 383; Tierman v. Beam, 1 Ham. R. 465; 2 Wash. R. 142. The taking of the note of the vendee is not a discharge of the claim; and if part of the purchase money be paid the lien is good as to the residue, and the vendee becomes a trustee as to that which is unpaid. Garson v. Green, 1 John. Ch. 308; Hallock v. Smith, 3 Barb. 276; Clark v. Hunt, 3 J. J. Marsh. 553; Fish v. Howland, 1 Paige, 20; Blackburn v. Grayson, 1 Bro. C. C. 420; Johnson v. Thompson, 4 J. J. Marsh. 382; Eskridge v. McClure, 2 Yerg. 85; Cox v. Fenwick, 3 Bibb. 183; White v. Cassanave, 1 Har. & J. 106; Kennedy v. Woolfolk, 3 Hayw. 197; 4 Hen. & Munf. 113; 1 Yeates, 393; Gibbons v. Baddell, 2 Eq. Ca. Ab. 682, n. (b); *Ex-parte* Peake, 1 Madd. 346.

But if security be taken for the purchase money upon the land or in any way, the lien is waived unless there be an express agreement retaining it. So the lien is waived when a note or bond is taken of the vendee for the purchase money, on which a third person is security, or indorser. Parrot v. Sweetland, 3 Myl. & K. 653; Fish v. Howland, 1 Paige, 20; Strider v. King, 3 Cranch, C. C. 67; Brown v. Gilman, 4 Wheat. 255; S. C. 1 Mas. 19.

This lien prevails against subsequent purchasers and incumbrancers, when they advance no new consideration, or had notice of the lien at or before their purchase, but not against *bona fide* purchasers for a valuable consideration, without notice or assignees under an assignment to specific creditors. It is superior to the lien of a prior judgment against the vendee. It exists against assignees by a general assignment, against a claim of dower by the wife of the vendee. Hallock v. Smith, 3 Barb. 267; Fish v. Howland, 1 Paige, 20; Arnold v. Patrick, 6 Paige, 310; Story's Eq. Jur. secs. 1218 to 1233; Champion v. Brown, 6 John. Ch. 398; Schwarz v. Stein, 29 Md. 112; Hagaen v. Cochrane, 51 Ill. 302; S. C. 2 Am. Rep. 303; Cocke v. Bailey, 42 Miss. 81; Green v. Demoss, 10 Humph. Tenn. 371; Lamberton v. Van Voorhies, 15 Hun. 336.

The lien for purchase money is enforceable in equity. The party holding the lien is not bound to exhaust his remedy at law, but may come into equity in the first instance. Bradley v. Bosley, 1 Barb. Ch. R. 152.

Where part of the purchase money is paid in a worthless promissory note or worthless bills of a broken bank, representing them to be good and collectable, the vendor has an equitable lien on the land for the amount thus paid. Shelton v. Tiffins, 6 How. 163; Bradley v. Bosley, 1 Barb. Ch. R. 152.

(See further McKay v. Green, 3 John. Ch. R. 58, as to lien of indorser of note used in payment of purchase money.)

This lien arises whether the estate be conveyed or only contracted to be conveyed, and may be enforced by the vendor's personal representatives, and also in favor of legatees and creditors when the vendor seeks payment out of the personal assets of the vendee. Chapman v. Turner, 1 Vern. 267; Pollexen v. Moore, 3 Atk. 272; Mackreth v. Symons, 15 Ves. 339; Cheesebrough v. Millard, 1 John. Ch. 409; McLearn v. McLellan, 10 Pet. 625; 12 Ad. & Ell. 632; 1 Bro. C. C. 302, 424; 6 Ves. 483; Smith v. Hibbard, 2 Dick. 730; Charles v. Andrews, 9 Mod. 152; Topham v. Constantine, Toml. 135; Evans v. Tweedy, 1 Beav. 55; Winter v. Ld. Anson, 3 Russ. 488.

In some of the states the vendor's lien is not recognized. Bisp. Eq. sec. 353; 1 Lead. Cas. Eq. 4th Am. Ed. 481, *et seq.*

When the vendor of land is unable to make title, the vendee has a lien on it for the purchase money paid by him. Wythors v. Lee, 3 Drew, 396; Rose v.

Wheat. 7.



*Mr. Jones*, contra, contended, that under the circumstances of the present case, the lien could not be asserted against creditors taking a *bona fide* conveyance from the vendee. This is not a case where the party comes in by operation of law. A creditor, who takes a conveyance for the security of his debt, stands in equal equity with one who pays his money, and is equally a purchaser. The *dictum* of Sugden on this subject is not supported by the adjudged cases in England, or in this country. Besides, the alleged debt due from Greenleaf to Bayley never attached any equitable lien to the land; Worman, and not Bayley, standing in the relation of vendor, and the true vendor being satisfied with the purchase money.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court, and after stating the facts, proceeded as follows:

**50\*** In opposition to the claim of the plaintiffs, it is alleged by the defendants, that the debt of Bayley has been discharged. As they have not succeeded in supporting this allegation, it will be necessary to inquire whether, in such a case as this, the plaintiffs can assert a lien on the land sold by Bayley to Greenleaf, for so much of the purchase money as remains due.

It is contended for the defendants, that as the legal title to the estate was never in Bayley, he never had a lien upon it for the purchase money.

Upon this point, some difference of opinion exists in the court; and we pass it over without positively deciding it, for the purpose of inquiring, whether Bayley, supposing him entitled to the same rights as a vendor of the legal title, has now a lien on the estate for the purchase money.

That a vendor, who has taken no other security for the purchase money, retains a lien for it on the land as against the vendee, or his heirs, seems to be well settled by the English decisions. It is equally well settled, that this lien is defeated by an alienation to a purchaser without notice. How far it may be asserted against creditors, seems not so well settled, and constitutes the subject of inquiry in this case.

The lien asserted by the vendor is not disclosed by any information given by a record. In *Chapman v. Tanner* (1 Vern., 267), the Lord Keeper said: "In this case there is a natural equity that the land should stand charged with so much of the purchase money as was not paid, and that without any special agreement for that purpose." In the case cited from 1 Bro. Ch. Ca., 420, the Chancellor says: "A bargain and sale must be for money [\*51 paid, otherwise it is in trust for the bargainor. If an estate is sold, and no part of the money paid, the vendee is a trustee; then if part be paid, it is not the same as to that which is unpaid?"

But whether the lien of the vendor be estab-

Watson, 10 H. L. Cas. 672; *Tompkins v. Seely*, 29 Barb. 212; *Lacon v. Mertins*, 3 Atk. 1; *Oxenham v. Esdalle*, 3 You. & Jerv. 493; 3 You. & Jerv. 262; *Griffith v. Depew*, 3 Marsh. 179; *Gibert v. Peteler*, 38 N. Y. 165; 6 Trans. App. N. Y. 329; S. C. 38 Barb. 488.

Where the deed shows on its face that the purchase money is yet to be paid, any purchaser of the land from the grantee is chargeable with notice of the vendor's lien to which he may be entitled for purchase money remaining unpaid. *Cordova v. Hood*, 17 Wall. 1; *Elliott v. Edwards*, 3 Bos. & Pull. 181.

Whether the vendor has waived his lien is a question of intention. Taking a note with security, for purchase money, raises a presumption of a waiver. But if the attendant circumstances, or positive testimony of the vendor, shows that such was not his intent, the presumption is rebutted. *Cordova v. Wood*, 17 Wall. 1; *Coit v. Fongera*, 36 Barb. 195.

In Texas the reservation of a vendor's lien in the conveyance is equivalent to a mortgage for the purchase money taken contemporaneously with the deed. *King v. Young Men's Association*, 1 Wood, 386.

A bill to enforce a vendor's lien for purchase money can only be filed after judgment at law for the amount due, or when the bill avers such facts as show that full and adequate remedy at law cannot be had. *Ford v. Smith*, 1 McArthur, 592.

A purchaser or one claiming under him cannot defend the vendor's suit to enforce a lien for purchase money, by impeaching the vendor's title to the land, unless fraud or eviction, actual or constructive, can be shown. Adverse title in a third person cannot be alleged in defense. For indemnity against such title the purchaser, and those claiming under him, must rely upon the covenants of title in the deed. If there are no such covenants, the purchaser, in the absence of fraud, can have no redress. *Peters v. Bowman*, 8 Otto, 56.

This lien may be waived by parol agreement (3 Sug on Vend. 122; 1 Sm. & Stu. 438, 445; *Ex-parte Parkes*, 1 Glyn. & Jan. 228); or, by taking a distinct and independent security for the purchase money. *Gaylord v. Knapp*, 15 Hun. 87; 3 Sugd. 123; 6 Ves. 483; 15 Ves. 348, 349; *Taylor v. Adams*, Gilmer, 329; *Brown v. Gilmer*, 4 Wheat. 255, 291; *Cox v. Fenwick*, 3 Bibb, 183; *Frances v. Huzlerig*, Hardin, 488; *Hatcher v. Hatcher*, 1 Rand. 53; *Cole v. Scott*, 2 Wash. 142; *Wilson v. Graham*, 5 Munf. 297; 9 Cow. 316; *Brown v. Gilman*, 1 John. Ch. 308; *Hare v. Van Deusen*, 32 Wheat. 7.

Barb. 92; *Garson v. Green*, 1 John. Ch. 308; *Lupin v. Marie*, 6 Wend. 77; *Conklin v. Merwin*, 12 N. Y. Week. Dig. 5; *Hallock v. Smith*, 3 Barb. 267; *Capper v. Shottiswoode*, Tam. 21. But see 15 Ves. 341; *Cowell v. Simpson*, 16 Ves. 278, 280.

Taking a bond or note for the purchase money, or the mere personal security of the purchaser only, no discharge of the lien. *Fish v. Howland*, 1 Paige, 20; *Warner v. VanAlstyne*, 3 Paige, 513; *Shirley v. Congress*, Ref. 2 Edw. 505; *Vail v. Foster*, 4 N. Y. 312; *Warner v. Fenn*, 23 Barb. 333; *Blackburn v. Gryson*, 1 Cox. 90; 1 Bro. C. C. 420; *Hatcher v. Hatcher*, 1 Rand. 53; *Tardiff v. Scrugham*, cited 1 Bro. C. C. 423; 15 Ves. 329, 336, 337; 1 John. Ch. 309; *Mears v. Kearney*, 1 Abb. N. C. N. Y. 303; 6 Ves. 752; *Hughes v. Kearney*, 1 Scho. & Lef. 132, 136; *Lynn v. Charters*, 2 Kee. 521; *Grant v. Shills*, 2 Ves. & Bea. 306; contra, *Blight v. Banks*, 6 Mon. 199; *Ducker v. Gray*, 3 J. J. Marsh. 163; not even if note be negotiated. *Ex-parte Loaring*, 2 Rose, 79; contra *Hallock v. Smith*, 3 Barb. 267. But where a receipt was indorsed on the deed for the purchase money, and a bond taken, the lien was held discharged. *Fawell v. Heelis*, Amb. 724; 1 Bro. C. C. 421, n.; 2 Dick. 485; contra, *Blackburn v. Gregson*, 1 Cox. 90; 1 Bro. C. C. 420, 423; 15 Ves. 336, 337.

Where the consideration is the future maintenance of the grantor, or the purchaser's covenant for the benefit of a third person, the lien is waived. *Camp v. Gifford*, 67 Barb. 324; *McKilip v. McKilip*, 8 Barb. 552.

The lien may be assigned with the debt to which it is security, if so expressly stated. *Smith v. Smith*, 4 Abb. Pr. N. S. N. Y. 420.

A third party furnishing the money does not thereby acquire a lien. *Marquat v. Marquat*, 7 How. Pr. 417.

The lien exists against subsequent grantees or incumbrancers without consideration, and without any liability in respect thereto or against a purchaser with notice. *Burlingame v. Robbins*, 21 Barb. 327; *Warren v. Fenn*, 23 Barb. 333; *Shearatz v. Nicodorus*, 7 Yerg. 1.

But not against a subsequent mortgagee and purchasers for value and without notice. *Shirley v. Cong. Ref.* 2 Edw. 505; *Fisk v. Potter*, 2 Keyes, N. Y. 64.

Where vendor contracts to sell the land, and subsequently conveys the same, subject to the contract, to a third person, the lien enures to the latter. *Sanders v. Aldrich*, 25 Barb. 63.



lished as "a natural equity," or from analogy to the principle that in a bargain and sale, the bargainor stands seized in trust for the bargainee unless the money be paid, still it is a secret, invisible trust, known only to the vendor and vendee, and to those to whom it may be communicated in fact. To the world the vendee appears to hold the estate, divested of any trust whatever; and credit is given to him, in the confidence that the property is his own in equity, as well as law. A vendor relying upon this lien, ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is, in some degree, accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien. It would seem inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien should be set up in a court of chancery, to the exclusion of *bona fide* creditors. The court would require cases in which this principle is expressly decided, before its correctness can be admitted.

The counsel for the plaintiffs say there are such cases; and cite the *dictum* of Sugden in his Law of Vendors, and the cases he quotes in support of the position.

Mr. Sugden does indeed say, that persons **52\*** coming \*in under the purchaser by act of law, are bound by an equitable lien, although they had no notice of its existence; and he adds, that "creditors claiming under a conveyance from the purchaser, are bound in like manner as assignees, because they stand in the same situation as creditors under a commission."

Mr. Maddock, who also recites the cases on this subject, says that the vendor has a lien on the estate sold "as against the vendee and his heir, and all persons claiming as volunteers, or purchasers for a valuable consideration, with notice." He adds, "nor does the bankruptcy of the vendee affect the lien of the vendor." But he does not say, with Sugden, that "creditors, claiming under a conveyance from the purchaser, are bound in like manner as assignees."

This lien has not, we believe, been extensively recognized in the courts of this country. In the case of *Garson v. Green and others* (1 Johns. Ch. Rep., 308), Mr. Chancellor Kent said: "The vendor has a lien on the estate for the purchase money while the estate is in the hands of the vendee; and when there is no contract that the lien, by implication, was not intended to be reserved."

If the lien has, in any of the states, or in any court of the United States, been sustained against creditors, the decision is unknown to us.

This is the first case in which the question, so far as respects creditors, has been made in this court, and may form a precedent on a subject of great interest to the public. We have looked into the English authorities for the purpose of inquiring how far the principle has been firmly established in that country.

**53\*** \*In *Chapman v. Tanner* (1 Vern., 267), the lien of the vendor was maintained against the assignees of a bankrupt. But in *Farwell v. Heelis* (Anbl., 724), the Lord Chancellor, speaking of that case, says: "It appears by the register's book, that the seller was to keep the title papers till he was paid. The court said, that a

natural equity arose from his having the deeds in his custody."

This explanation of the case of *Chapman v. Tanner* lessens the weight of that case in support of the lien, not only as against the assignees of a bankrupt, but as against the vendor himself, since the retaining of the title deeds by the vendor is considered as equivalent to an agreement for the preservation of the lien.

*Farwell v. Heelis and others*, reported in Ambler, was a suit to establish the lien of the vendor against the trustees of an insolvent debtor. The Chancellor determined against the lien, because a receipt for the purchase money was indorsed on the deed, and a bond taken for it from the vendee. "If," said the court, "the vendor parts with the estate, and takes a security for the consideration money, there is no reason for a court of equity to assist him against the creditors of the purchaser."

A doctrine ascribed to Lord Apsley, that "creditors claiming under such a deed (a deed of an insolvent debtor to trustees for his creditors), stand in the same situation as creditors under a commission," has been supposed to apply to the case now before the court, and is cited by Mr. Sugden to support his general proposition, that "creditors claiming under \*a [**54** conveyance from the purchaser are bound in like manner as assignees, because they stand in the same situation as creditors under a commission."

It is uncertain whether this was said by the Chancellor, as from himself, or with reference to the arguments of counsel; but if it be his *dictum*, it will not, we think, aid the plaintiffs in the cause under consideration; nor does it justify the broad and general terms used by Sugden; terms which have been probably understood in a more extensive sense than he intended. A declaration that creditors under a conveyance, and under a commission, are in the same situation as regards the lien of the vendor, made in a case in which the decree was against that lien, is not entitled to the respect which the same declaration would claim had the decree been made in favor of the lien. The Chancellor was against the lien, whether set up against assignees or trustees, and might not, therefore, examine very accurately the sameness or the discrepancy of the principles on which the two cases stood. Had he considered *Chapman v. Tanner*, as decided on the general principle, and not on its particular circumstances, it would have been necessary to inquire whether the same principle applied to the case of *Farwell v. Heelis and others*; but not being of that opinion, and being opposed to the lien, the inquiry became less necessary.

Another consideration, entitled to great attention, is, that this *dictum* of the Chancellor, if it be one, is confined in terms to "such a deed" as was then under his consideration. That was a deed made by an insolvent, after his insolvency, to trustees for his creditors. \*This [**55** was, we suppose, a deed made in pursuance of the statute; and between a deed assigning the estate of an insolvent under the insolvent law, and a deed assigning the estate of a bankrupt under the bankrupt law, there is not, perhaps, much difference. But it does not follow that the same rule would be applied to a conveyance made by the mere act of the party, for the se-

curity of one or more creditors, or of creditors generally.

The case of *Blackburn v. Gregson* (1 Bro. Ch. Rep., 420), was also an attempt to set up the lien of the vendor against the assignees of a bankrupt.

In that case, the general question of the existence of such a lien was argued at bar as one not yet finally settled; and, although the inclination of the Chancellor's mind seemed in favor of the lien, he made no decision on that point. An issue was directed to try whether the conveyance was made to defeat creditors under the 13th of Eliz., ch. 5, and the jury having found that it was so made, the conveyance was set aside.

The question of lien appears to have remained still open; and in the case of *Nairn v. Prowse* (6 Ves., Jur., 752), it was still doubted whether a vendor who had taken the bond or note of the vendee for the purchase money, retained his lien on the land. That case was between a creditor who claimed under an equitable mortgage created by the deposit of a deed, and the vendor who had taken a deposit of stock to secure the payment of the purchase money. The court determined, that by taking the deposit of **56\*** stock he had \*waived his lien; and, consequently, the question between the creditor and vendor was not decided.

It does not appear ever to have been decided. We find no case in which the naked question has been determined against the creditor. Could the case of *Chapman v. Tanner* even be stripped of the circumstance that the vendor retained the title papers in his hands, still the assignees of a bankrupt are not understood, in England, to stand in the same situation with a creditor who is secured by a mortgage. In the case of *Mitford v. Mitford* (9 Ves., Jur.,) the master of the rolls says, "between a particular assignment for valuable consideration, and an assignment by operation of law, such a distinction has always been made, that the effect of the one is not necessarily to be inferred from that produced by the other." In the same case he says: "I have always understood the assignment from the commissioners, like any other assignment by operation of law, passed his rights precisely in the same plight and condition as he possessed them. Even where a complete legal title vests in them, and there is no notice of any equity affecting it; they take subject to whatever equity the bankrupt was liable to. This shows they are not considered purchasers for a valuable consideration, in the proper sense of the words. Indeed, a distinction has been constantly taken between them and a particular assignee, for a specific consideration; and the former are placed in the same class as voluntary assignees and personal representatives."

Were it, then, completely settled that the vendor retains his lien against the assignees of a **57\*** bankrupt, it \*would not follow that he would retain it against creditors holding under a *bona fide* conveyance from the vendee. To establish this principle on the authority of adjudged cases, the court would require cases in which the very point is decided. We have seen no such cases. We have seen no case in which this lien has been supported against a judgment creditor, against a mortgagee, or even against

a creditor charging an heir on the bond of his ancestor in which he was bound.

The weight of authority is, we think, the other way. The lien of the vendor, if in the nature of a trust, is a secret trust; and, although to be preferred to any other subsequent equal equity, unconnected with a legal advantage, or equitable advantage which gives a superior claim to the legal estate, will be postponed to a subsequent equal equity connected with such advantage. This principle is laid down in *Hargrave & Butler's notes to Co. Lytt.* 290, *b*; and the case of *Stanhope v. Earl Verney*, decided in chancery in 1761, is quoted in support of it. That was the case of an equitable mortgage, founded on the deposit of a deed for a term of years to attend the inheritance, with a declaration of the trust. This is a much stronger case. It is an actual conveyance of the legal estate.

In the United States the claims of creditors stand on high ground. There is not, perhaps, a state in the Union, the laws of which do not make all conveyances not recorded, and all secret trusts, void as to creditors as well as subsequent purchasers without notice. To support the secret lien of the vendor \*against a [**58** creditor who is a mortgagee, would be to counteract the spirit of these laws.

*Decree affirmed with costs.*

[PRACTICE.]

## BROWDER v. M'ARTHUR.

This court will not grant a rehearing in an equity cause, after it has been remitted to the court below to carry into effect the decree of this court, according to its mandate.

**M**R. DODDRIDGE, for the appellant, Browder, moved for a rehearing in this cause, which is the same case that was determined at the last term, and remitted to the court below to carry into effect the decree of this court.<sup>1</sup> It was now again brought before this court, upon an appeal from the decree of the court below, entered according to the mandate from this court. The appellant's counsel now moved for a rehearing upon the merits.<sup>2</sup>

The court denied the motion, being of opinion that it was too late to grant a rehearing in a cause after it had been remitted to the court below, to carry into effect the decree of this court, according to its mandate; and that a subsequent appeal from the Circuit Court, for supposed error in carrying into \*effect such man- [**59** date, brought up only the proceedings subsequent to the mandate, and did not authorize an inquiry into the merits of the original decree.

*Motion denied.*

Cited—3 How. 426; 16 How. 103; 18 How. 42; 12 Wall. 129; 17 Wall. 283.

1.—S. C. 6 Wheat. Rep.

2.—He cited 2 Madd. Chan. 390; 3 P. Wms. 8; 2 Atk. 439.



## [COMMON LAW. LOCAL LAW.]

## RICARD v. WILLIAMS AND OTHERS.

Possession of land by a party, claiming it as his own in fee, is *prima facie* evidence of his ownership and seisin of the inheritance.

But possession alone, unexplained by collateral circumstances, which show the quality and extent of the interest claimed, evidences no more than the mere fact of present occupation by right.

But if the party be in under title, and by mistake of law supposes himself possessed of a less estate than really belongs to him, the law will remit him to his full right and title.

It is a general rule that a disseisor cannot qualify his own wrong, but must be considered as a disseisor in fee.

But this rule is introduced only for the benefit of the disseisee, for the sake of electing his remedy.

And it must also appear that the party found in possession entered without right; for if his entry were congeable, or his possession lawful, his entry and possession will be considered as limited by his right.

Presumptions of a grant, arising from the lapse of time, are applied to corporeal, as well as incorporeal hereditaments.

They may be encountered and rebutted by contrary presumptions, and can never arise where all the circumstances are perfectly consistent with the non-existence of a grant.

*A fortiori*, they cannot arise where the claim is of such a nature as is at variance with the supposition of a grant.

In general, the presumption of a grant is limited to periods analogous to those of the statute of limitations, in cases where the statute does not apply.

Where the statute applies, the presumption is not <sup>60</sup>generally resorted to; \*but if the circumstances of the case are very cogent, and require it, a grant may be presumed within a period short of the statute.

Under the laws of Massachusetts and Connecticut, the power of an administrator to sell the real estate of his intestate, under an order of the Court of Probates, must be exercised within a reasonable time after the death of the intestate.

The case of such a power to sell is not within the purview of the statute of limitations of Connecticut, which limits all rights of entry and action to fifteen years after the title accrues; but the reasonable time, within which the power must be exercised, is to be fixed by analogy to that statute.

One heir, notwithstanding his entry as heir, may afterwards, by disseisin of his co-heirs, acquire an exclusive possession, upon which the statute will run both against his co-heirs and against creditors.

An heir may claim an estate by title distinct or paramount to that of his ancestor; and if his possession is exclusive under such claim, against all other persons, until the statute period has run, he is entitled to the protection of the bar.

## ERROR to the Circuit Court of Connecticut.

This was a suit instituted by the defendants in error against the plaintiff in error, in the court below. The original action is commonly known in Connecticut by the name of an action of disseisin, and is a real action, final upon the rights of the parties, and in the nature of a real action at the common law. The cause was tried upon the general issue, *nul tort, nul disseisin*, and a verdict being found for the demandants, a bill of exceptions was taken to the opinion of the court upon matters of law at the trial.

The history of the case, as it stands upon the record, is in substance as follows: The demandants claimed the estate in controversy, by purchase from the administrator of William Dudley, at a sale made by him for the payment of the debts of his intestate, pursuant to the laws of Connecticut, which authorize \*a sale of the real estate of any person [\*61 deceased, for the payment of his debts, when the personal assets are insufficient for that purpose. In order to establish the title of William Dudley in the premises, the demandants proved that Thomas Dudley, the father of William, was, in his life-time, possessed of the premises, as parcel of what were called the Dudley lands, and died possessed of the same in 1769, leaving seven children, of whom William was eldest, being of about the age of fourteen years, and Joseph Gerriel, the youngest, being about four years of age. Upon the death of his father, Joseph Mayhew, the

## NOTE.—Adverse possession.

Claim or color of title is necessary. *Harvey v. Tyler*, 2 Wall. 323; *Stillman v. White R.*, Co. 3. *Woodb. & M.* 538; *Gardner v. Sharp*, 4 Wash. C. C. 609; *Jackson v. Porter*, 1 Paine, 457; *Peyton v. Stith*, 5 Pet. 485; *Waldon v. Gratz*, 1 Wheat. 292; *Boone v. Chiles*, 10 Pet. 177; *Blight v. Rochester*, post, 548; *Watkins v. Holman*, 16 Pet. 25; *Gregg v. Sayre*, 8 Pet. 244; *Wright v. Mattison*, 18 How. 50; *Bradstreet v. Huntington*, 5 Pet. 402; *Pillow v. Roberts*, 13 How. 472; *Roberts v. Pillow*, *Hempst.* 624; *Arrowsmith v. Burlingame*, 4 McLean, 489; *Moore v. Brown*, 11 How. 414; *Walker v. Turner*, 9 Wheat. 541; *Bunce v. Gallagher*, 5 Blatchf. 481; *Stark v. Starr*, 1 Sawyer, 15; *Lamb v. Burbank*, 1 Sawyer, 227; *Hedges v. Lessees*, 5 Biss. 177; *Pike v. Evans*, 94 U. S., 4 Otto, 6; *Abeel v. Harris*, 11 Gill & J. 371; *Cooper v. Smith*, 9 Serg. & R. 26; *Jackson v. Porter*, 1 Paine, C. C. 457; *Harvey v. Tyler*, 2 Wall. 323; *Kinchelow v. Treadwells*, 11 Gratt. 605; *Ewing v. Bennett*, 11 Pet. 41; *LaFrombois v. Jackson*, 8 Cow. 589; *Gittens v. Lowry*, 15 Ga. 336; *Markley v. Amos*, 2 Bailey, 603; *Ray v. Barker*, 1 B. Mon. 364; *Moore v. Moore*, 8 Shep. 350; *Lamb v. Foss*, 8 Shep. 240; *Millay v. Millay*, 6 Shep. 387; *Hamilton v. Paine*, 5 Shep. 210; *Read v. Thompson*, 5 Barr, 103; *Dikeman v. Parrish*, 6 Burr, 210; *Hall v. Stephens*, 9 Mete. 418; *Moore v. Johnston*, 2 Spear, 288; *Rogers v. Hillhouse*, 3 Conn. 403; *Borretts v. Turner*, 2 Hayw. 114; *Armour v. White*, 2 Hayw. 69; *Grant v. Winborne*, 2 Hayw. 57; *Tasker's Lessee v. Whittington*, 1 Harr. & McH. 151.

Not necessary that there should be a rightful title; only necessary that possession be taken under color or claim of title, and continued for the requisite period to bar an action, under the statute of limitations. It is immaterial whether the title be defective, or whether the occupant makes color

under a written or parol contract, or even any contract at all. *Jackson v. Wheat*, 18 John. 44; *Jackson v. Newton*, 18 John. 355; *Smith v. Lorillard*, 10 John. 356; *Smith v. Burtis*, 9 John. 180; *Jackson v. Woodruff*, 1 Cow. 276; *Jackson v. Camp*, 1 Cow. 605; *Northrup v. Wright*, 7 Hill. N. Y. 476; *Burkhalter v. Edwards*, 16 Ga. 593; *Den v. Putney*, 3 Murph. 562; *Bradstreet v. Huntington*, 5 Pet. 401; *Monro v. Merchant*, 28 N. Y. 9; *La Frombois v. Jackson*, 8 Cow. 589; *McCall v. Neely*, 3 Watts. 72; *Gregg v. Lessee of Sayre*, 8 Pet. 244; *Tyler on Eject.* 861; *Humbert v. Trinity Church*, 24 Wend. 587; *Bogardus v. Trinity Church*, 4 Sand. Ch. 663; *Burbans v. VanZandt*, 7 Barb. 91; *Crary v. Goodman*, 22 N. Y. 170; *Overfield v. Christie*, 7 Serg. & R. 177; *Munshorn v. Patton*, 10 Serg. & R. 334; *Den v. Alpough*, 2 Penn. 452; *Payne v. Skinner*, 8 Ohio, 159; *Lessee of Abram v. Will*, 6 Ohio, 164; *Bauman v. Grubbs*, 26 Ind. 419; *Doe v. Herrick*, 14 Ind. 242.

If the claim is under a conveyance, the conveyance must have a grantor and grantee, a description of the lands, and apt words of conveyance, and be properly executed to convey the title. *Dufour v. Campana*, 11 Martin, 715; *Frigue v. Hopkins*, 4 Martin, N. S. 224; *Bowne v. Powers*, 3 Martin, N. S. 462; *Tyler on Eject.* 870; *Brooks v. Bruyn*, 35 Ill. 392; *Childs v. Showers*, 18 Iowa, 261.

The possession must be hostile in its inception. *Brandt v. Ogden*, 1 John. 156; *Jackson v. Sharp*, 9 John. 163; *Jackson v. Parker*, 3 John. Cas. 124; *Guy v. Moffitt*, 2 Bibb. 507; *McGee v. Morgan*, 1 Marsh. 62; *Kirk v. Smith*, 9 Wheat. 241; 12 John. 365; *Jackson v. Thomas*, 16 John. 292; *Floyd v. Mintsey*, 7 Rich. 181; *Vrooman v. Shepherd*, 14 Barb. 441. And exclusive. *Parker v. Hotchkiss*, 25 Conn. 321; *Huntington v. Whaley*, 29 Conn. 391; *Rosseel v. Wikham*, 36 Barb. 386; *Tyler on Eject.* 883-885.

Wheat. 7.



guardian of William, entered into possession of the Dudley lands, and of the demanded premises as parcel, taking the rents and profits in his behalf during his minority; and upon his arrival of age, William entered and occupied the same, taking the rents and profits to his own use, until his death, which happened in the year 1786; all his brothers and sisters being then living. During the life of William, no other person claimed any right to enter or occupy the premises, except that his mother used to receive one-third of the rents and profits, until she died in the year 1783. During his life, and while in possession of the premises, William always declared that he held the same only for life, and therefore would not allow any improvements on them at his expense; no leases were made by him except for short periods; and no attempt was made by him to sell or convey the premises; and he declared that he had no right to sell them, and that upon his death they would descend to his son, Joseph Dudley, under whom **62\*** the tenant derived his title, in the manner hereafter stated. No administration was ever taken in Connecticut upon the estate of William Dudley, until 1814, and his estate was then declared insolvent; and, in 1817, the lands in controversy were sold by the administrator, by order of the Court of Probates, for the payment of the debts found due under the commission of insolvency.

To rebut the title of the demandants, and to establish his own, the tenant proved that William Dudley died intestate, leaving seven children, the eldest of whom was Joseph Dudley. Upon the death of his father, the guardian of Joseph (the latter being within age) entered into possession of the Dudley lands, and the demanded premises as parcel, and used and occupied the same, receiving the rents and profits in behalf of Joseph, until his arrival of age, when Joseph himself entered into possession, claiming them as his own, and taking the rents and profits to his own use, and holding all other persons out of possession, until the year 1811 and 1812, when he sold the demanded premises, and the tenant, either by direct or mesne conveyances under Joseph, came into possession, and has ever since held the premises in his own right. In the year 1811, Samuel Dudley, the brother of Joseph, claimed title to some of the Dudley lands possessed by Joseph, and brought an action of ejectment for the recovery of them, but the suit was compromised by Joseph's paying him about \$2,000; and about the same time Joseph settled with another of his brothers, but did not pay him anything. But Joseph **63\*** never admitted that his brothers or sister had any interest in the lands; and said he could hold them, and did hold them in the same manner as he held the lands in Massachusetts.

The will of Governor Dudley, which was admitted to probate in Massachusetts in 1720, was also in evidence, but neither party established any privity or derivation of title under it.

Upon these facts, the tenant prayed the court to instruct the jury, that the demandants had not made out a title in themselves, nor in William Dudley. Not in themselves, because

the sale by the administrator to the demandant was void, by force of the statute regarding the sale of disputed titles, the tenant being in possession of the property at the time of the sale, claiming it as his own, and that William Dudley had acquired no title to the property in question by possession, as he claimed to hold the same only during his life, and could therefore acquire no title, except for life, by any length of possession, and that if he could acquire title by possession, if this estate descended from Thomas Dudley, said William could not, in seventeen years, acquire a title against his brothers and sisters, or at least against those of them who had not been of full age for five years before the death of said William; and if the demandants could recover at all, it could only be for that proportion of the estate which descended from William as one of the heirs of Thomas Dudley.

The tenant further prayed the court to instruct the jury, that if they found that Joseph Dudley had, for more than fifteen years before he sold the land in controversy, been in possession of the same, exclusively claiming **[\*64]** them as his own, and holding out all others, he had gained a complete title to the property.

The tenant further claimed that the court ought to have instructed the jury, that under the circumstances attending the possession of said lands by William Dudley, the father, and by Joseph Dudley, and the length of time which had elapsed since the death of said William, without any claim on the part of the creditors of said William, the jury might presume a grant from some owner of the land to William for life, with remainder to his eldest son. But the court did charge and instruct the jury that the sale by the administrator under an order of court was not within the statute regarding disputed titles, and was not, therefore, void. That William Dudley, by mistaken constructions of the will of Governor Dudley, might have claimed an estate for life in the premises, and that such mistake would not operate to defeat his title by possession. That the length of time in which this estate had been occupied by William and Joseph Dudley, would bar any claims by the other children of Thomas Dudley, deceased, and that the jury were authorized to presume a grant by said children to their brother, William Dudley, deceased, and, therefore, if the demandants recovered, they must recover the whole of the premises.

The court also charged the jury that, as against the creditors of William Dudley, neither Joseph Dudley nor the tenant had gained title to the lands in controversy by possession, and that the jury were not authorized to presume a grant to Joseph.

**\*To which several opinions of the [\*65]** court, the tenant by his counsel excepted.

*Mr. D. B. Ogden*, for the plaintiff in error, argued, 1. That this being a writ of entry, in which the demandants or plaintiffs counted on their own seisin, and could count in no other way; and as they were unconnected with any other seisin than their own, it was necessary for them to have shown upon the trial an actual entry. Without such actual entry there never could have been any seisin or possession in them; and without such seisin or possession in



them there never could have been any disseisin or forcing them out of possession. In an action of ejectment, which is a mere legal fiction, the execution of the lease, the entry under it, and the ouster are all stated in the declaration, and they must be proved upon the trial. Unless the defendant will afford the means of that proof by his confession, the plaintiffs cannot obtain a verdict. So here the entry and ouster must be proved, or the plaintiffs never can recover; because the entry and ouster are the very foundation of the whole action. Actual seisin is as necessary in a writ of entry as a writ of right.<sup>1</sup> The actual seisin and ouster are expressly stated in the declaration. They are material and necessary allegations. It is a universal rule, that whatever is a material and necessary allegation in the declaration, is a material and necessary part of the proof upon the trial, unless that necessity be dispensed with by **66\*** the pleadings. Now, in this case, there is no pretense that any actual entry was ever made in the premises in question by the plaintiffs. None was proved upon the trial; the demandants were, thereupon, not entitled to a verdict.

By the local law of Massachusetts and Connecticut an administrator has no seisin of the lands of his intestate. They descend to his heir at law, subject to a naked power in the administrator, in case of an insufficiency of the personal property to pay the debts of his intestate, to sell the lands for the payment of those debts. The administrator or executor may lawfully sell them, whether they be in the possession of a devisee, or an heir, or their heirs or assigns, or of a disseisor of a devisee or heir; for, say the cases, the naked authority of an administrator to sell on license cannot be defeated by the seisin of a devisee, or heir, or by their alienation or disseisin.<sup>2</sup> By the law of Connecticut, which in this respect is precisely similar to that of Massachusetts, the administrator may sell the lands of his intestate for the payment of debts, and his conveyance vests in the grantee, not the possession or seisin of the land, because that was never in the administrator; but a right to the property, and a right of entry into it; a right to the possession of it, but not the possession itself. Upon this right of possession, the grantee might at once bring an ejectment, in which he need prove no actual **67\*** entry and ouster, but they must be \*confessed by the defendant, or he might make an actual entry, and found upon it this remedy of a writ of entry. He has not thought proper to bring an ejectment, but has brought a writ of entry; and he must, therefore, prove an actual entry and ouster.<sup>3</sup>

2. Independent of this objection, the demandants are not entitled, upon the evidence set forth in the bill of exceptions, to the judgment which they have obtained. They claimed under a deed from the administrator of William Dudley, deceased. It became, therefore, necessary for them, in order to entitle themselves to

recover, to prove, that William Dudley in his life-time, and at the time of his death, was seized of an estate in the premises, which descended to his heirs; because, unless William Dudley was seized of such an estate in the premises, it is manifest that his administrator could grant no title to the property.

Did the demandants prove such a seisin in William Dudley? They proved that Thomas Dudley, the father of William, was in possession of the premises at the time of his death, in 1766; that upon the death of Thomas, the guardian of William, then an infant of fourteen years of age, in right of his ward, entered into possession of the premises, receiving the rents and profits thereof, and continued in possession until William came of age, in 1776; that William then took possession, and continued in the exclusive possession thereof, until he died, in 1786. This was all the evidence of title in William offered by the plaintiff upon the trial. Was this evidence of title sufficient?

\*Thomas, the father, died in possession, [**68** in 1769. What estate he had in the premises does not appear; but the subsequent acts of William afford strong evidence that his father had not an estate in fee in the premises, but that his estate, whatever it was, terminated with his life. If Thomas, the father of William, had had an estate in fee in the premises, it would, upon his death, have either descended to his heirs at law, or vested in his devisees if he had devised it by will. It is not pretended that he made any devise of it, and of course it would have descended to his heirs at law. The record states, that he left seven children, all of whom, by the law of Connecticut and Massachusetts, were at that time his heirs at law. The exclusive possession of the premises by William, taken after the death of his father, is therefore conclusive evidence that William did not consider his father as having been possessed of the fee of this land; and the rest of the children of Thomas never having claimed any right to enter and occupy the premises, or any part thereof, after they came of age, affords strong evidence that they also knew and believed that Thomas, their father, had no estate in the premises, which could descend to his heirs at law. At the time Thomas died, William, his son, was fourteen years of age, and his guardian, immediately upon his death, takes possession of the land, as the property exclusively of his ward William,—thus affording his testimony, also, by his acts, that he knew that Thomas had no estate in the premises which could descend to his heirs at law. What was the estate which Thomas had in the premises does not appear, but it is \*manifest, [**69** from the acts of all the parties at the time, that it is not an estate in fee-simple. William, then, did not enter as heir at law of Thomas, his father. He can therefore claim nothing from the possession of his father, as showing any title to the fee of this property; because, if his father was seized of the fee by right, it would have descended to his heirs at law, and if seized of it by wrong as disseisor, the descent would still have been cast upon his heirs at law.

Under what claim of title, then, did William enter? As he did not enter as heir at law, his entry must have been either adverse to his

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1.—Green v. Litter, 8 Cranch, 229, 244.

2.—Drinkwater v. Drinkwater, 4 Mass. Rep. 354; Willard v. Nelson, 5 Mass. Rep. 240; Hays v. Jackson, 6 Mass. Rep. 143.

3.—Drinkwater v. Drinkwater, 4 Mass. Rep. 354.

father's title, and of course to his heirs at law, in which case his possession has no connection with his father's; or, he must have entered, considering his father as a mere tenant for life or for years with remainder to him and his heirs, or that the father was tenant in tail, and the estate limited to William, his eldest son, and so on to the eldest male heir. If the father was tenant for life, or for years, with remainder to William, then William's right of possession commenced when his father's ended, in 1769; and under that right William possessed the premises from 1769, down to his death, in 1786, which would, under the laws of Connecticut, taking away the right of entry after fifteen years, give him, or those claiming under him, a right to recover the premises in question, if out of possession, or to hold them against all the world, if in possession, provided he claimed to hold the possession as the owner in fee. And why? Because William, in that case, would **70\*** have been in possession seventeen years, and not because his father had been in possession before him.

But that William did not enter, claiming that his father had been tenant for life, or for years, with remainder to him in fee, is manifest.

First. Because William, when in possession, declared that he held the premises only for life; and that upon his death, they belonged to his eldest son; and,

Second. Because, after his entry he suffered his mother, the widow of the father, to receive one-third of the rents and profits of these lands as her dower. She could be entitled to no dower if her husband had been either a tenant for life or for years of the premises.

As, then, Thomas, the father of William, was not the owner in fee of this property, nor the tenant of it for life or for years, under what right did he claim it?

The answer to this question is, that it is most probable he claimed it as a tenant in tail, limited to the eldest son.

First. Because, if Thomas was tenant in tail of these lands, his wife would have been entitled to her dower in them, which, it has already been stated, she took; and,

Second. Because William frequently declared, that they were his for life only, and that after his death they belonged to his eldest son.

Now, if Thomas claimed these lands as tenant in tail, and if William also claimed them as **71\*** tenant in tail, and was really entitled to them as such, then, upon his death, the estate in tail would vest in his eldest son, Joseph; and the creditors of William could have no lien upon the property for his debts, nor the administrator no right to convey the property for the payment of any such debts; and, of course, the demandants, the grantees of the administrator, have no right to recover in this case.

But it may be said that William had an estate in fee-simple in these lands under the will of Governor Dudley, set forth in the record, which gave to his devisees an estate in fee-simple, and not in fee-tail. But it is a point of no importance whether that will gave the devisees a fee-simple or a fee-tail. How, if at all, William Dudley, or his father, were connected with the testator, nowhere appears on the record.

There appears no connection of blood, and no privity of estate between them. His will, therefore, must be put entirely out of the question.

Again, it may be said, that by the laws of Connecticut, there can be no grant of an estate in tail to continue longer than the life of the first donee; and that all such estates given in tail remain in absolute estate in fee-simple to the issue of the first donee in tail.

What operation has this law upon the rights of these parties? The argument is, that Thomas, the father of William, was not a tenant in tail, but in fee, of the premises in question, because, he being the issue of the first donee, became, by the local law, vested with an absolute estate in fee-simple. Let it for a moment be admitted, what then? William, his **\*eldest son**, **[\*72]** upon his death, entered into possession of the lands. I have already shown that he did not enter into possession as devisee of Thomas, his father, because the latter died intestate; nor as heir at law of his father, for he was not so; but he entered, claiming that the estate, subject to his mother's right of dower, was his for life, and upon his death, would descend to his eldest son. This is the claim under which William's entry was made, and under which the property has been possessed from 1769 down to the present hour; a possession of 53 years; a possession, in favor of which any presumption would be justifiable; a possession, in favor of which, to use the strong language of Lord Kenyon, the court ought to presume not only one, but one hundred grants.

If, then, Thomas, the father of William, was seized in fee of the premises in question, as he made no devise of them to William, and as William did not enter as heir at law, we are certainly to presume that he entered with right, and that his claim to enter was a good one. We are then to presume a grant, consistent with his entry and possession, and with the acts of all parties at the time. We have a right to presume that his father, being the tenant in fee, made a grant of the premises to his son William, in tail, limiting the estate to his (William's) eldest son. Such a grant is not inconsistent with the laws of Connecticut, and is perfectly consistent with his claim, as always declared by him, that he was only entitled to the estate during his life, and that after his death it would go to his eldest son. It is also consistent with his mother's claim of dower, to which she would **\*have been entitled**, the grant of his **[\*73]** father notwithstanding; and consistent with the possession taken at William's death, by his son Joseph, under whom we claim. This presumption would support and confirm a title under a possession of fifty-three years. Any other would shake and unsettle titles which have, for half a century, been considered as good and valid.

If this grant be presumed from Thomas to William, then, according to the law of Connecticut referred to, Joseph, being the issue of William, the first donee, was the tenant in fee of the premises; and the plaintiff in error, being his grantee, is also the tenant in fee of them.

It was stated by the learned judge, in his charge to the jury, that as William had been so long in possession, the jury might presume a



grant to him from his co-heir, in order to support that possession. But the nature of William's possession, the claim under which he must be presumed to have taken that possession, must be judged of according to the state of things at the time when he took the possession. He must be presumed to have continued in possession by the same right under which he originally claimed to enter into it, until it be shown that he acquired another right. Now, when William entered, upon the death of his father, in 1769, I have already shown that he entered under some claim of right, distinct and different from that of heir at law. He cannot be presumed to have entered as grantee of his co-heirs at law, because such grant could not be made; he was not only an infant himself, **74\***] but his brothers and \*sisters were all infants still younger than he was. As, then, when he entered, claiming the whole of this property as his own, William could have had no grant from his co-heirs; and as his possession must be presumed to have continued under the same claim of title under which he originally entered, it seems to be a presumption against all law that he ever had a grant from his co-heirs.

It is a well-established rule that the declarations of a person in possession of land as to his title are evidence against him and all persons claiming under him. In this case we have the declarations of William Dudley, under whom the demandants claim, made while in possession of the land, that he held it for life only, and that after his death it would descend to his eldest son. If, then, declarations are evidence against all claiming under William, they, of course, are evidence against the demandants, and show that William never had anything but an estate for life in the premises in question, which expired with him; and there was no interest left which the administrator could sell after his death. In this view of the case, it is immaterial how long William's possession continued. It was a possession under a claim of an estate for life, and the possession was commensurate with the claim. As I have already shown that the plaintiff's title rests wholly on William's possession, and as William never pretended to any possession but for life, there can be now no title in the demandant. Presumptions are often made to support old claims of title accompanied by a long possession, but it **75\***] is \*new doctrine that a possession under a claim of an estate for life gives a fee.

It appears by the record, that immediately after the death of William Dudley, in 1786, Joseph, his eldest son, entered into possession of the premises by his guardian, and, afterwards, by himself, taking the whole rents and profits, and claiming the lands as his own, and continued in the exclusive possession thereof, holding all others out, until he sold the land in 1811 and 1812, when his grantees entered as owners, and continued to hold until this action in 1819. If, then, a possession of seventeen years in William gave him a title which is a sufficient ground of recovery for the demandant, why is it that a possession of thirty-three years in Joseph, and those claiming under him, does not give a good title to the defendants? The reason assigned by the demandants why this possession should not avail the defendants is, that William died in possession, and the pos-

session of Joseph was but the continuance of William's possession, a part of the same title, and that title is subject to be sold for the payment of William's debts. But if the possession taken by Joseph was a possession taken under a claim adverse to the claim of a fee in William, then it would seem to follow, as an inevitable consequence that the possession of Joseph, and those claiming under him, would give them a good title. William died intestate, and left seven children. Joseph, the eldest, then being an infant, all these children, by the law of Connecticut, were his \*heirs at law. **[\*76** Joseph, however, entered into the exclusive possession of the whole of the premises, "keeping all others out." He did not, then, enter as heir at law, but he entered denying the rights of the heirs at law; he entered, therefore, under a claim of title adverse to them, and, of course, adverse to the claim of a fee now set up in William, his father. There can, in this case, be no presumption of a grant from his co-heirs when he entered, because they were infants of very tender years when he entered.

But not only can no grant be presumed from them to Joseph, but the record contains upon its face evidence that no such grant was ever made by them. The plaintiffs proved, that in 1811, two of the brothers claimed to be entitled to a portion of the property, which, at all events, shows that they had never granted it to Joseph. Inasmuch, then, as Joseph entered and continued in possession, claiming title, which title was adverse to any claim in the heirs at law of William, to any claim of the fee in William; and as this possession continued for thirty years, uninterrupted and undisturbed, it gave to Joseph, and to those claiming under him, a full and complete right to retain the possession against all the world.

We have, in this possession of Joseph, exclusively taken and held by him, and so long acquiesced in by others, not only evidence of the opinion of his guardian, founded doubtless upon a knowledge of the title at the time, and of his own opinion of the title, but we have, by their acquiescence, and by the admission of \*his co-heirs that they had no right, and **[\*77** the admission of the creditors, for the payment of whose debts these lands have now been sold to the demandants, evidence that William, their debtor, had no estate of inheritance in the premises which could descend to his heirs, or be liable for his debts. How else are we to account for their conduct in relation to these lands? That William possessed them was notorious. The demandants, upon the trial, proved that they had always been known by the name of the Dudley lands, which consisted of a large tract, situate in Connecticut and Massachusetts. If, then, the creditors of William Dudley had believed that he had been seized in fee of the lands, and that they were, therefore, liable for his debts, how is their conduct to be accounted for in suffering their lands to go into possession of Joseph, as his own, and continue there twenty-eight years before they took a single step to enforce the lien which they had upon the lands? When William died these creditors knew their rights, and no doubt knew his title papers might at that time have been produced to show what were the respective estates of William and Joseph



in the premises. If, then, the creditors had not been conscious that William did not own the fee of the lands, they never would have remained so long quiet, seeing another enjoy the lands, and taking the rents and profits.

3. By the statute of Connecticut, no person has a right of entry into lands, but within fifteen years next after his right or title shall first descend or accrue, with the usual savings. It is **78\***] contended, that \*the right of entry of the demandants is not taken away in this case, because their right did not accrue until the conveyance to them, by the administrator, in 1817.

But the demandants claim a fee in these premises, under William Dudley. The fee held by William was the entire estate in the premises. If that estate has become extinct; if the fee which was in him has been extinguished, either by those who had a right to extinguish it, or by the operation of law, operating through an adverse possession, then no person can any longer claim under it. If William had been living, and there had been an adverse possession against him, his right of entry would have been gone. His heirs, by the adverse possession, have lost their right of entry; and every other person claiming under the same title is in the same situation. If the right of William and his heirs be gone, and taken away, can the act of an administrator resuscitate it? Land is one thing, an estate in it is another. The lien of the creditor is upon William's estate in the land, and not upon the land. The lien is no inherent part of the soil always accompanying it. It is here a claim upon William's estate in it, which was a fee. Now, a fee is but one estate. Whether in the hands of William, or his heirs, or his grantees, or the grantees of his administrator, it is still but the same one estate. So long as that estate in the lands continue, the lien may possibly continue; but when the estate is gone, the lien is gone.

It may possibly be denied, that the heirs at law of William could maintain an action for the recovery of these lands, as they were tenants **79\***] in common with \*Joseph; and it may be said, that the possession of one tenant in common is the possession of all. This, as a general principle, is admitted. But if one tenant in common enters into actual and exclusive possession of the land, taking the rents and profits to his own use, and openly assert his own exclusive property in the lands, and deny the title of any other, it will be considered as an adverse possession by him, and those claiming under him, and an ouster of the other claimants.<sup>1</sup> In this case the record states that Joseph did enter into the exclusive and actual possession of the premises, taking the rents and profits, denying the title of his brothers and sisters, and keeping all others out of possession for 30 years. The heirs at law, therefore, of William, could not have entered; William, if alive, could not enter; and by what principle is it that the grantee of an administrator, who can have no greater right than William, or his heirs at law, is to be held to have a right which they would not have?

In answer to this obvious question, it is said that William's estate was liable for his debts,

and to be sold by his administrator for payment of them; there is no limitation to the time in which letters of administration may be granted; that the sale of the administrator was in pursuance of the provisions of the law of Connecticut, and therefore his grantee is entitled to the property. But let this argument be examined.

By the common law, where a man bound himself and his heirs, the obligee might sue the heir, and have \*execution of the land descended to the heir; but if the heir aliened the land before action brought, the alienee held the land free from any lien for the debt of the ancestor.<sup>2</sup> But by the law of Connecticut and the construction which has been repeatedly given to it, the creditor may follow the lands into the hands of the grantee of the heir at law, or devisee. But he can follow them only when the right of entry is not tolled. There are, besides, particular circumstances in this case, which show that the demandants cannot claim to be *bona fide* purchasers without notice of the facts of the case, but that they had full notice, and were actors in the transaction.

Lastly. The deed is void in itself, under the statute of Connecticut, of 1747, against the sale of disputed titles.

<sup>1</sup> *Mr. Pinkney*, contra, (1) answered the objection made by the plaintiff in error, that in the present action, being a writ of entry, the demandants must show a seisin in deed; by which (he supposed) was meant either an actual or constructive seisin. The writ in this case sets forth a plea, that the tenant render to the demandants "the quiet and peaceable seisin and possession of two certain tracts of land," &c. The count is, that "on or about the 20th day of December, 1817, they were well seized and possessed in their own right, as joint tenants in fee-simple;" and "that the tenant thereunto entered, and ejected and deforced the demandants, and ever since has continued to deforce and hold the demandants out of \*the [**81** possession," &c. And it is now contended, that they are bound to prove their seisin and possession as they have laid it; and not having done so, cannot recover.

The first answer to this objection is, that the bill of exceptions does not cover it. The first prayer is, that the court should instruct the jury, that the demandants had not made out a title in themselves, nor in William Dudley. The second prayer is, for an instruction, that if the jury found that Joseph Dudley had been in possession of the lands for fifteen years, &c., that he had gained a complete title to the property. The third instruction asked for, is, that under the circumstances, &c., the jury might presume a grant from some owner of the land to William, &c. But the court charged the jury, 1st. That the sale by the administrator, under an order of court, was not within the statute regarding disputed titles, and was not therefore void. 2d. That William Dudley, by mistaken constructions of the title of Governor Dudley, might have claimed an estate for life in the premises, and that such mistake would not operate to defeat his title by possession. 3d. That the length of time in which the estate had been occupied by William and Joseph

1.—*Cummings v. Weyman*, 10 Mass. Rep. 464.  
Wheat. 7.

2.—*Co. Litt.* 102.



Dudley, would bar any claims by the other children of Thomas Dudley, deceased; and that the jury were authorized to presume a grant, by them to their brother William; and, therefore, if the demandants recovered, they must recover the whole of the premises. And, lastly, that as against the creditors of William Dudley, neither Joseph Dudley nor the plaintiff in error had gained title by possession, \*and that the jury were not authorized to presume a grant to Joseph. It is obvious, then, that neither the prayers nor instructions cover this objection, which was not made in the court below, and therefore no opinion was given upon it. The bill of exceptions does not profess to do more than deal with the title. It did not mean to state more than was sufficient to raise the questions which were raised in respect to that title.

The second answer to this objection is, that in Connecticut, the writ of entry is constantly used as an action of ejectment. The forms of actions, concerning real property, depend, in all the states, upon local usage, and no positive enactments of the legislature have been thought necessary to authorize a deviation, in this respect, from the rules of the common law. The writ of entry, in the present case, is not like an English writ of entry. If tried by the rules of English law, it could not stand a moment's examination. It does not regard and set forth the different degrees, as is required at common law; nor is it a writ of entry in the post, under the statute of Marlbridge, 52 Hen. III., c. 30, alleging that the defendant had not entry, until after the disseisin or forfeiture of the original wrong-doer, passing by all the intermediate degrees. In Connecticut, on the contrary, the defendant is always alleged to be the deforciant, which, if the fact were not so, would in England be fatal. Neither is the time of the forfeiture or disseisin ever stated, either in the writ or count, at common law; and in England, it would never be said that the disseisin or **§3\*** disseisin was about \*such a time. This, at least, may safely be asserted to be peculiar to the practice of Connecticut. So that it becomes manifest, that the peculiar properties of writs of entry cannot be applied to this action, as it exists by the local law and practice. It is used indiscriminately with the action of ejectment, and intended to try the right of possession, which, in that state, is the right of property.

2. The title of the demandants is under an administrator's sale, by order of court. By the local law, there is no limitation to the granting letters of administration, by the mere lapse of time.<sup>1</sup> But even if there were, every question respecting it, and respecting the debts for which the lands were sold, has been decided by the competent court, of peculiar and exclusive jurisdiction. This decision has been confirmed, in the last resort, by the Superior Court of the state, which is the only court that has an appellate jurisdiction from the decrees of the Court of Probates. There can therefore be no objection now to the validity of these letters of administration, and the sale which was made under them, on the ground of the debts being antiquated. The appointed forum has settled

these questions forever. If, then, the lands in question were, at the death of William Dudley, his lands in fee, the demandants have a good title, unless that title has been intercepted by an adverse possession or title, as is contended on the other side.

3. The next question, then, is upon William's title. His father died in possession, and William had exclusive possession by himself or guardian, receiving the rents and profits, from 1769 to 1785, claiming \*for himself only, [**\*84** to the exclusion of all the world. That this possession barred all strangers who, at the time, might have a right of entry, there cannot be a doubt; and the only possible question is, whether it barred his brethren and sisters. His father had an estate, or he had not. We may adopt the argument used on the other side for Joseph's protection. If his father had no estate, then none descended to his children; and William's entry was, of course, for his own benefit, and gained him, with the possession which followed, an estate by possession. It is not directly found that his father had any estate which could descend. It might be a naked possession; and if it was, the entry of William, for his own exclusive benefit, he not being heir at law, was not a continuation of that possession for any person's benefit but his own. He did not come to a regular succession as heir, nor were there any duties cast on him as heir by a regular descent. He took in his own right, so as to keep out everybody else. It is true, indeed, that his mother is stated to have received a third of the rents and profits, but whether as dower or how, *non constat*; and any inference from such a fact cannot now be made in the absence of proof. His brethren and sisters did not need to be barred, if no estate descended to them; and William's possession was not their possession unless they had right.

But suppose an estate descended from Thomas, then William's exclusive possession, for himself, was sufficient to bar his brethren and sisters under the statute of Connecticut, and to gain him a title in fee.

\*To this it is objected that he claimed [**\*85** only a life estate, and, therefore, can gain no more. The answer is, he could not, by an adverse possession, gain an estate for life, or any estate less than a fee. A limited estate can be given only by contract of the parties, or act of law. Wrongful possession must give a fee or nothing. And it must be so in the nature of things, since there is nothing to limit it. The effect of possession is to bar actions against the possessor by those who are entitled to bring the actions. It does not operate like a grant, or any other mode of alienation, which may be circumscribed and limited. His claim of a life estate only did not create a remainder in favor of any other, so as to give to that other, for the first time, a right of action on his death. It did not contribute to exclude actions during his life. The person entitled might as well have sued, within the time of limitations, whether William claimed a life estate or not. The restricted claim changed nothing. It did not prevent his possession from being adversary, or make it less wrongful. It is the proprietor being out of possession, and another being in possession against his title, that produces the

1.—Wales v. Willard, 2 Mass. Rep. 120.

bar; and it cannot be material whether the adversary possession excludes the rightful possession upon one pretext or another. Contract only can prevent the effect, and then the possession is not adversary.

It is inconceivable that a wrongful possession can be restricted in its effects as a bar of limitation to a life estate, when the whole fee is **86\*** actionable against it. Cases may, indeed, be conceived in which it would produce a limited effect; as, for example, if the heir should hold against tenant in dower, or by the curtesy. But there is nothing there to bar but the tenancy in dower or curtesy. If there was, the bar would extend to it. In our case, the whole fee is against the possession by wrong, and his possession is against the whole fee. His declarations, that he claimed only a life estate, did not give him a life estate. They gave him nothing; and if they gave nothing, and secured nothing, how could they restrain the prejudice of the legal effect of his possession? Contract would have operated both ways. But the declarations of the party could not work the effect of contract one way, and there is no reason why it should the other. Whose rights did his declaration save? It could save none, unless it took them out of the statute by postponing their right of action. Whoever had a right of action was told by the statute: sue, or you will be barred by the adversary possession after fifteen years. And unless the declarations of the possessor suspended the right of action, so as that the proprietor could not sue by reason of it, the statute reaches the case; since, it bars all rights of action subsisting during the adversary possession, and not exerted within the time limited. A possession by a man claiming an estate tail, but having in fact no title, would bar all the proprietors having a right to sue. No matter what he claims; if he claims adversely to everybody during his possession of fifteen years, he excludes everybody claiming **87\*** title during the time, and everybody forbears to disturb him; and the statute says, he shall not afterwards be disturbed.

It is not here necessary to inquire why William claimed only a life estate. That belongs to another branch of the subject. For the present purpose it is immaterial why he did so.

The doctrine of remitter will illustrate this head. Littleton says (sec. 695); "If a man be disseized, and the disseisor let the land to the disseisee by deed poll, or without deed, for term of years, by which the disseisee, entereth, this entry is a remitter to the disseisee. For in such case where the entry of a man is congeable, and a lease is made to him, albeit that he claimeth by words *in pais*, that he hath estate, by force of such lease, or saith openly that he claimeth nothing in the land but by force of such lease, yet this is a remitter to him, for that such disclaimer *in pais* is nothing to the purpose." So, also, it is laid down that a dis-

seisor has a fee-simple, and cannot have less.<sup>1</sup> And no claim can possibly alter or qualify it.<sup>2</sup>

The question then recurs, are the brothers and sisters barred by William's exclusive possession?

It may be said they are not; because, being coparceners with him,<sup>3</sup> his possession is theirs. But a coparcener or tenant in common may be barred by the statute of limitations, if the possession of his companions be adverse. [**88** verse, or, in other words, amount to an actual ouster. So long as there is nothing adversary, the possession of one is the possession of all; but if one parcener usurp the whole, and hold out his companion, he is a deforciant, against whom a writ of entry will lie as well as a writ of partition. Here the coparceners of William never had possession at all. His first entry was for himself, and perfectly exclusive. There never was any possession but his. The leading case on this subject was determined in Lord Mansfield's time,<sup>4</sup> and his doctrine was afterwards confirmed by Lord Kenyon.<sup>5</sup> An entry, and sole occupation of the whole, keeping the co-tenant out, is sufficient.<sup>6</sup> So, also, in a subsequent case, although it was strenuously contended at the bar that there ought to be a receipt of the rents, and an actual hindering of the co-tenant from entering, which did appear in the case, yet the court held that "one tenant in common in possession, claiming the whole, and denying possession to the other, is evidence of an ouster."<sup>7</sup> So, also, Lord Hardwicke says: "In the case of a fine and non-claim by tenant in common, it will bar his companion if he does not call the person to an account for the profits; for this has always been admitted to be evidence of an ouster."<sup>8</sup> And, again, it is said that, "although the entry of one co-tenant is the entry of both, yet if one enter claiming the whole, this will be an entry [**89** adverse to his companion."<sup>9</sup>

As to the minority of William's brothers and sisters, and its effect to prevent the operation of the statute, it may be observed that they all arrived at age during his life. The statute had been running against them during minority, as to ten years, and when William died it was running against them for the other five. He had then the fee in progress against them, and nearly completed. It descended to his heirs, and if his brethren and sisters did not sue before the small remnant of the time expired, they are barred by the statute. It seems to be admitted, that they could not sue after that time. Their title was extinguished, beyond all doubt; and it was in progress to be extinguished at William's death.

4. As to the title of Joseph D., it is sought to be founded on the presumption of a grant, from somebody (not said whom), to William for life, with remainder to Joseph in fee or in tail. But presumptions may be rebutted by contrary presumptions. They depend on circumstances; and these must warrant the particular presump-

1.—Co. Litt. 297, a.

2.—Co. Litt. s. 296; Co. Litt. 266, b. Mr. Butler, in his note to the last cited passage, says: "It is to be observed, that a disseisor by his disseisin acquires a tortious fee-simple, notwithstanding at the time he makes the disseisin he claims a less estate."

3.—Fisher and others v. Prosser, Cowp. 219. Wheat. 7.

4.—Peaceable v. Read, 1 East, 275.

5.—5 Burr. 2603; 1 Atk. 493; 2 Atk. 32; 1 Ld. Raym.

6.—Doe v. Bird, 11 East, 51.

7.—2 Atk. 632.

8.—14 Vin. Abr. 512, Pl. 5. And in the margin. "The possession of one heir in gavelkind, claiming the whole, is adverse."



tion, or at least not be inconsistent with it.<sup>1</sup> One of the grounds of presumption is the existence of a state of things which may most reasonably be accounted for by supposing the fact presumed. Here it must be founded on Joseph's possession, and on William's declaration,<sup>90\*</sup> that he claimed \*only a life estate, and that it would descend to Joseph. The state of the case, as it appears on the bill of exceptions, is defective; but it is easy to see that all the parties must have claimed under the will of Governor Dudley, and upon the supposition of a continuing estate tail created by that will. This explains William's declarations.

It may indeed be said, that records, and acts of parliament, and grants of the crown, have all been presumed. But this has been after the lapse of ages, with imperfect records, and the presumption supported by parol evidence.<sup>2</sup> But it will be found in all these cases, that circumstances have been always shown to support the presumption, and that after a great length of time, all things which the case shows ought to have been done, will be presumed to have been done correctly. But in this country, where all the land titles are recorded, the presumption of a grant cannot be so easily indulged, and especially where the lands lie in two different states, and the property depends on the same title. If the record were lost in one, it would be found in the other. Such a presumption would repeal all the registry acts of both states, and would promote the interests only of the negligent, or the fraudulent.<sup>3</sup> It must be presumed, first, that the deed was made; and, second, that it had been lost. If the grant be supposed from Thomas, who had some estate <sup>91\*</sup> of inheritance, it must have \*been made before Joseph was born, and when William was under fourteen years of age; not for a valuable consideration certainly; and if a family donation or settlement, some traces of it would appear. Who preserved it for the infant William, or the unborn Joseph? How could it have been preserved except on record? If the presumption goes on the ground of acquiescence, that acquiescence is of recent commencement. Joseph's supposed remainder first took effect in 1786. The deed must have been in existence at that time, to justify the acquiescence. How happens it that no vestige of it now remains? A presumption, which is to make a title, cannot stand under such circumstances. If it were merely to supply some defect arising from circumstances, congenial with the presumption, it would be different. William's claim of a life estate, connected with his declaration, that it would descend to his son Joseph, does not indicate a remainder in the latter; and can only be satisfactorily explained by going up to Governor Dudley's will, which reconciles the conduct and language of all parties.

The creditors cannot be charged with acquiescence. They were strangers to the title. The family believed it to be an estate tail, and

none of them administered. The statute of limitations is not a bar, for it allows an entry fifteen years after the title accrued. Possession is adverse only to those who have a right of entry. The creditors had no right of entry, and the demandants had none till the sale to them by the administrators. The estate of the creditors was merely potential. Immediately on the sale, the \*purchaser was in as by <sup>[\*92]</sup> the intestate. It is well settled by the local decisions that "no seisin of the heir, of his alienee, or his disseisor, can defeat the naked power of the administrator to sell on license."<sup>4</sup> And at common law, where "A devises lands to be sold by his executors; A dies seized; the heirs of A or a disseisor enters, and the heir or disseisor makes a feoffment to B, and B dies seized, and his heir is in by descent. Yet the executors may enter and sell: for a descent takes away rights of entry; but not titles or powers, as entry for condition broken, for mortmain, &c. Neither does it take away in case of devisee or patentee of land, where an abator enters, for they have no other remedy. And executors have only a power; and when they sell, the vendee is in by the will paramount to the descent cast."<sup>5</sup>

The entry of Joseph was consistent with the title of the creditors; and that shall not be taken to be unlawful, which by possibility may be considered as lawful.<sup>6</sup> He had a right to enter, and his possession could not be adverse to the creditors. They might elect to consider him as a trustee for them.<sup>7</sup> He was heir; he took possession as heir, and his claim is reconcilable with that of the creditors. He took it charged with the lien. It was a statutable lien which he could not defeat by his wrong. He was a trustee, and could not bar the trust. The statute of \*limitations only runs <sup>[\*93]</sup> from the commencement of a clearly adverse possession.<sup>8</sup> If the statute acted against those having no present right, the argument we are considering would be conclusive. But, though the tenant for life be barred, the remainder man cannot, because he has no right of action.

But it is said that Joseph's possession barred his coparceners, represented by William; and as William's estate is barred, the lien which attached to it is gone of course. The answer is, that the bar may exist for one purpose, and against some parties, and not for every purpose, and against all parties. Joseph still retains his character of heir, and by barring the other heirs, the claim of the creditors is not barred. Being heir, he has kept out his companions by deforcing them; but being heir, he cannot destroy the statutable lien by his own wrong, for his own benefit. He has ceased to be liable to his co-heirs, but not to the creditors. He has acquired the whole fee as against his coparceners, because they had a right of action. He has not defeated the estate of the creditors, because they had no such right. In *Stanford's* case,<sup>9</sup> it was held, that if the lessee of a future term dies, and the prior term expires, then the

1.—Phillips, Evid. 119, 121; 2 Saund. 175; 1 Taunt. 288; 3 East, 290; 16 East, 583; 2 Barnw. & Ald. 791.

2.—1 Inst. 115, a; 12 Rep. 5; 1 Ventr. 257; Bro. Jac. 254; Cowp. 102; 2 Strange, 1129; 2 Atk. 19; 2 T. R. 154; 1 Ves., Jun., 265.

3.—See Jackson v. Cary, 16 Johns. Rep. 302.

4.—4 Mass. Rep. 359.

5.—Jenk. Cent. 184; Ca. 75, Bro. Abr. Devise. Pl. 36; Litt. 1, 381, 392, 169; Sir W. Jones, 352.

6.—10 East, 588; Adams Eject. 50.

7.—1 Burr. 60, 12.

8.—3 Wheat. Rep. 224.

9.—Cited in Cro. Jac. 61; See also Leon, 119.

lessor enters, and levies a fine, and five years pass, and then B takes administration to the lessee; he shall have five years afterwards; for no one had title till administration.

**94\*]** \*Allusion has been made to the doctrine of the common law, by which the heir is liable for the specialty debts of his ancestor, so long as the lands remain in his hands, but no longer. It should be remembered, however, that the statute has remedied that evil; that the lands are now subject to the payment of the bond debts of the ancestors, into whose ever hands they may come. The maxim of legislative policy is, *caveat emptor*. So, too, in equity, the rule is, the vendee under a power shall see to the application of the money. And under the local law of Massachusetts and Connecticut, the cases before cited show that the alienation of the land will not discharge the lien. It is true, that the lapse of 20 years will, under certain circumstances, discharge that lien of a judgment. But how does it discharge it? By presuming payment and satisfaction of the judgment; but that is not the case here. The debts cannot be presumed to be satisfied, since the report of the commissioners to the Court of Probates shows them to be still in existence.

Lastly. The objection as to the sale of the demandants being void as against the statute to prevent the selling of disputed titles, has been sufficiently answered by what has been said respecting the authority of administrators and executors, to sell lands in the possession of heirs, their alienees or disseisors, or the alienees of the latter. This is a sale by authority of law; nor is it within the words of the statute, which speaks only of "sales by a person disseised or ousted of the possession of lands by the entry, possession, and enjoyment of any **95\*]** other person." \*Here was no disseisin or ouster of the creditors of the administrator.

*Mr. Webster*, for the plaintiff in error, in reply, stated, that there were two questions for consideration. 1. Whether William D. was shown to have been seized of such estate in the lands that they became chargeable with his debts at his decease. 2. Supposing him to have died seized of an estate thus chargeable, are the demandants entitled to recover against the adversary claim of Joseph D. and his grantees?

1. It is not proved that William D. had a fee in the lands. He entered into possession on the death of his father, Thomas, in 1769. But *non constat* what estate the latter held. The will of Governor Dudley may be wholly laid out of the case, inasmuch as neither party attempted at the trial to deduce title under that will. William, being a minor, and having brothers and sisters younger than himself, then living, entered into possession of the lands, by his guardian; and there being no devise in fee to him from his father in proof, the legal presumption is, that he entered, either as having an estate of his own, in the lands, commencing on his father's death, or as one of the co-heirs of his father. But it is apparent, that he did not enter as a co-heir, because he entered, claiming an exclusive right, took an exclusive possession, and held his brothers and sisters out. He claimed, however, an estate for life only, and the same proof, which shows the possession, shows also under what title that pos-

Wheat. 7.

session was held. This is not inconsistent with \*the general doctrine, that a disseisor can- [**\*96** not qualify his own wrong. For it is first to be proved that he was a disseisor. The presumption ought to be, that he entered rightfully, having such title as he pretended to have. It is clear, that the declarations of a person in possession of land as to his title, are admissible against him. If he were tenant for life, then he had a peculiar limited estate acquired by purchase, and perfectly consistent with Joseph's title in the fee. That he held such a limited estate is shown by his own conduct and declarations, and by the conduct of his brothers and sisters, who never disturbed his possession. On the death of William, in 1786, Joseph, being then a minor, and having also brothers and sisters, entered upon the lands, taking the whole rents and profits, holding his brothers and sisters out of possession, and claiming the lands exclusively as his own, and finally conveyed them as his property to those under whom the tenant in the present action claimed. He did not therefore enter as a co-heir of his father, for he excluded his brothers and sisters. Nor did he enter as a tenant for life, for he claimed the whole fee, and disposed of it. So that from 1769 to the commencement of the present suit, a period of 50 years, these lands have been possessed and enjoyed in a manner strictly conformable to the supposition that William had an estate for life in the premises, with remainder to his son Joseph in fee. Now, as neither party produced any documentary evidence of title, but both parties rested on the presumption of grants arising from possession, such \*a [**\*97** grant, and such a grant only, ought to have been presumed, as should conform to the whole length of possession. It ought to have been left to the jury, to presume a grant to William for life, with remainder to Joseph in fee, because the possession proved such a grant, if it proved any whatsoever. Why should the presumption arise from any one part of the possession, rather than from the whole? And especially, how can a grant to William in fee be presumed from his possession, when he pretended to have an estate for life only? His declarations were not contrary to his possession, but conformable to it; and both his possession and his declarations, and all his conduct, are strictly conformable to the supposition of a remainder in fee in Joseph. The jury ought to have been directed to take all these circumstances into consideration, and to presume such a grant as would support the possession throughout its whole duration.

There is an insurmountable difficulty in any other view of the case. The learned judge below, going upon the supposition that Thomas D. died possessor of an estate in fee, and that William entered as co-heir to that estate, instructed the jury that they might presume a grant to him, by his brothers and sisters, of their portions of the inheritance. But this presumption could not be made, because, when he entered, claiming to hold them out, and down to the time of his death, in 1786, some of them were within the saving of the statute of limitations; and it is very clear that, where the statute would apply, any length of time, short of the statute period, can never warrant a presumption; for that would be to presume against



**98\*]** \*the statute.<sup>1</sup> If there were in fact any grant from the brothers and sisters of William, it is more reasonable to suppose such grant made to Joseph. If we admit, then, that the same length of possession by a parcener, would bar one of his coparceners as would bar others, still William, having entered in 1769, would not bar any of his co-heirs, by possession, until 1784; but in the latter year the greater number of his brothers and sisters were still either minors, or within the five years' saving of the statute in favor of minors, and to be allowed after they came of full age. So that there is no ground whatever on which it is possible to presume a grant to William from his brothers and sisters.

There is, then, a double difficulty in supporting the instruction which was given to the jury. 1st. Because they were told that they might presume a grant to William in fee, when the whole possession, taken together, was shown to be incompatible with the existence of such a grant. And, 2d. Because they were instructed they might presume a grant to William, from his brothers and sisters, in a case in which the statute of limitations would apply, if they had not been within its exception as minors. The jury were farther instructed, that William might have claimed an estate for life in the premises by mistake, and that such mistake ought not to defeat his title by possession. I agree, that if it appeared, that he had an estate in fee, his mistake ought not to prejudice him; but that not appearing, there is no evidence, which shows that he had any title at all, shows such title to be only to an estate for life, and there is no ground to presume any mistake.

2. The remaining general question is, whether, supposing William D. to have died possessed of an estate in fee, the demandants are entitled to recover in the present action.

Here has existed a possession of 33 years in Joseph, and those claiming under him. The judge instructed the jury, that, as against the creditors of William, supposing him to have died possessed of the land in fee, neither Joseph, nor those claiming under him, had gained title by possession. There can be no doubt this ought to be considered an adverse possession. Every possession is adverse where there are circumstances to destroy a presumption that the defendant is in under the plaintiff's title.<sup>2</sup> There is no ground to presume that Joseph entered into possession, intending to hold subject to the incumbrance of William's debts; especially, as there were strong reasons to suppose he entered claiming a title in himself, not derived from his father. It seems clear, that this length of possession would have barred William Dudley himself, if he had lived. If he had conveyed on the day of his death, it would have barred his grantee. If he had devised the lands, it would have barred the devisee. If he had mortgaged, it would have barred the mortgagee. If he had mortgaged for the payment of this very **100\*]** debt, the creditor and mortgagee would

have been long since barred by the adverse possession of Joseph, and those claiming under him. The doctrine contended for on the other side goes to give more permanency to a general unknown lien, than to a well-known and specific lien. A mortgage deed is registered, and may be known; but where are debts registered? How is a stranger to know anything of them? In the present case, a creditor, twenty-eight years after the death of his debtor, causes letters of administration of his estate to be taken out, proves his debt, or gets it confessed, and attempts to enforce his general lien as creditor on the debtor's land, after this lapse of time, against *bona fide* purchasers buying without notice of the claim. To permit this would be opposed to justice and equity, and to the whole policy of the law. If twenty-eight years will not bar such a claim, what lapse of time will bar it? or is it to be perpetual? The general mischiefs of such a doctrine are obvious. It would disturb titles to a very great extent. No man could buy with any security. The defendant in this case has, of course, no means of contesting the existence or amount of the debt. That question is settled between other parties; and although from lapse of time, all debts would be presumed to be paid, yet, if the administrator, who in such cases is generally the agent of the creditor, desires to admit the debt, the tenant of the land cannot dispute it. This renders it absolutely indispensable, for the security and safety of purchasers, that liens of this nature should be enforced promptly, or in reasonable time after the debtor's decease. No system could answer the common purposes of [**\*101** justice, which should allow a creditor to come on the land for his debt, at any time, and in whosoever hands he might find it. The courts of Massachusetts have expressed the opinion that a creditor, by unreasonable neglect and delay, in pursuing his remedy, should be deemed to waive his lien on the land; and have very clearly intimated that in ascertaining what neglect ought to be considered as unreasonable, they should be governed by the analogy of the statute of limitations.<sup>3</sup> They have also decided that the estate should not be sold, if the creditor's demand be barred by the act limiting actions against administrators and executors; and that if the administrator pay the debt himself, and then lie by till it would have been barred, he shall not indemnify himself by charging it on the land.<sup>4</sup>

In this case there is great reason for following the analogy of the statute of limitations. The words of the Connecticut statute are the same as those of the English, except as to the number of years. "No person shall make entry into lands, &c., but within fifteen years next after his right or title shall descend or accrue." This is descriptive of the title under which he enters, and does not regard the time of his own accession to that title. In the case of *Beach v. Catlin*,<sup>5</sup> it would seem to be intimated by one of the \*learned judges, that a judgment [**\*102** creditor, coming into the land by extending his judgment on it, is in under a new title, and that,

1.—Cowp. 114.

2.—Jackson v. Todd, 2 Caines' Rep. 183.

3.—Gore v. Brazer, 3 Mass. Rep. 542; Wyman v. Bridgen, 4 Mass. Rep. 150.

4.—Scott v. Hancock, 13 Mass. Rep. 162; Allen v. Strong, 15 Mass. Rep. 58.

5.—4 Day's Rep. 284.

as to him, the statute runs only from the time of the execution of the writ. That case is understood to have been relied upon as applicable to this, in the court below. It would be difficult, I think, to support it; for supposing that a judgment can be extended on lands, of which the judgment debtor is not in possession, but which are in possession of another holding adversely to him, it would seem that he could derive no higher right, or better title than his debtor had, and must hold under him. This would not be the accruing of a new title in the judgment creditor, but merely a transfer or devolution of an existing title. It is no more a new title than if he had acquired it by deed of conveyance. Perhaps it would not be going too far, in the case now before the court, to hold the demandants within the words of the statute, on a liberal construction, as having a right to enter, being creditors, on the death of their debtor, insolvent; for although the right was not perfect, they could make it perfect whenever they pleased. They could as well have caused letters of administration to be taken out in 1784, as in 1814. But because this may be, I contend the present case is within the principle of the cases which have been decided by the analogy of the statute of limitations, and on grounds of public policy. It is well known that many cases which are not within the letter of the statute, are construed to be within it by analogy. The statute, for instance, does not apply, in terms, to proceedings in equity; but **103\*** they are affected by analogy.<sup>1</sup> Where a party has an equitable lien, if he be guilty of such negligence as would bar him at law, he shall be barred in equity. In relation to the whole class of incorporeal hereditaments, whether the cases arise in equity, or at law, the bar is furnished, not by the terms of the statute of limitations, but by its analogy.<sup>2</sup> So is the law, also, with regard to an equity of redemption. There is no right to enter. It is but a mere equitable interest in the land; it is not, therefore, within the terms of the statute; but yet it is barred by the lapse of time prescribed by the statute for other cases.<sup>3</sup> Rent, also, a highly favored lien, will be presumed to be discharged by the lapse of the statute period.<sup>4</sup>

In short, it will be difficult to find a case in which a lien upon land, which may be asserted and enforced at any time, has been established, after the expiration of the time allowed to make title to the land itself. In most of these cases, the ends of justice, and the policy of the law, are attained by presuming a grant. This presumption is made from principles of public policy, and the necessity of the case. It is for the furtherance of justice, and for the sake of peace; it is founded in this, that whatever has long existed, and has been acquiesced in by **104\*** those who had an interest to disturb it, had, probably a lawful beginning. It is not to be supposed that a man would suffer another to obstruct the enjoyment of his right without complaint, and an effort to obtain redress. The presumption is not to be made out by weighing

minutely the evidence of particular facts and probabilities. This would be proof, not presumption.

Legal presumption is resorted to where there is no particular proof, and because there can be no particular proof; the question, in such cases, is not to be decided by personal belief or disbelief. The grant presumed is taken to exist as a fact, in contemplation of law.<sup>5</sup>

Whatever is possible may be presumed, in order to establish long continued possessions. Royal charters, acts of parliament, grants from the state, common recoveries, and private conveyances of all descriptions.<sup>6</sup> Some of the questions now presented here were fully discussed in the Supreme Court of Connecticut, in a case in which the same parties were plaintiffs, as in this, and which respected the same title; and I refer particularly to the judgment pronounced in that case by the Chief Justice.<sup>7</sup> The ground is, that by a neglect to assert the claim, and enforce the lien for a length of time equal to that prescribed by the statute to bar a title to the land itself, the creditor shall be presumed to have waived \*or sur- **105** rendered the lien: that this presumption stands on principles of public policy, and furnishes a complete bar to the demandants' recovery.

Mr. Justice STORY delivered the opinion of the court:

The principal questions which have arisen, and have been argued here, upon the instructions given by the Circuit Court and to which alone the court deem it necessary to direct their attention, are, first, whether, upon the facts stated, a legal presumption exists, that William Dudley died seized of an estate of inheritance in the demanded premises; and, if so, secondly, whether an exclusive possession of the demanded premises, by Joseph Dudley and his grantees, after the death of William, under an adversary claim, for thirty years, is a bar to the entry and title of the demandants under the administration sale.

It is to be considered, that no paper title of any sort is shown in William Dudley, or his son Joseph. Their title, whatever it may be, rests upon possession; and the nature and extent of that possession must be judged of by the acts and circumstances which accompany it, and qualify, explain, or control it. Undoubtedly, if a person be found in possession of land, claiming it as his own, in fee, it is *prima facie* evidence of his ownership, and seisin of the inheritance. But, it is not the possession alone, but the possession accompanied with the claim of the fee, that gives this effect, by construction of law, to the acts of the party. Possession, *per se*, evidences \*no more **106** than the mere fact of present occupation, by right; for the law will not presume a wrong; and that possession is just as consistent with a present interest, under a lease for years or for life, as in fee. From the very nature of the case, therefore, it must depend upon the collateral circumstances, what is the quality and extent of the interest claimed by the party; and

1.—1 Scho. & Lefr. 413.

2.—2 Saund. 175, note a; 1 Bos. & Pnll. 401; 3 East, 294; 4 Day's Rep. 244.

3.—1 Powell Mort. 408.

Wheat. 7.

4.—Bailey v. Jackson, 16 Johns. Rep. 210.

5.—2 Bos. & Pull. 206; 12 Ves. 261.

6.—12 Ves. 374; 2 Hen. & Munf. 370; 2 T. R. 159.

7.—Sumner v. Child, 2 Conn. Rep. 607.



to that extent, and that only, will the presumption of law go in his favor. And the declarations of the party, while in possession, equally with his acts, must be good evidence for this purpose. If he claims only an estate for life, and that is consistent with his possession, the law will not, upon the mere fact of possession, adjudge him to be in under a higher right, or a larger estate. If, indeed, the party be in under title, and by mistake of law, he supposes himself possessed of a less estate in the land than really belongs to him, the law will adjudge him in possession of, and remit him to, his full right and title. For a mistake of law shall not, in such case, prejudice the right of the party, and his possession, therefore, must be held co-extensive with his right. This is the doctrine in *Littleton* (sec. 695), cited at the bar; and better authority could not be given, if, indeed, so obvious a principle of justice required any authority to support it. But there the party establishes a title in point of law greater than his claim; whereas, in the case now supposed, the party establishes nothing independent of his possession, and that qualified by his own acts and declarations. This is the **107** distinction between the cases, and accounts at once for the different principles of law applicable to them.

It has also been argued at the bar, that a person who commits a disseisin cannot qualify his own wrong, but must be considered as a disseisor in fee. This is generally true; but it is a rule introduced for the benefit of the disseisee, for the sake of electing his remedy. For if a man enter into possession, under a supposition of a lawful limited right, as under a lease, which turns out to be void, or as a special occupant, where he is not entitled so to claim, if he be a disseisor at all, it is only at the election of the disseisee.<sup>1</sup> There is nothing in the law which prevents the disseisee from considering such a person as a mere trespasser, at his election; or which makes such an entry, under mistake for a limited estate, a disseisin in fee absolutely, and, at all events, so that a descent cast would toll the entry of the disseisee. But, were it otherwise, in order to apply the doctrine at all, it must appear that the party found in possession entered without right, and was, in fact, a disseisor; for if his entry were congeable, or his possession lawful, his entry and possession will be considered as limited by his right. For the law will never construe a possession tortious unless from necessity. On the other hand, it will consider every possession lawful, the commencement and continuance of which is not proved to be wrongful. And this upon the plain principle, that every man shall be presumed to act in obedience to his duty, **108** until the contrary appears. When, therefore, a naked possession is in proof, unaccompanied by evidence, as to its origin, it will be deemed lawful, and co-extensive with the right set up by the party. If the party claim only a limited estate, and not a fee, the law will not, contrary to his intentions, enlarge it to a fee. And it is only when the party is proved to be in by disseisin that the law will construe it a disseisin of the fee, and abridge the party of his right, to qualify his wrong.

1.—Com. Dig. Seisin, F. 2 & F. 3; 1 Roll. Abr. 662, l. 45; Id. 661, l. 45.

Now, in the case at bar, it is not proved of what estate Thomas Dudley died seized in the premises. His possession does not appear to have been accompanied with any claim of right to the inheritance. It might have been an estate for life only, and as such, have had a lawful commencement. If it were intended to be argued that he had a fee in the premises, it should have been established by competent proof that he was in possession, claiming a fee by right, or by wrong. No such fact appears. The only fact, leading even to a slight presumption of that nature, is, that his widow took one-third of the rents and profits during her life. But whether this was under a claim of dower, or any other right, is not proved. The circumstance is equivocal in its character, and is unexplained; and the inference to be deduced from it, of a descendible estate in her husband, is rebutted by the fact, that immediately on his death, his son William entered into the premises, claiming a life estate, and held them during his life, as his own, without any claim on the part of the co-heirs of his father, to share in the estate. There is, then, nothing in the case, from which it can be judicially **109** inferred that Thomas was ever seized of an estate of inheritance in the premises, and, of course, none of a descent from him to his heirs.

Then, as to the estate of his son William in the premises. It is argued, that William had an estate in fee, by right or by wrong. That if his entry, either in person, or by his guardian, was without right, it was a disseisin, and invested him with a wrongful estate in fee. If with right, then it must have been a co-heir of his father, and a grant ought to be presumed from the other co-heirs to him, releasing their title, and confirming his.

The doctrine, as to presumptions of grants, has been gone into largely, on the argument, and the general correctness of the reasoning is not denied. There is no difference in the doctrine, whether the grant relate to corporeal or incorporeal hereditaments. A grant of land may as well be presumed, as a grant of a fishery, or of common, or of a way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration, that the facts are such as could not, according to the ordinary course of human affairs, occur unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession. They may, therefore, be encountered and rebutted by contrary presumptions; and can never fairly arise where all the circumstances are perfectly consistent with the non-existence of a grant.

*A fortiori*, they cannot arise where the **110** claim is of such a nature as is at variance with the supposition of a grant. In general, it is the policy of courts of law to limit the presumption of grants to periods analogous to those of the statute of limitations, in cases where the statute does not apply. But where the statute applies, it constitutes, ordinarily, a sufficient title or defense, independently of any presumption of a grant, and, therefore, it is not

generally resorted to. But if the circumstances of the case justify it, a presumption of a grant may as well be made in the one case as in the other; and where the other circumstances are very cogent and full, there is no absolute bar against the presumption of a grant, within a period short of the statute of limitations.<sup>1</sup>

If we apply the doctrines here asserted to the case at bar, we may ask, in the first place, what ground there is to presume any grant of the premises to William Dudley, and if any, what was the quantity or quality of his estate? It has been already stated that there is no sufficient proof that his father died seized of a descendible estate in the premises; and if so, the entry of William by his guardian, or in person, cannot be deemed to have been under color of title as heir; and in point of fact he never asserted any such title. For the same reason, no estate can be presumed to have descended to his co-heirs; and if so, the very foundation fails upon which the presumption of a grant from them to William can be built; for if they had no title, and asserted no title, **111\***] there is no reason \*to presume that he or they sought to make or receive an inoperative conveyance. There is no pretense of any presumption of a grant in fee from any other person to William; and as there is no evidence of any connection with the will of Governor Dudley, or of any claim of title under it by William, there does not seem any room to presume that he was in under that will, upon mistaken constructions of his title derived from it. There is this further difficulty in presuming a grant from the co-heirs to William, that at the time of his own entry, as well as that of his guardian, all of them were under age, and incapable of making a valid conveyance. During this period, therefore, no such conveyance can be presumed; and yet William, during all this period, claimed an exclusive right, and had an exclusive possession of the whole to his own use; and his subsequent possession was but a continuation of the same claim without any interference on the part of the co-heirs. In point of fact the youngest brother arrived at age about the time of William's death; and as to two others of the co-heirs, the statute of limitations of Connecticut, as to rights of entry, would not then run against them. The presumption of a grant from them is therefore in this view, also, affected with an intrinsic infirmity.

In addition to all this, William never claimed any estate in fee in the premises. His declaration uniformly was, that he had a life estate only, and that upon his death they would descend to his son Joseph. Of the competency of this evidence to explain the nature of his possession and title, no doubt can reasonably be entertained. His title being evidenced **112\*]** \*only by possession, it must be limited in its extent to the claim which he asserted. If, indeed, it had appeared that he was in under a written title which gave him a larger estate, his mistake of the law could not prejudice him; but his seisin would be co-extensive with, and a remitter to that title. But there is no evidence of any written title, or of any mistake

of law in the construction of it. For aught that appears, William's estate was exactly what he claimed, a life estate only, and the inheritance belonged to his son Joseph. It is material also to observe, that the acts of the parties, and the possession of the estates during the period of nearly fifty years, are in conformity with this supposition, and at war with any other. Why should William's brothers and sisters have acquiesced in his exclusive possession during his whole life, of the inheritance descended from their father? Why should Joseph's brothers and sisters have acquiesced in his exclusive possession during a period of twenty-five years without claim, if their father William was seized of the inheritance? Why should the guardians of William and Joseph have successively entered into the premises, claiming the whole in right of their respective wards, if their title was not deemed clearly and indisputably an exclusive title, or if they were in by descent under the title of their fathers? If, indeed, a presumption of a grant is to be made, it should be of a grant conforming to the declarations and acts of possession of the parties during the whole period, and if any grant is to be presumed from the facts of this case, it is a grant of a particular estate to William, with a remainder of the inheritance to Joseph, or in the most **\*113** favorable view of an estate tail to William, upon whose death the estate would descend to Joseph, as his eldest son, *per formam doni*. If Thomas, the grandfather, were proved to have been the owner of the fee, there is nothing in the other circumstances which forbids the presumption of such a grant from him; but as the cause now stands, it may as well have been derived from some other ancestor, or from a stranger. It is therefore the opinion of this court, that the Circuit Court erred in directing the jury that William, by mistaken constructions of the will of Governor Dudley, might have claimed an estate for life in the premises, and that such mistake would not operate to defeat his title by possession, for there was no evidence that William ever claimed under that will; and also erred in instructing the jury that they were authorized to presume a grant by the children of Thomas to William. The compromise entered into by Joseph with two of his brothers is not thought to change the posture of the case, because that compromise was made with an explicit denial of their right; and is therefore to be considered as an agreement for a family peace.

The other question in the cause is of great importance, and if decided one way will probably put an end to further controversy. It has been very fully and ably argued at the bar, and does not, from anything before us, appear to have received a final adjudication in the state courts of Connecticut. It must therefore be examined and decided upon principle. By the laws of Connecticut (as has been **\*alrea- [\*114** dy stated), the real estate of an intestate is liable to be sold for the payment of debts, where there is a deficiency of personal estate. The administrator in virtue of his general authority, has no right to meddle with the real estate; but derives this special authority from the order of the Court of Probates, which possesses jurisdiction to direct a sale, upon a proper application,

1.—See Phillips on Evidence, ch. 7, s. 2, p. 126; Foley v. Wilson, 11 East, 56.



and proof of the deficiency of the personal assets. This power or trust, call it which you please, when granted or ordered, is not understood to convey any estate to the administrator in the lands of the intestate. He derives simply an authority to sell from the court, and upon the sale makes a conveyance to the purchaser; and the estate passes to the purchaser upon his entry into the land by operation of law, so that he is under the estate of the intestate. As long as an administration legally subsists, or may be legally granted, this power over the land may be exercised, if the land remains in possession of the heirs; and it is not defeated simply by an alienation or disseisin of the heirs.<sup>1</sup> By analogy, also, to other cases of a like nature, at the common law, as, for instance, a power given by a will to executors to sell an estate for payment of debts, it may be true that a descent cast will not toll an entry, for there is a distinction between a right of entry and a mere power.<sup>2</sup> The former is in general barred by a descent cast; but the latter is not. On this, however, it is not necessary to express any opinion.

It does not appear that at the time of granting the administration on this estate, any statutable limitation of the period within which an original administration might be granted, existed in Connecticut, though a limitation generally to seven years after the death of the party has been since introduced.<sup>3</sup> And the present administration, though granted after the lapse of 28 years from the death of William Dudley, must be considered as valid, it having been allowed by a court of competent and exclusive jurisdiction, whose decision we are not at liberty to review.

Still, however, the question recurs, whether a power of sale, thus derived under the law, and not from the act of the party, is to be considered as a perpetual lien on the land of which the intestate died seized, and capable of being called into life at any distance of time, and under any circumstances, whatever may be the mesne conveyances, disseisins, or descents, which may have taken place. If it be of such a nature, great public mischiefs must inevitably occur, and many innocent purchasers, fortified as their possession may be, by length of time, against all interests in the land, may yet be the victims of a secret lien, or power, which could not be forseen or guarded against, and which may spring upon their titles when the original parties to the transactions are buried in the grave.<sup>4</sup> The principles of justice would seem to require, that the law should administer its benefits to those who are vigilant in exercising their rights, and not to those who sleep over them. It is always in the power of creditors to compel an administration to be taken upon an estate by application to a court of probates; and if the next of kin decline the office, it is competent for the court to appoint any other suitable person. So that, if creditors do not

choose to act, the loss or injury ought rather to fall on them, than on those who are meritorious purchasers without the means of knowledge to guard them against mistake. A power to sell the estate for payment of debts being created by the law, ought not to be so construed as to work mischiefs against the intent of the law. It ought to be exercised within a reasonable time after the death of the intestate; and gross neglect or delay on the part of the creditors for an unreasonable time, ought to be held to be a waiver or extinguishment of it. This appears to be the doctrine in Massachusetts;<sup>5</sup> whose laws on this subject are like those of Connecticut, and is so just in itself, that unless prevented by authority, we should not hesitate to adopt it. There is no decision in Connecticut, which, to our knowledge, controverts this doctrine; and it stands supported by the very learned opinion of her late Chief Justice in the case of *Sumner v. Childs*.<sup>6</sup> There are many cases where indisputable liens on land may be lost by lapse of time, and transmutation of the property. And even the rights of mortgageors to redeem, and of mortgagees to enforce payment out of the land, may be lost by presumptions, or laches arising from time.

What, then, is to be deemed a reasonable time for the exercise of this power to sell? It has been argued that the case of such a power is within the purview of the statute of limitations of Connecticut; and if not, that the reasonable time for its exercise is to be fixed by analogy to that statute. The statute provides that no person shall, at any time thereafter, make entry into any lands or tenements, but within fifteen years next after his right or title shall first descend or accrue to the same, with a saving in favor of infants, *femes covert*, &c., of five years after the removal of the disability.<sup>7</sup> The language of the statute would seem to apply merely to rights of entry; but it has been the uniform construction of the courts of the state, that it also takes away all rights of action, and, therefore, bars all real actions after that period.<sup>8</sup> Now, the argument at the bar is, that the words right or title first accrued, refer solely to the commencement of the original title under which the party claims, and not to his own accession to the title. But it appears to us, that this construction of the statute cannot be maintained.<sup>9</sup> The title against which the statute runs, is a present right of entry; and it is admitted, that when once it so begins to run, no devolution of the same title, and no supervening disability, will stop its operation. When, therefore, it speaks of a right or title first accrued, it means a new right or title first accruing to the party, and not the transfer of an old title. Against titles, *in esse*, at the time of the adverse possession, the statute was intended to run; but titles which should afterwards come *in esse*, were not within the provision of the statute, because they could not be enforced within the period, and it would be unjust to bar future

1.—*Drinkwater v. Drinkwater*, 4 Mass. Rep. 354, 359; Jenk. Cent. 184, pl. 85.

2.—*Littleton*, s. 169, Jenk. Cent. 184, pl. 85; *Brooke's Abridg. Devise*, pl. 36; Litt. s. 391; Co. Litt. 240.

3.—*Statutes of Connecticut*, Revision of 1821, tit. 32, Estates 33.

4.—*Gore v. Brazer*, 3 Mass. Rep. 523, 542; *Wyman v. Brigden*, 4 Mass. Rep. 150, 155.

5.—2 Conn. Rep. 607.

6.—See the statute in *Revised Laws of Conn.*, tit. 59, sec. 1, p. 309; 1 *Swift's System*, 335.

7.—1 *Swift's System*, 335, 336; *Sumner v. Child*, 2 Conn. Rep. 607, 615.



rights in respect to which there could, by no possibility, be an imputation of laches. And such has been the uniform construction of all the statutes which contain a clause of this nature. *Stanford's* case, cited at the bar, and referred to in *Cro. Jac.*, 61, is directly in point; and it would be easy to multiply instances under the statute of limitations, and the statute of fines, to the same effect.<sup>1</sup> If, indeed, the construction were otherwise, it would not help the present case, for the right of entry of the purchaser did not accrue until after the conveyance to him, and if he should then be deemed in under the estate of the intestate, and in privity of title, it would be a new right growing out of the exercise of a power conferred by law, and no more barred than a right of entry upon an ex-  
**119\***] tent after a fine levied, \*and five years past, where the judgment was obtained before the fine.<sup>2</sup>

But we do think it is a case clearly within the same equity as those which are governed by the statute of limitations; and that by analogy to the cases where a limitation has been applied to other rights and equities not within the statute, the reasonable time within which the power should be exercised, ought to be limited to the same period which regulates rights of entry. It would be strange, indeed, that when the estate of the heirs in the land, which is but a continuation of the estate of the intestate, is extinguished by the statute, the estate should still be considered as a subsisting estate of the intestate himself. That the administrator should possess a power over the property which the intestate could not possess if living; and that a lien created by operation of law should have a more permanent duration of efficacy, than if created by the express act of the party. The convenience of mankind, the public policy of protecting innocent purchasers, and the repose of titles honestly acquired, require some limitation upon powers of this nature, and we know of none more just and equitable than this, that when the right of entry to the land is gone, or the estate is gone by an adverse possession from those who held as heirs or devisees, the whole interest in the land, the power of the administrator to make sale of the land for payment of debts, is gone also. In this opinion we do but follow the doctrine which has been distinctly intimated both  
**120\***] \*in the Massachusetts and Connecticut courts.<sup>3</sup>

The remaining consideration under this head is, whether the possession of Joseph Dudley can be considered as an adverse possession so as to toll the right of entry of the heirs, and, consequently, extinguish, by the lapse of time, their right of action for the land, as well as extinguish by analogy of principle the power of the administrator to sell the land. It is said, that the entry of Joseph into the premises is consistent with the potential right of the creditors; that he had a right to enter as a co-heir of his father, and if he entered as co-heir, his possession was not adverse, but was a possession for the other heirs and creditors, and he could not afterwards hold adversely, or change the

nature of his possession, for the creditors might always elect to consider him their trustee. There is no doubt, that in general, the entry of one heir will enure to the benefit of all, and that if the entry is made as heir, and without claim of an exclusive title, it will be deemed an entry not adverse to, but in consonance with, the rights of the other heirs. But it is as clear, that one heir may dispossess his co-heirs, and hold an adverse possession against them, as well as a stranger. And, notwithstanding an entry as heir, the party may, afterwards, by disseisin of his co-heirs, acquire an exclusive possession upon which the statute \*will run. An ouster, or disseisin, [\***121** is not, indeed, to be presumed from the mere fact of sole possession; but it may be proved by such possession, accompanied with a notorious claim of an exclusive right. And if such exclusive possession will run against the heirs, it will, by parity of reason, run against the creditors. For the heirs, *qua* heirs, are in no accurate sense in the estate as trustees of the creditors. They hold in their own right by descent from their ancestor, and take the profits to their own use during their possession; and the most that can be said is, that they hold consistently with the right of the creditors. The creditors, in short, have but a lien on the land which may be enforced through the instrumentality of the administrator acting under the order of the Court of Probates.

But in order to apply the argument itself, it is necessary to prove that the ancestor had an estate of inheritance, and that the party entered as heir. Now, in the case at bar, all the circumstances point the other way. There is not, as has been already intimated, any proof, that William Dudley died seized of an inheritance in the land; and there is direct proof that he asserted the inheritance to be in his son Joseph; and the entry of the guardian of Joseph as well as his own entry, after his arrival of age, was under an exclusive claim to the whole, not by descent, but by title distinct or paramount. There is certainly no incapacity in an heir to claim an estate by title distinct or paramount to that of his ancestor; and if his possession is exclusive under such claim, and he holds all other persons out until the statute period has \*run, he is entitled to the full benefit [\***122** and protection of the bar. It appears to us, therefore, that the jury ought to have been instructed, that if they were satisfied that Joseph's possession was adverse to that of the other heirs, and under a claim of title distinct from, or paramount to that of his father, during his 25 years of exclusive possession, the entry of the purchaser, under the administrator's sale, was not congeable, and that the power of the creditor over the estate was extinguished. There was therefore error in the opinion of the court to the jury, that as against the creditors of William Dudley, neither Joseph nor the tenant had gained any title to the land in controversy by possession.

For these reasons the judgment of the Circuit Court must be reversed, and the cause re-

1.—Bac. Abr. Limitations, B; Bac. Abr. Fines and Recoveries, F; Comyn's Dig. Fine, K. 2.

2.—Bac. Abr. Fines, &c., F. cites 1 Mod. 217.

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3.—Gore v. Brazer, 3 Mass. Rep. 523, 542; Wyman v. Bridgen, 4 Mass. Rep. 150, 155; Sumner v. Childs, 2 Conn. Rep. 607.



manded, with directions to the court to order a *renire facias de novo*

Cited.—9 Wheat. 238; 11 Wheat. 318 (*n*); 5 Pet. 445; 12 Pet. 262; 3 Wood. & M. 549; 1 Paine, 407; 4 McLean, 285.

[LOCAL LAW.]

BOULDIN AND WIFE V. MASSIE'S  
HEIRS AND OTHERS.

The patent issued on a military warrant under the law of Virginia, is *prima facie* evidence that every prerequisite of the law was complied with.

The loss of a paper must be established before its contents can be proved; but where the patent issues upon an assignment of the warrant, and the legal title is thus consummated, the assignment it-123\*] self being no longer a paper essential to that title, the same degree of proof of its existence cannot be required as if it were relied on as composing part of the title.

Where there is a strong degree of probability that the assignment has been lost or destroyed, through accident, its non-production, by the party claiming under it, ought not to operate against him, so as to defeat his legal title.

The original law of Virginia, which authorizes the assignment of warrants, did not require that it should be made by indorsement, or by an instrument annexed to the warrant.

A PPEAL from the Circuit Court of Ohio.

This suit was brought by the appellants, who were plaintiffs in the Circuit Court, to obtain a conveyance for twelve-nineteenths of a tract of land lying in the state of Ohio, containing 1,900 acres, for which a patent was issued in December, 1814, to the defendants, the heirs of Nathaniel Massie. The other defendants were purchasers from him. The survey on which the patent was founded was made as to 1,200 acres, part thereof on a military land warrant No. 2,675, granted by the commonwealth of Virginia, to Robert Jouitte for 2,666 $\frac{2}{3}$  acres of land, of which 2,051 $\frac{1}{2}$  acres were alleged to have been assigned to Nathaniel Massie by Robert Jouitte. The plaintiff, Alice, claimed as heir of Robert Jouitte, and denied this assignment; on the existence and validity of which the whole cause depended. The assignment it-

self could not be produced, and was supposed by the defendants to have been consumed with the other papers of the war office, in November, 1800. Under these circumstances, the defendants insisted that the patent was *prima facie* evidence that every prerequisite of the law was complied with; and that satisfactory and legal proof of the assignment was [\*124 made; and they relied on the testimony in the cause as supporting, instead of weakening, this presumption.

The plaintiffs contended that the papers filed in the land-office did not justify the emanation of the patent; and that the absence of the assignment, and of any proof of its destruction, justified their requiring from the defendants the most complete proof of its existence and loss.

The papers on which the patent issued, were a copy of the original warrant, a copy of the plat and certificate of survey made in the name of N. Massie, as assignee, on the 24th of December, 1796, and recorded in the surveyor's office on the 9th of June, 1797, to which were annexed the following certificate and affidavit: "I do certify that the within survey was made on 1,200 acres, part of warrant No. 2675 (Jouitte's warrant); 403 acres, part of warrant No. 3398; and 277 acres, part of warrant No. 2642. The warrants No. 2675 and 3398 were taken out of this office the 13th day of June, 1797, with the original survey, of which this is a duplicate; warrant No. 4675 was taken out the 14th day of March, 1799; and that the said warrants had not been satisfied prior to the date on which they were taken out of this office, and that so much of each warrant as is contained in this survey, at least, was assigned to said Massie.

Given under my hand and seal of office, this 20th day of April, 1802.

RICHARD ANDERSON. L. S.

\*State of Ohio, Ross county, ss. [\*125

Personally appeared before me, Joseph Taylor, a justice of the peace in and for the county aforesaid, Nathaniel Massie, who made oath, that the original survey of which this is a duplicate, was lodged in the office of the Secretary of War for the purpose of obtaining a patent

NOTE.—Evidence of lost paper.

If original paper be lost or destroyed, secondary evidence of its contents will be admitted. Sebre v. Dorr, 9 Wheat. 558; Riggs v. Tayloe, 9 Wheat. 483; DeLane v. Moore, 14 How. 253; U. S. v. Doebler, Baldw. 519.

So where the paper is in possession of the opposite party, if notice to produce be given, and it be not produced at the trial, inferior evidence of its contents may be given. Bas v. Steele, 3 Wash. C. C. 381; Hauston v. Eustace, 2 How. 653; U. S. v. Winchester, 2 McLean, 135.

The contents of written instruments cannot be proved by parol, unless the originals have been lost or destroyed, or their non-production is in some way accounted for. Wilson v. Young, 2 Cranch, C. C. 33; U. S. v. Lynn, 2 Cranch, C. C. 309; Hutchinson v. Peyton, 2 Cranch, C. C. 365; Patriotic Bank v. Coote, 3 Cranch, C. C. 169; Halderman v. Halderman, Hempst. 559; U. S. v. Wary, 1 Cranch, C. C. 312; U. S. v. Long, 1 Cranch, C. C. 373; U. S. v. Chevaul, 2 Cranch, C. C. 70; Ransdale v. Grove, 4 McLean, 282.

The rule applies to criminal as well as civil suits. U. S. v. Reyburn, 6 Pet. 352; U. S. v. Carrico, 2 Cranch, C. C. 110; U. S. v. Winchester, 2 McLean, 135.

The party offering secondary evidence must show

that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. Simpson v. Dall, 3 Wall. 460.

As to the degree of search necessary, see Hotchkiss v. Mosher, 48 N. Y. 478; Simpson v. Dall, 3 Wall. 460; DeLane v. Moore, 14 How. 253; Minor v. Tillotson, 7 Pet. 99; Ins. Co. v. Weider, 14 Wall. 375.

The secondary evidence must be the best the party has in his power to produce. Cornett v. Williams, 20 Wall. 226.

Photographic copies of public documents on file in the departments at Washington, which public policy requires should not be removed, are admissible in evidence when their genuineness is authenticated in the usual way by proof of handwriting. Leathers v. Salow Wrecking Co. 2 Woods, 680.

Where judgment roll has been lost or destroyed secondary evidence may be given of its contents. Mandeville v. Reynolds, 68 N. Y. 528.

To prove the contents of a lost deed, it must be shown to have been duly executed, and the witness must prove substantially its contents. Edwards v. Noyes, 65 N. Y. 125.

Before giving evidence of the contents of a lost instrument, it is the right of the opposite party to

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prior to the 8th day of November, 1800, and that the same has been lost or destroyed.

Given under my hand and seal this 16th day of January, 1806.

JOSEPH TAYLOR.

L. S.

The testimony of Anderson was taken in the cause for the purpose of proving the assignment from Joutite to Massie, and the substance of his evidence will be found in the opinion of the court. In confirmation of his testimony, the defendants also relied on a grant made to Massie, on the 2d of January, 1802, on a survey made the first of April, 1797, for Massie, as assignee of part of the same warrant. The entry was made on the 27th of January, 1795, and the patent contains a recital of the assignment of 205½ acres, part of Joutite's warrant.

A decree, dismissing the plaintiff's bill, was entered by the Circuit Court, *pro forma*, by consent, and the cause was brought by appeal to this court.

Mr. Hammond, for the appellants, argued, that the defendants stood in the same situation that Massie was at the time he made the sales, and it was incumbent upon them to prove the assignment of the warrant to Massie.

**126\*]** "In every case, the person claiming as assignee, must establish his right by proof. If the indorsee of a promissory note, bill of exchange, or other writing made assignable at law, sue in his own name upon such note, bill, or writing, he cannot recover without making proof of the assignment. The person who claims to be the assignee of a warrant or plat and certificate of survey, until after a patent is issued to him, cannot assert in his own name, against third persons, a right arising under such warrant or survey without proving his purchase.<sup>1</sup> If this is the law where the original owner asserts no claim, and is no party before the court, there is much stronger reason that it should be so when such original owner is pursuing his right in the hands of a third person, whose claim he contests. It has, indeed, been decided, that when a grant once issues, such grant is *prima facie* evidence that every intermediate act necessary to authorize the emanation of the grant has been regularly

transacted.<sup>2</sup> But that was at law, and the court, in the opinion delivered, plainly intimate, that the fact, whether the incipient right had actually been assigned, might be contested in equity. Upon whom the burden of proof should rest, in such a case, is not noticed.

But the Kentucky Court of Appeals has decided, that where there had been no actual assignment of the warrant, the owner might recover the lands in \*the hands of the [\*127 pretended assignee, after the grant, or in the hands of the purchaser with notice.<sup>3</sup> And they seem to have required the claimant to adduce proof that no assignment ever was made. In these cases, the assignment was actually indorsed upon the warrant, which it is conceived is a material circumstance.

Warrants for land, and plats and certificates of survey were not assignable upon the principles of the common law. They were subjects of contract, and might be sold and purchased; but without the aid of statutory provisions, the purchaser could not have acquired an absolute legal interest in them. The first statute of Virginia, that provided for granting land warrants, and executing surveys, enacted that "all persons, as well foreigners as others, shall have a right to assign and transfer warrants and certificates of survey for land." To assign or transfer—that is, to vest in the purchaser an absolute legal title to the warrant or plat and certificate of survey—can only be done by indorsing such assignment or transfer upon the warrant or plat itself, or by making it in writing, and attaching such writing to the document transferred; so that the subject assigned or transferred, and the act of assignment and transfer shall be inseparable. The owner of a land warrant may sell it, either by parol or written contract. Such sale would vest in the purchaser an equitable right to the warrant; a right which a court of law would respect, and a court of equity enforce; \*but it [\*128 would not constitute him the legal owner. It would not operate as an absolute assignment or transfer of the legal ownership. So the obligee of a bond, made assignable by law, may dispose of it by contract; but if no assignment be

1.—Kerr v. Watts, 6 Wheat. 550.

2.—Polk's lessee v. Wendell, 9 Cranch, 87; Ross v. Reed, 1 Wheat. Rep. 482, 487; 6 Wheat. Rep. 293.

3.—1 Hardin, 37; 4 Bibb. 447.

cross-examine the witness as to the sufficiency of the search. Loomis v. Mowry, 4 Hun. 271.

An extract of a lost letter is not evidence, unless the witness can testify as to the contents of the whole document. Walbridge v. Kilpatrick, 9 Hun. 135.

Where the person to whom the letter is written testifies that he does not know where it is, but believes it has been destroyed, its contents are admissible in evidence. Green v. Disbrow, 7 Lans. 381.

The contents of a letter may be proved by parol where the person having it in possession is out of the country. Tucker v. Woolsey, 6 Lans. 482; S. C. 64 Barb. 142.

To render a person competent to testify as to the contents of a writing, he must have seen and read it, and be able to speak from personal knowledge. His having heard it read by another is not sufficient. Nichols v. Ore Co., 56 N. Y. 618.

Where negotiable notes past due are surrendered to the maker, the presumption is that they are destroyed, and secondary evidence of their contents is admissible. Chrysler v. Renois, 43 N. Y. 209.

Copies compared are competent testimony of Wheat. 7.

high order of proof, upon proof of loss of the original. Reid v. U. S. Exp. Co. 48 N. Y. 462; Hildebrand v. Crawford, 6 Lans. 502; Rice v. Davis, 7 Lans. 393.

Letter press copies of letters are in no sense original papers, and are admissible in evidence only after notice to produce the originals, or proof of their loss. Foot v. Bentley, 44 N. Y. 166.

A copy of a letter written by one party to the other, no notice to produce the original having been given, though sworn to by the writer as correct, is not competent evidence in his behalf. Foster v. Newbrough, 58 N. Y. 481.

In action upon lost note, testimony of plaintiff that he let the makers take it, for a special purpose, who said they had lost the note, and he had not since seen it, is sufficient proof of loss to sustain finding of jury of the loss. Ellenwood v. Fults, 63 Barb. 321.

Loss cannot be shown by one who has no recollection of the paper, and has not had it, or searched for it. Roelker v. Ins. Co., 2 Sweny, 275.

Where the paper is of little value, that aids the presumption of its loss, and less diligence of search is required. Baker v. Squier, 1 Hun. 448.



indorsed upon it, or absolutely attached to and connected with it, the purchaser, it is conceived, could not sustain an action upon it in his own name as assignee. He would be compelled to sue in the name of the original obligee, and upon establishing his purchase, a court of law would so far respect it as to preclude the nominal plaintiff from interfering to control the suit.

This position is sustained by the subsequent legislature of Virginia on this subject. Provision was made by law for returning warrants in part located, or otherwise, and receiving new warrants in exchange. The propriety of issuing new warrants to assignees where the name of the original owner was merely indorsed on an assignment executed without the attestation of witnesses, was doubted. To provide for this case, the act of the Virginia Assembly of February, 1809, was enacted. It recites the provision authorizing the assignment of warrants in general terms, and that there are "many warrants outstanding which have been transferred, sometimes by the mere indorsement of the names of the holder, and at others by assignment without attestation, and doubts have arisen whether, in such cases, it would be proper for the register of the land-office to grant to the present holders new warrants in exchange for the warrants so transferred and assigned. It \*then directs, that in such cases new warrants may be granted in exchange, provided always that no such exchange shall be made, unless, the applicant therefor shall have previously annexed to such warrant his own affidavit, stating that so far as he knows or believes, the indorsements or assignments appearing on such warrant have been made fairly and *bona fide*, and that he, or those in whose name or names such exchange is sought, is or are the true and rightful proprietor or proprietors of such warrant." The act provides that this affidavit, with the original warrant, shall be preserved, and that the right of the original owner, or other, to the original warrant, shall not be effected by this proceeding. And it directs, that thereafter warrants shall only be assigned by written assignment on the back, attested by two or more witnesses. It is insisted that the framers of this statute recognized no mode of assignment, to vest a legal interest, in the warrant, that existed distinct and separate from the warrant itself. They contemplated that in every case the warrant should carry with it the evidence of ownership. And because in all transactions with third persons, claiming to be owners, the evidence might be insufficient or fabricated, the law required the preservation of the warrant itself, that with it this evidence might be preserved. Lest by exchanging the warrant this evidence should be lost, and the relative rights of the parties changed, or otherwise affected, the provisions just recited were enacted.

In this case, the warrant never was so assigned or transferred as to vest a legal interest **130\*** in Massie, \*and it certainly cannot be incumbent upon the complainants to disprove that which does not exist. Had an assignment of any kind, subscribed with Joutite's name, been indorsed upon the warrant, there would be something to which the complainants could direct their proof. They might attempt to nega-

tive the fact that Joutite had actually subscribed the paper; and the actual existence of such indorsement might be considered, at least after the grant issued, as *prima facie* evidence that it was genuine. But this presumption cannot be raised, without some foundation for it to rest upon.

Where the assignment is made upon a separate paper, as is claimed here, the defendants must establish the existence of this assignment, before it can avail them anything. When the existence of such separate assignment is established, its genuineness and operative effect are to be examined.

The deposition of Anderson does not sufficiently prove that any such assignment ever existed. He evidently testifies, not from any distinct recollection of the fact, but from a knowledge of what ought to have existed to justify him in allowing entries in Massie's name as assignee. His testimony is as to the general course of business in the office, from which he infers that an assignment must have existed. And when the defendants put the question direct as to the character of the assignment, whether indorsed upon the warrant or made on a separate paper, his answer is not positive as to the fact; but is clearly an inference from other facts. "On a separate piece of paper, I presume, as the entries \*in **131** the first instance were in Joutite's name." This presumption, deduced by the witness from the fact that the warrant was deposited in the office by Joutite, unassigned, and various locations made upon it in the owner's name, is but slender evidence upon which to establish any fact. The foundation on which the witness makes this presumption is before the court. Can it be said that the inference is of that irresistible character that amounts to proof? If the witness were present, his testimony could not be received as competent to establish the fact that such paper existed, unless he were able to state, and did state, that he had such knowledge of Joutite's handwriting, as, upon well-settled principles, would enable him to testify to it. Nothing is shown in his deposition of his knowledge of Joutite's handwriting. For this reason alone his testimony is inoperative.

Were the existence of the paper clearly established, its contents and effect could not be proved without first proving its loss. The testimony shows that this assignment was delivered to Massie. It is thus traced to his possession. His own affidavit, made with a view to obtaining the grant for the lands in question, is wholly silent as to its loss or destruction, and there is no evidence what has become of it. In such case it is not competent for the defendants to prove its contents.

The testimony of Anderson is liable to some exceptions. He is positive that he never made but one entry without an assignment of the warrant; that Joutite's first entries were made by Massie; that the assignment was taken out of the office with the plat \*and certificate, **[\*132]** and that the assignment was first produced by Massie. He is, with respect to other facts equally material, unable to recollect. He is not certain that the assignment was on a separate paper; does not recollect when it was produced; its date, or whether attested by sub-

scribing witnesses; nor is he positive whether it was executed by Joutte personally, or by an agent. It is manifest from all this, that he does not state facts from a distinct recollection of circumstances and transactions, but from inference only. His official papers show, that certain facts ought to have existed, and hence he supposes that they existed, and so testifies.

The certificate of Anderson, on the 10th of May, 1801, that the warrant had been taken out of the office by mistake on the 14th of June, 1797, is incorrect in point of fact; because, both his subsequent certificates of the 20th of April, 1802, and his deposition, show that it was delivered to Massie with the original plat and certificate of survey to be returned to the war office, that a patent might issue. As the warrant was wholly appropriated, the last survey upon it being made upon the first of April preceding, it was regular and proper, if not absolutely necessary, to return the warrant to the war office. The law required the warrant to be returned to the office where the patent issued, or a certificate to be adduced from the surveyor that a part remained unappropriated in the office, before a grant could issue. As the warrant was wholly appropriated, this certificate could not be made; there was, of consequence, a propriety in returning **133\*** the original warrant. There \*could be no mistake about it; and this certificate was found of great practical convenience to Massie, who was relieved by it from the necessity of returning the warrant without an assignment, or the warrant with the assignment, to be preserved as evidence against him.

The act of Congress of March 3d, 1803, c. 343, which provided what evidence should supply the place of a warrant or certificate lost or destroyed, directed that a certified copy of the warrant or plat and certificate of survey, with satisfactory proof, by affidavit or otherwise, of the loss or destruction of the warrant or plat and certificate of survey, should be sufficient. The warrant never was in fact returned. No evidence was ever produced of its loss. Massie, in his affidavit made in 1806, in conformity with the provisions of this law, is silent as to the loss of the warrant, and confines himself to the plat and certificate of survey. It is by means of this certificate that the warrant was taken out of the office by mistake that the omission to return the warrant is supplied; although a careful examination of the whole documents would have shown that this certificate did by no means account for keeping the warrant back. It is thus demonstrated from the documents themselves, that the grant issued to Massie's heirs was upon incompetent and insufficient evidence.

By depositing his warrant with the surveyor, and procuring it to be located, Joutte did all he could to secure his own rights, and to prevent imposition upon others. The warrant no **134\*** longer existed a mere floating \*evidence of a right to land, which circulated through the country, and upon which any person might forge an assignment, and thereby deceive and prejudice others. After the location, the warrant was no longer assignable until withdrawn; and it was by the unauthorized act of Massie, in withdrawing the warrant, that it was again in a condition to be assigned. The owner of a

warrant, who has thus acted, stands in a situation different from one who has not thus been careful. From him and his representatives the same degree of proof ought not to be required of a forged or unauthorized assignment, as might properly be exacted from one whose warrant by his own act, or his own neglect, was thrown afloat into the market. Indeed, it is deemed doubtful, whether, after the owner had entered the warrant, and thus put an end to its assignable character, that character could again be restored by the unauthorized act of another.

Upon the whole, we insist that the evidence does not make for the defendants even a *prima facie* case of assignment; that when its competency and effect are examined by settled principles of law, it amounts to nothing; of consequence, there is nothing for the plaintiffs to disprove. The right of their ancestor is vested in them, and they must recover.

Mr. Doddridge and Mr. Scott, contra, stated, that whether the burthen of proof of the assignment be cast on the respondents, who claim under it, or the appellants, who deny it, was a question of vast importance to those who hold lands anywhere under the laws of Virginia. The cases cited from the Kentucky \*reports furnish precedents in favor of [**\*135** the respondents, especially as the proofs of the assignments claimed were yet in being, which is not the case here.

It is insisted, on the other side, that the evidence of the contract of assignment ought to be written on the warrant, or on some paper attached to it; inseparably attached to it, to use the language of the counsel.

A warrant for land under the Virginia system may strictly be termed a chose in action. It is the mere evidence of executory contract between the state and a citizen. Bounties in land had been promised to the army, by various laws, as a reward for military services. Where the services were performed, the relation between the parties was that of debtor and creditor. It is immaterial whether the debt thus created was payable in money, or in land at a particular place, and at a future time. When, by the act of 1779, warrants for the bounties were created, like all other evidences of debts due from the state, they would have been subject to the policy of the common law, and not assignable, but for the policy of that act. The statute made warrants and the certificates of survey assignable; but the words "shall have right to assign and transfer warrants and certificates of survey for lands," do not import any particular mode of assignment. They give to the document its assignable quality, leaving the parties to choose their own mode of evidencing the contract. Whether they adopt the ancient policy of the common law, requiring all assignments to be made by deed of indenture, or the more easy mode of indorsement or \*deliv- [**\*136** ery, seems to be quite immaterial. If proof of an assignment on paper, either attached to the writing or not, were now required, the rights of assignees would, at this time, fail for millions of acres; for, if positive proof of an assignment must be made, in all cases, by those claiming under it, the mere ink and paper importing the assignment would not be sufficient. Proof of the execution would be required; in a great



majority of cases, it could not be produced. These papers passed from hand to hand like coin; they were owned by all classes of people; as well by the poor and illiterate, as by men of business.

Warrants, in many cases, were left with the principal surveyors, for safe-keeping, and a letter addressed to him from the owner, to let another have so many acres of warrant, was received as sufficient authority to make an entry for the assignee. These letters could be produced in but few cases; but if required at all, the mere production would not be evidence. Proof of the handwriting would be called for on the appellant's principles. As to the cases cited from the Kentucky reports, in one of these an assignment was indorsed; in the other a breach of trust existed. As against the patentee or those claiming under him with notice, proof was admitted, in the one case, that the assignment was a forgery; in the other, that the confidence of the owner was abused. But this proof was given by the owner of the warrant, not by the claimants under the patent. In these cases the nature of the claim could yet be traced; in ours it cannot.

From these cases, and the reason of the thing, **137\*** it is \*evident that the patent is *prima facie* evidence of all that was necessary to its emanation. Indeed, it seems to be admitted on the other side, that it has been so decided. But this admission is qualified. It is insisted that where the patent office contains the warrant, assignment, and survey, all in regular order, there claimants of the warrant will be held to disprove the derivative claim. If this be the rule, the patent is but *prima facie* evidence of its own existence only, and, of nothing necessary to its existence. This notion is fanciful, but not sound. The patent is *prima facie* evidence of an assignment, or it is not. If it is *prima facie* evidence, the appellants must wholly fail. We have a patent to Massie's heirs, and which they claim legally, and the other defendants, at least, equitably (for we are in a court of equity), and the appellants have no proof.

The act of 1809, referred to by the appellants' counsel, gives him no aid. It recites that assignments were sometimes made in a loose manner, and that there was a consequent hazard in granting exchange warrants; and its provisions are prospective, and all of them are merely directory to the register.

But if the claimants are held to the proof of an assignment, in fact, they have made that proof. Anderson states that he came into office in July, 1784, the commencement of the official duties in Kentucky; has ever since held the office. At the commencement, a few entries were made by another person; in 1812, eight or ten by his daughter, while he was sick; and for some reason, not explained, about as many more, by his son, in 1814. With these exceptions, every \*entry on his records was made by himself. All those on Jouitte's were so made. They were all directed by Massie. He considered him agent at first, but never saw a written power. Before the 27th January, 1795, Massie produced a written assignment, on which he made the entry in question of that date. He further states, that on the 14th June, 1797, he delivered the assignment and warrant to Massie, with the survey in question.

An attempt is made to discredit this testimony by its intrinsic demerits. It is said to be wonderful that he should not recollect whether there were any witnesses to the assignment, what its date, and when delivered to him. But the assignments in his office are so numerous, that if at the distance of twenty-two years he should feign to recollect such particulars, that would, indeed, discredit him. It is further objected to him, that he states that he never, but in one instance, made an entry for an assignee, without having the assignment, and that was not in the present case; and that he pretends to recollect delivering out the warrant in question, to whom and when. But it is to be remembered, that upon delivering out official papers, entries are made, which assist the memory. As to the particular case of an entry, without an assignment, it would be strange if he did not recollect it. That was the only case in an official life of nearly forty years in which he suffered such an indiscretion to pass him. He was uneasy about it, and made immediate inquiry of the owner. The attempt to discredit Anderson, from his own examination, therefore fails.

\*So much for Anderson's testimony [**\*139** under the commission. Is it supported or defeated by the official evidence?

Some apparent confusion occurs, which is cleared up by an attention to dates. His second certificate relates to the first transaction in point of time. It was his practice to forward the assignment with the first survey, in order that they might lay in the patent office, to be referred to when other surveys should be returned; and called thence a reference paper. The warrant with the last. But he delivered both the assignment and warrant to Massie, with the survey in question, being the first, which, as to the latter, was a mistake. It was not recollected that one or more surveys were yet to come. Of such delivery an entry is made. The time and the occasion can, therefore, be recollected. If our hypothesis be right, Massie may be well supposed to have delivered all the papers into the war office, when they were destroyed by fire on the 8th of November, 1800. After the destruction of the war office, the surveyor is applied to for the last survey of 851 acres; then it was that the warrant should have been delivered with the survey. But the warrant was not found, and the memorandum book would show what had become of it. He could not refer to the assignment or warrant as reference papers, for they were destroyed. He, therefore, states what was the amount of the assignment, and that the warrant was taken from his office, by mistake, on the 14th of June, 1797. On these papers a grant issued for the 851 \*acres. Although Anderson might [**\*140** have stated in his certificate by whom the warrant was taken, and on what occasion, the omission to do so is unimportant.

By a law of Congress, patents can be had upon lost papers, by taking a copy of the warrant from the register, or a copy of the plat and certificate from the surveyor, and satisfying the officer of the loss of the papers by his own oath, or otherwise. Massie made affidavit on the copy of the plat and certificate, that the original, of which that was a copy, had been filed in the war office, and that it had been lost



or destroyed. The omission to state that the warrant and assignment accompanied the plat, and were destroyed with it. He got them all in order to procure a patent. It was his interest to file them; and it is incredible that he did not.

But supposing the assignment not to be clearly proved, the court will presume one from the circumstances, in order to support the possession.

On the subject of such presumptions, generally, reference may be had to the authorities cited in the argument of another cause at the present term.<sup>1</sup> To these may be added some of the decisions in the local tribunals. Thus the Court of Appeals of Virginia have determined that, though the presumption arising from the lapse of time may be repelled by circumstances, yet those circumstances must be clearly proved, which, in the present case, they are not.<sup>2</sup> By the law of Virginia, a person owning lands on one side of a stream, and de-<sup>141\*</sup> siring enough of the \*lands of another on the opposite side, against which to abut his dam, may acquire it contrary to the will of the owner. He procures a writ from the County Court in nature of a writ *ad quod damnum*, to value the land. The law provides, that upon paying that value, the party shall be seized of the land condemned. In the case in question, the condemnation had taken place in 1777. The money had not been paid; the land had been sold; possession had gone with the condemnation, and a mill had been built. The statute period of limitation had not elapsed, yet the court presume the fact of payment; the very fact which divests one man and invests another with the inheritance.<sup>3</sup> In another case a testator had appointed several executors, and empowered them to sell. Some had qualified, and some had not. They who qualified, sold and conveyed. Time had not elapsed to bar a writ of right. The case was decided under the stat. 21 Hen. III., c. 4. The deed was absolutely void; it passed no estate in law or equity, unless it appeared that the other executors had renounced. The court determined that the renunciation was a fact which admitted of proof *in pais* as well as by record; but that in favor of the possession it might be inferred from circumstances.<sup>4</sup>

The presumption sustained in the cases quoted vastly exceeds what is required in ours. In our case the circumstances are unanswerable.

The appellants cannot rely on any supposed difference between an imperfect legal title and an equitable one, as to the question of either <sup>142\*</sup> presumption or \*abandonment. If a warrant creates nothing but an equitable interest, and an entry upon it an imperfect legal one, then Joutte never had more than an equity. He never had an entry unless the testimony of Anderson be sufficient to establish an agency. Give but credit to that testimony, and both agency and assignment are established.

As to the defendants, who have not admitted the appellants' derivative claim, the decree must be affirmed at all events, unless the documents from Albemarle County Court are sufficient to establish the character of Alice as heir-

ess. Let this be conceded for argument sake; then what are they? Documents made *ex parte*, and received by usage only in Virginia, for the direction of the register of the land-office. If this evidence can establish a derivative title, ours filed in the land-office for the direction of the commissioner, are of equal authority to support our derivative title. *A fortiori*, as ours grew in'o use, not by custom merely, but by act of Congress.

*Mr. Hammond*, for the appellants, in reply, stated, that it had been insisted by the respondent's counsel, that as it is shown in the bill that the complainants never abandoned the first original entries, they cannot claim the land in question, because, if entitled at all, it is to the lands upon which the first location is made. If this were correct, it would follow that the warrant might actually appropriate double the amount of land that it called for. The complainants would hold the first location, and the defendants that where the warrant is patented. This absurd consequence \*is sufficient [<sup>143</sup> to show that the position is incorrect. It is, however, untenable for another reason. The owner of a land warrant, who has never parted with his right to it, may regard the person who intermeddles with it, as acting for him; and thus claim and hold the land appropriated, although he never directed the location.

It is also said, that as the legal title was invested in Massie's heirs by the patent to them, that title enures to the benefit of those to whom Massie had previously conveyed without title, and that therefore the defendants are invested with a legal title. This proposition cannot be sustained. It is true, that in certain cases, where a person conveys without title, and the same person afterwards obtains title, as between such person, and the person to whom a conveyance was made, the after-acquired title cannot be set up to prejudice the purchaser. But this proceeds upon the doctrine of estoppel, and can have no application to a case like this, where the person with whom the title first commenced, is seeking to assert it against those who have unfairly got possession of it.

It is conceded that a warrant for lands is made assignable by the statute that authorized it to issue; and it is said, that it is the mere evidence of an executory contract between the state and a citizen. The contract is for a grant of land, hereafter to be made, and the warrant is evidence of that contract. The act did not mean to give authority to transfer the land when granted; but the evidence of right before a grant was made. The power to assign and transfer \*is, therefore, not a power to [<sup>144</sup> make a sale of the subject; and it is apprehended that a deed of indenture was never used at the common law to transfer to a purchaser a legal right in any written evidence of an executory contract.

The warrant, or plat and certificate of survey, is the subject that is to be transferred by the act of assignment, and it seems indispensable that there should be some direct connection between an act and the subject upon which it operates. Hence we insist, that an assignment can only be made as before suggested.

1.—*Ante*, p. 59, Ricard v. Williams.

2.—1 Wash. Rep. 188.

3.—Young v. Price, 2 Munf. 534.

4.—Giddy v. Butler, 3 Munf. 345.



It is not pretended, that a purchaser of a warrant cannot hold, unless it be thus assigned. The principle is applied to the evidence that ought to be required. If the assignment be indorsed upon the warrant, or be executed upon a separate paper, and connected with the warrant, these facts might be considered *prima facie* evidence of a sale, sufficient at least to put the claimant upon some proof to impeach them. But where nothing of this kind exists, and a purchase be claimed, such purchase is wholly matter *in pais*, and he who claims under it must furnish the proof of its existence. Until such proof be furnished, there is nothing for the other party to impeach.

This might be insisted upon even after the patent emanated. The law requires the warrant and plat, and certificate upon which the grant emanates, to be carefully preserved. And this is not without object. That object would seem to be a preservation of the evidence upon **145\*** which the grant was obtained, that \*the fact of ownership, decided *ex-parte* by the officers of the land-office, might be fairly open for investigation. But certainly this matter of fact cannot be presumed against an original owner, before the patent issues, and we insist that this case stands as if the patent had not issued. And, besides, it is conceived, that this fact ought not to be presumed against an owner, in a case standing as this does, where the proof is clear that the patent was issued upon evidence that did not authorize it.

That a very loose method of transferring land warrants was adopted and practiced, cannot vary the law, nor has it been considered to have had that consequence. The cases cited show that property in these warrants could not be acquired by delivery as in the case of other chattels. The mischiefs apprehended do not exist. We do not claim that the warrant can be followed into the hands of an innocent purchaser of the legal title. But we conceive that the patentee is not such a purchaser. It is incumbent upon him to know that he is fairly owner of the intermediate evidence of title; and if he is not, he ought not to hold the land. This is the policy of the act of 1809, and though prospective as to its enactments respecting future assignments, it plainly intimates, by its provisions for existing cases, that its authors contemplated no such thing as an assignment, distinct and separate from the subject claimed to be assigned. If any mischief results from the doctrine asserted, it can only fall upon those who have possessed themselves of the rights of **146\*** others, without \*taking proper precaution to be certain that they were not aiding to do injustice.

It is also insisted for the defendants, that, although an assignment in fact may not be proved, yet from the circumstances, the court will presume an assignment to support the possession.

All presumptions stand upon their own particular circumstances. But presumptions are never resorted to where the facts are otherwise understood. Here the nature and character of the pretended assignment is fully in evidence. It stands surrounded with many suspicious circumstances. Proofs as well as presumptions are strong against the fairness of Massie's conduct. In such a case it would surely be very

unsafe to found a title upon presumption. In all the cases cited, the parties were all residents in the same neighborhood. The claimants witnessed daily the acts of ownership exercised, and improvements made by the other party. From their omission to assert any right, the presumption naturally arose that they had no right to assert. Here the case was different. After commencing his title the original proprietor died. His heir knew nothing of what was done. She resided in the interior of Virginia; the land-office was in Kentucky; the lands in the wilderness of Ohio. It is going too far to say that she was bound to take notice of the entry in the office, in Kentucky, and of the improvements commenced and carried on in Ohio. It is palpable that she was in fact unacquainted with the whole subject. The court are asked to presume, first, that she was apprised of that of which she was really ignorant, and from that presumption to presume \*again, that she knew there was a sale, [\***147** or assignment, and for that reason forbore to assert her pretensions.

The time, in this case, under its circumstances, would not bar a recovery on ejectment, in Ohio; an inchoate legal title ought not to be destroyed by presumption in a shorter period. It is believed, that none of the cases go so far.

The certificate of the court of Albemarle county is sufficient, in this case, to prove the heirship of the plaintiff, Alice, and her intermarriage with the other plaintiff. The facts are evidently denied in the answer, *pro forma*. The defendants assert only their ignorance, and ask proof. The certificate in question is exactly that kind of evidence which is taken to establish the *prima facie* right of the party to a warrant, plat, and certificate, and patent as heir, or representative, and ought to be sufficient to satisfy those who profess only that they know nothing, and therefore call for proof.

The surveyor's certificate that the warrant was assigned, has been received in the land-office, as evidence of such assignment, and when the commissioner has acted upon it, and issued the grant, the defendant's counsel has strongly urged, that he who claims against it, must disprove it. We ask no more in the case of the certificate of the County Court. There is no act of Congress directing such certificate to be received for any purpose. In respect to this the counsel are mistaken.

Mr. Chief Justice MARSHALL delivered the opinion of the court, and after stating the case, proceeded as follows:

\*It may be doubted whether the act [\***148** of the 10th of August, 1790, authorized the issuing of a patent in the name of an assignee. This doubt, however, is entirely removed by the act of June 9th, 1794, c. 238, which enacts that every officer and soldier, his heirs or assigns, entitled to bounty lands, &c., according to the laws of Virginia, 'shall, on producing the warrant, or a certified copy thereof, and a certificate under the seal of the office where the said warrants are legally kept, that the same or a part thereof remains uncertified, and on producing the survey agreeably to the laws of Virginia, for the tract or tracts to which he or they

may be entitled as aforesaid, to the Secretary of the Department of War, such officer or soldier, his or their heirs or assigns, shall be entitled to and receive a patent for the same, from the President of the United States, anything in any former law to the contrary notwithstanding."

This act recognizes the right of the assignee to a patent, without prescribing the manner in which the assignment is to be proved. It requires the production of the warrant, or a certified copy thereof, and of the plat and certificate of survey, but gives no rule respecting the proof of the assignment.

It is admitted that the assignment may be indorsed on the warrant, or may be connected with it, and that the warrant may remain in the surveyor's office, since a patent may be issued for a part of it, as was done in this case, while a part remains unsatisfied; and may be issued on a certified copy of it. It would seem, from these circumstances, that proof of the assignment might be received by the surveyor.

**149\*]** \*If the warrant were assigned by indorsement before the entry, or if the entry were assigned and transferred before the survey, the survey would be made and certified to the land-office, in the name of the assignee. The law does not, in terms, require that the original assignment, or a copy of it, should be transmitted to the office with the survey. It would seem, then, that in ordinary cases, proof of the assignment might be made in the surveyor's office, and certified to the land-office.

Unquestionably, if notice were given by any person claiming title against the certificate of the surveyor, the fact would be examinable before the emanation of the patent; but as no law requires that the assignment should be submitted to the person who issues the patent, or be always examined and decided on by him, nothing seems to oppose the practice of relying, in ordinary cases, on the surveyor's certificate. If such be the rule of the office, the court ought not to disregard it; and that it is the rule, is, we think, to be inferred from the fact that this patent has been issued to the assignee in this case on such testimony, and that the bill does not charge it to have been issued irregularly. It denies the assignment; but not that the usual proof of it was made in the land-office. In this case the survey was made in the name of the assignee, and the surveyor certifies that the warrant was assigned to the extent of the survey. We must suppose that the usual proof of the assignment was received.

By the act of the third of March, 1803, c. 343, it is enacted, that "where any warrants granted by the state of Virginia for military **150\*]** services, have been surveyed \*on the north-west side of the river Ohio, between the Scioto and the Little Miami rivers, and the said warrants, or the plats and certificates of survey made thereon, have been lost or destroyed, the persons entitled to the said land may obtain a patent therefor, by producing a certified duplicate of the warrant from the land-office of Virginia, or of the plat and certificate of survey from the office of the surveyor in which the same was recorded, and giving satisfactory proof to the Secretary of War, by his affidavit, or otherwise, of the loss or destruction of said warrant, or plat and certificate of survey."

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This act has been literally complied with, except that instead of "a certified duplicate of the warrant from the land-office of Virginia," we find a copy of the warrant, certified by Richard C. Anderson, the principal surveyor, dated the 30th of April, 1795, when the warrant was in his office, and the certificate regularly and officially given, and written on the back of a survey, No. 1629, for 400 acres, part of the said warrant, on which a patent was issued to Robert Joutte, dated the 26th day of October, 1799.

The purpose for which a certified duplicate from the land-office of Virginia was required in the case of a lost warrant, undoubtedly was to protect the United States from fraudulent claims on warrants alleged to be lost, but which never existed; not to settle controversies between the original holder and those claiming under him by assignment. The land-office of the United States being in possession of an official copy of that warrant, on which a patent had been issued, no motive existed for requiring a duplicate \*from the land-office of **[\*151]** Virginia. The original existence of such warrant could not be more fully proved, and the evidence of it which was in the office was such as the law deemed satisfactory at the time it was received. But if this were an irregularity, it is one which could only affect the United States, and is of no consequence in this cause, since all parties admit the existence of the warrant and claim under it.

This patent, then, must be considered as having issued regularly, on the documents required by the rules of the office; at least so far as concerns the parties before the court. The title of the person who has obtained it is undoubtedly examinable, but no presumption exists against him.

The testimony of Anderson, the principal surveyor, has been taken, for the purpose of proving the assignments from Joutte to Massie. He deposes that the office was opened for making entries on the north-west side of the Ohio, on the 1st day of August, 1787, and that he had continued ever since to transact the business in person, with the exception of a short time which he mentions, and which does not comprehend the making of the entries in this case. He has never, except in one instance, which was not Joutte's, made entries in the name of an assignee, without having previously received the assignment, and in that instance he was informed by the original proprietor of the warrant himself, that he had sold it. That Joutte's warrant was deposited in his office on the 19th day of November, 1784 (he thinks by Robert Joutte himself), and that the witness made \*all the entries on it. He has no hesi- **[\*152]** tation in saying the assignment was prior to the entry on which this survey was made, or he could not have made the entry. On being asked whether the assignment was on the warrant, or on a separate piece of paper, he answers, on a separate paper, he presumes, as the first entries were made in Joutte's name. On being cross-interrogated by the plaintiff, he says that he does not recollect the precise time when the assignment was produced in his office, but it was not prior to the 27th of January, 1795 (the date of the first entry in the name of Massie), and to the best of his recollection, purported and appeared



to be made by Joutte himself. He does not recollect its date, nor whether it was attested by a subscribing witness. It was lodged in his office by Nathaniel Massie, and taken out with the plat and certificate of survey of the assigned part of the warrant, by him, on the 14th of June, 1797.

In corroboration of the testimony of Anderson, the defendants rely on a grant made to Massie, on the 2d of January, 1802, on a survey made the 1st of April, 1797, for Massie, as assignee of part of the same warrant. The entry was made on the 27th of January, 1795, and the patent contains a recital of the assignment of 2051 $\frac{3}{4}$  acres, part of Joutte's warrant.

It is impossible to read the testimony of the principal surveyor, or to credit it, without believing that an assignment, purporting to be made by Joutte, was produced by Massie, and deposited in his office. His fixed rule to require the **153** production of an assignment \*before an entry in the name of the assignee could be permitted, his averment that he never departed from that rule, except in a single instance, his clear recollection of the circumstances attending that instance, his admission of entries in the name of Massie, as assignee in the life-time of Joutte, his averment that the assignment was placed in his office, and taken out with the plats and certificates of survey by Massie, prove that there must have been such a paper. But the proof of its being executed, by Joutte, is certainly not so explicit as it might or ought to have been. Colonel Anderson does not say that he was acquainted with the handwriting of Joutte, and believed the assignment to have been written by him. But he acted as a public officer on the full conviction of this fact, and his whole testimony proceeds upon the idea that he was entirely satisfied of the verity of the instrument. Joutte and himself having been officers in the same service, it is not improbable that the handwriting of the one was known to the other; and to the question whether the assignment purported to be made by Joutte himself, or by an agent, he answers that it "purported and appeared to him to be made by Joutte himself, to the best of his recollection." The word "appeared," which is introduced by the witness in his answer, to this interrogatory, and which is not in the question, seems intended to indicate that he had formed an opinion on the handwriting. Had the plaintiff suspected that Anderson was not acquainted with the handwriting of Joutte, or not perfectly satisfied that this assignment was in his handwriting, **154** \*some question would have been propounded indicating this suspicion. But no such question is propounded; and we can make no other justifiable inference, from his whole testimony and conduct, than that he was acquainted with the handwriting of Joutte, and was satisfied that the assignment was written by him.

On the character of the principal surveyor no imputation is cast. His office is a proof of the confidence reposed in his integrity by those who knew him. His testimony is incorrect, is studiously calculated to establish an untruth, and his official conduct fraudulent, if he had no sufficient knowledge of the verity of the assignment. That his testimony is less explicit than it ought to have been; that it omits the

express averment of a fact, implied by all he says, and which is necessary to its fairness and its truth, will not, we think, justify a presumption against that fact. We understand Colonel Anderson's testimony as implying a knowledge of the handwriting of Mr. Joutte, and of the verity of the assignment.

There is still another defect in the testimony which is by no means inconsiderable, and which has been strongly pressed by the counsel for the plaintiff. The assignment itself is not produced, and there is no direct proof of its loss. Its absence depriving the plaintiffs of the power of disproving it, is a circumstance calculated to excite suspicion, and ought to be accounted for. The rule that the loss of a paper ought to be established before its contents can be proved is well settled, and ought to be maintained. Yet there are difficulties in applying it to this case which are not to be surmounted.

\*The legal title of Massie is consumed, [\***155** and the assignment, having performed its office, is no longer a paper essential to that title. The same proof respecting it, therefore, cannot be demanded, which might be required were it relied on as composing part of the title. It was not absolutely incumbent on the assignee to preserve it after the emanation of the patent; and he could not, unless the transaction he presumed fraudulent, foresee this controversy. He died before any claim on the part of the plaintiffs was asserted, before any denial of the assignment was made, and therefore could not be expected to prepare testimony in its support, or to account for its loss. Had the assignee been living, he might be expected to show, at least by his own affidavit, supported by probable circumstances, the loss of the assignment; but he died before the occurrence of any circumstance which might suggest the propriety of such an affidavit. The defendants have done all in their power. They aver their belief that the assignment was real, their total ignorance of its present existence, and their belief of its destruction, and they state the probability that it was burnt with the papers of the war office.

Under all the circumstances of the case, the probability of its being consumed in the war office is great. The assignment was delivered with the warrant, and the plat and certificate of survey, to Massie, on the 14th of June, 1797. It might be supposed proper to deposit it with those papers in the war office for the purpose of obtaining the patent. There \*is noth- [\***156** ing unreasonable in the supposition that it was there deposited, and consumed with the other papers of the office.

We think, too, that the length of time which was permitted to elapse before any inquiries appear to have been made respecting this property, furnishes strong evidence of the opinion that Mr. Joutte had parted with his interest in it. So early as January, 1795, between one and two years before the death of Joutte, Massie claimed a part of the warrant as his own, and made entries on it in the public office, in his own name as assignee. It is not probable that a property which constituted no inconsiderable part of the estates of the officers, should have been neglected by this officer in his life-time, or by his family after his death. Inquiries respecting it would naturally have been made,



not by the daughter, who may be supposed to have been an infant, but by her mother, her guardian, or other friends. The omission to make these inquiries may be accounted for if it was known that the warrant was assigned; not otherwise, without imputing to those relatives of the infant, a considerable degree of negligence.

We think that under these circumstances the non-production of the assignment ought not so to operate against the defendants as to defeat their legal title.

But the plaintiffs deny the validity of the assignment, because it was not made on the warrant, nor annexed to it.

The law which authorized the assignment of warrants did not require that it should be made by indorsement, or by any instrument annexed **157\*** to the warrant. \*It is not shown to have been the usage. Under circumstances most generally attending this property, and which actually attended this particular case, the assignment could neither have been indorsed nor annexed without great inconvenience. The warrant was filed in the office of the Surveyor-General, with the entries. This would occur in every case where the entries in whole or in part were made. The original proprietors resided generally in Virginia. The warrants were deposited in the office of the Surveyor-General, in Kentucky. These warrants, thus deposited, and the entries made on them, were transferable. It is obvious that the transfer, if no law forbid it, would be made on a separate paper. If any particular mode of authentication was necessary, the law ought to have prescribed that mode. This not being done, the mode was left to the parties.

The subsequent act of the legislature of Virginia, rather shows the mischief which had grown out of this state of things, and of the practice under the law, than that the practice under the law was contrary to the legislative construction of it.

This is one of those cases in which the equity of the plaintiffs is not, we think, sufficiently proved to deprive the defendants of their legal title.

*Decree affirmed with costs.*

Cited—13 Pet. 448; 15 Pet. 107; 9 How. 447.

**158\*** [\*LOCAL LAW. CHANCERY.]

WATTS

v.

LINDSEY'S HEIRS ET AL.

It is a rule at law, and in equity, that a party must recover on the strength of his own title, and not on the weakness of his adversary's title.

To support an entry, the party claiming under it must show that the objects called for are so de-

scribed, or are so notorious, that others, by using reasonable diligence, can readily find them.

The following entry was pronounced, under the circumstances, to be void for uncertainty: "7th of August, 1787. Capt. Ferdinand O'Neal enters 1,000 acres, &c., on the waters of the Ohio, beginning at the north-west corner of Stephen T. Mason's entry, No. 654, thence with his line east 400 poles, north 400 poles, west 400 poles, south 400 poles." The entry of Stephen T. Mason referred to, being as follows: "7th of August, 1787. Stephen T. Mason, Assignee, &c., enters 1,000 acres of land on part of a military warrant, No. 2012, on the waters of the Ohio, beginning 640 poles north from the mouth of the third creek running into the Ohio, above the mouth of the Little Miami River; thence running west 160 poles, north 400 poles, east 400 poles; thence to the beginning."

The Ohio and Little Miami rivers are identified and notorious objects.

But the third creek above the mouth of the Little Miami, is to be taken according to the numerical order of the creeks, unless some other stream has by general reputation or notoriety been so considered.

Cross Creek, the stream which the party claiming under O'Neal's entry assumed for the beginning to run the 640 poles north from the mouth of the third creek, as called for in Mason's entry, not being in fact numerically the third creek above the mouth of the Little Miami, and there being no satisfactory proof that it had acquired that designation by reputation, the claim was pronounced invalid.

**A** PPEAL from the Circuit Court of Ohio.

This cause was argued by *Mr. Doddridge* for the appellant, and by *Mr. Brush* for the respondents.

\**Mr. Justice TODD* delivered the [**\*159** opinion of the court:

This controversy arises from entries for lands in the Virginia military reservation, lying between the Scioto and Little Miami rivers, in the district of Ohio.

The plaintiff in the court below (Watts), exhibited his bill in chancery for the purpose of compelling the respondents to surrender the legal title, acquired under an elder grant founded on a surveyor's entry, than the one under which he derives his title.

The entry, set forth in the bill, and claimed by the plaintiff, is in the following words: "7th August, 1787. Captain Ferdinand O'Neal enters 1,000 acres, &c., on the waters of the Ohio, beginning at the north-west corner of Stephen T. Mason's entry, No. 654, thence with his line, east 400 poles, north 400 poles, west 400 poles, south 400 poles."

The entry of Stephen T. Mason, referred to in the above entry, is in the following words:

"7th August, 1787. Stephen T. Mason, assignee, &c., enters 1,000 acres of land on part of a military warrant, No. 2012, on the waters of the Ohio, beginning 640 poles north from the mouth of the third creek running into the Ohio above the mouth of the Little Miami River; thence running west 160 poles, north 400 poles, east 400 poles, south 400 poles; thence to the beginning."

The respondents, in their answers, deny the

NOTE.—As to description of lands in an entry, &c., see note to *McIver's Lessee v. Walker*, 9 Cranch, 173; and note to *Newsom v. Pryor's Lessee*, ante, 7.

Distance along a road is to be computed by the meanders of the road, and not by a straight line. *Bodley v. Taylor*, 5 Cranch, 191; *Littlepage v. Fowler*, 11 Wheat. 215.

When the quantity of land is laid off on a given base, it shall be included within four lines, forming Wheat. 7.

a square, as near as may be, unless that form be repugnant to the entry. *Massie v. Watts*, 6 Cranch, 148; *Shipp v. Miller's Heirs*, 2 Wheat. 316.

If the calls do not fully describe the land, but furnish enough to enable the court to complete the location, by the application of certain principles, they will complete it. *Ibid*.

Description must designate the place and objects and identify the lands so as to enable other persons



validity of O'Neal's entry; allege that it is vague and uncertain, and that the survey made on it includes no part of the land described in the **160\*** entry, and if properly \*surveyed would not interfere with any part of the land to which they claim title; that the creek selected by the complainant as the third creek, in the entry of Mason, on which that of O'Neal depends, is not in truth and in fact, the third creek running into the Ohio above the mouth of the Little Miami River; but that another is.

The depositions of several witnesses were taken, and other exhibits filed in the cause. Upon a final hearing in the Circuit Court, a decree was pronounced dismissing the plaintiff's bill.

The cause is now brought into this court by appeal, and the principal question to be decided is, whether, from the allegations and proofs in the cause, the entry claimed by the plaintiff can be sustained upon sound construction, and legal principles arising out of the land laws applicable thereto.

Before we go into an examination of that question, we will dispose of some preliminary objections made by the counsel for the respondents. They were that attested copies of the entries and patent referred to, and made exhibits in the bill are not in the record; that there does not appear in the record any assignment, or proof of an assignment from O'Neal to the plaintiff. Nor does it appear from the plat where the entry of O'Neal was actually surveyed, nor does it designate the creeks running into the Ohio above the mouth of the Little Miami River, so as to ascertain the third creek.

Some of these objections seem to be well founded, and might induce the court to dismiss the bill, but such dismissal should be without **161\*** prejudice to the \*commencing of any other suit the party might choose to bring; the effect of which would be only turning the parties out of court, without deciding the merits of the cause. We have therefore attentively examined the record, and are of opinion it contains enough to get at and decide the merits.

It has been long and well established as a rule of law and equity, that a party must recover on the strength of his own title, and not on the weakness of his adversary's title.

In order to uphold and support an entry, it is incumbent on the party claiming under it, to show that the objects called for in it are so sufficiently described, or so notorious, that

others, by using reasonable diligence, could readily find them.

As O'Neal's entry is dependent on Mason's, if the objects called for in the latter can be ascertained, the position of the former can be precisely and certainly fixed.

The Ohio and Little Miami rivers, from general history, the one having been used before, at, and since the time when these entries were made, as the great highway in going from the eastern to the western country, and each of them having been referred to in general laws, and designated as boundaries of certain districts of country, we consider must be deemed and taken as being identified and notorious, without further proof.

The third creek, running into the Ohio above the mouth of the Little Miami River, is then the only and principal object to be ascertained, to fix the entry of Mason with specialty and precision. The plaintiff \*has assumed [**\*162** what is now called Cross Creek for the beginning, to run the 640 poles north from the mouth of the third creek, as called for in Mason's entry. The respondents contend, that what is now called Muddy Creek, and sometimes Nine Mile, is "the third creek."

It seems to be admitted, in argument, that Cross Creek is not, in truth and in fact, numerically the third creek above the mouth of the Little Miami. But the counsel for the plaintiff contends that the early explorers of the country, when the entries were made, designated Muddy Creek as the second. That streams then called creeks have since been degraded into runs, and other streams, then called runs, are now termed creeks.

If this argument was supported by the proofs in the cause, it would be entitled to great consideration; but upon a careful and minute examination, there is a great preponderance of testimony against it: there is the deposition of one witness that affords some foundation for it; there are also the depositions of many witnesses who contradict it. But waving this testimony, and examining this entry upon its face, it is obvious that subsequent locators and explorers commencing their researches at the mouth of the Little Miami River, would examine the creeks emptying into the Ohio above, according to their numerical order. The words "the third creek," emphatically applies to that order; nor would they depart from it, unless another stream, by general reputation or notoriety, had been so con-

with reasonable care and diligence to find it. If the description will fit another place better, or equally well, it is defective. *Dallum's Lessee v. Brackenbridge*, 1 Cooke, 152; *Mason v. Herd*, 1 Wheat. 130; *McArthur v. Browder*, 4 Wheat. 488; *Littlepage v. Fowler*, 11 Wheat. 215; *Henderson's Lessee v. Long*, 1 Cooke, 128; *Brush v. Ware*, 15 Pet. 93.

Where an error in description does not mislead, it is not fatal. *Shipp v. Miller's Heirs*, 2 Wheat. 316; *Shum's Lessee v. Dickson*, 1 Cooke, 137.

When some of the calls of an entry are vague or repugnant, they may be rejected or controlled by other material calls which are consistent and certain. Course and distance yield to visible, known, and definite objects, if the latter are more material and equally certain. *Ibid*; *Henderson's Lessee v. Long*, 1 Cooke, 128; *Jackson v. Sprague*, 1 Paine. 494; *Graham's Lessee v. Dudley*, 1 Cooke, 353.

See also *Simms v. Guthrie*, 9 Cranch, 19; *Polk's*

*Lessee v. Wendel*, 9 Cranch, 87; *Finley v. Williams*, 9 Cranch, 164; *Matson v. Hord*, 1 Wheat. 130; *Danforth's Lessee v. Thomas*, 1 Wheat. 155; *Ross v. Reed*, 1 Wheat. 482; *Perkins v. Ramsay*, 5 Wheat. 269; *Polk's Lessee v. Wendall*, 5 Wheat. 293; *Hoofnagle v. Anderson*, *post*, 212; *Blunt's Lessee v. Smith*, *post*, 248; *Meredith v. Pickett*, 9 Wheat. 573; *Danforth v. Wear*, 9 Wheat. 673; *Elmendorf v. Taylor*, 10 Wheat. 152; *McDowell v. Peyton*, 10 Wheat. 454; *Tyler v. Owing*, 11 Wheat. 226; *Jackson v. Sprague*, 1 Paine, 494; *Thompson's Lessee v. Norwood*, 1 Cooke, 346; *Graham's Lessee v. Dudley*, 1 Cooke, 353; *Rutledge's Lessee v. Buchanan*, 1 Cooke, 363; *Shepherd's Lessee v. Bailey*, 1 Cooke, 369; *Stringer v. Young*, 2 Pet. 337; *Galt v. Galloway*, 4 Pet. 332; *Boardman v. The Lessees of Reed*, 6 Pet. 328.

It is essential to the validity of an entry, that it shall call for an object notorious at the time, and that the other calls shall have the same precision. *Lindsey v. Miller*, 6 Pet. 666; 1 McLean, 32.

sidered. It has, however, never been held **163\***] that reputation or notoriety \*could be established by a single witness; and it may be further observed, that the other witness, whose deposition has been taken on the part of the plaintiff, states, that he had meandered the Ohio, and in his connection, had laid down Muddy, or Nine Mile Creek, as the third, and that he so considered it, until the year 1806, or 1807, when, from the information of the other witness, and an examination of the entries and surveys on the books of the principal surveyor, he was induced to change his opinion. It is also in proof that the plaintiff and the last-mentioned witness, in searching for O'Neal's entry, claimed a different creek as being the third, and directed the survey to be commenced from it. If, then, a locator and deputy-surveyor, who had meandered the Ohio, and designated Muddy Creek as the third, and had so considered it for nearly ten years, it is surely a strong circumstance to show, negatively, that Cross Creek was not in fact numerically, nor by general reputation or notoriety considered as "the third creek." If an examination of the records in the principal surveyor's office would show that the streams were designated and numbered differently, it was incumbent on the party to exhibit at least so much thereof as would conduce to prove the fact. It is incompetent to prove it by parol.

Upon mature consideration of the whole case, it is the unanimous opinion of the court that the decree of the Circuit Court be

*Affirmed with costs.*

Cited.—4 Otto, 775.

**164\***] [\*CONSTITUTIONAL AND LOCAL LAW.]

MATTHEWS v. ZANE ET AL.

Where a party claiming title to lands under an act of Congress, brought a bill for a conveyance, and stated several equitable circumstances in aid of his title, and the state court where the suit was brought having dismissed the bill, and the cause being brought to this court by appeal, under the 25th section of the judiciary act of 1789, c. 20, upon the ground of an alleged misconstruction of the act of Congress by the state court. Held, that this court could not take into consideration any distinct equity arising out of the contracts or transactions of the parties, and creating a new and independent title, but was confined to an examination of the plaintiff's title as depending upon the construction of the act of Congress.

The lands included within the Zanesville district, by the act of Congress of the 3d of March, 1803, c. 343, s. 6, could not, after that date, be sold at the Marietta land-office.

A statute, for the commencement of which no time is fixed, commences from its date.

The decision of this court in *Matthews v. Zane*, 5 Cranch, 92, revised and confirmed.

**A**PPEAL from the Supreme Court of the State of Ohio, being the highest court of equity of that state, under the 25th sec. of the judiciary act of 1789, c. 20.

The bill filed by the plaintiff, Matthews, in the State Court, was brought for the purpose of obtaining from the defendants, Zane and others, a conveyance of a tract of land to Wheat. 7.

which the plaintiff alleged that he had the equitable title, under an entry, prior to that on which a grant had been issued to the defendants. \*The validity of his entry [\***165** descended on the construction of the act of Congress of May 19th, 1800, c. 209, the 6th section of the act of March 3d, 1803, c. 343, and the act of the 26th of March, 1804, c. 388, all relating to the sale of the public lands in the territory north-west of the river Ohio. The case stated, that on the 7th of February, 1814, the plaintiff applied to the register of the Marietta district, and communicated to him his desire to purchase the land in controversy. The office of receiver being then vacant, no money was paid, and no entry was made; but the register took a note or memorandum of the application. On the 12th of May, 1804, soon after the receiver had entered on the duties of his office, the plaintiff paid the sum of money required by law, and made an entry for the land in controversy, with the register of the Marietta district. In pursuance of the 12th section of the act of the 26th of March, 1804, c. 388, and of instructions from the Secretary of the Treasury, the sale of the lands in the district of Zanesville (which had been formed out of the Marietta district, and included the land in controversy) commenced on the 3d Monday of May, 1804, and on the 26th of that month the defendants became the purchasers of the same land. There were several charges of fraud in the bill, and a contract between the parties was alleged; but as the opinion of this court turned exclusively on the title of the parties under the act of Congress, it is deemed unnecessary to state these circumstances. The State Court having determined against the validity of the plaintiff's title under the act of \*Congress, and dis- [\***166** missed his bill, the cause was brought by appeal to this court.

*Mr. Doddridge*, for the appellant, stated, that the cause depended upon the construction of three acts of Congress, which he insisted had been misconstrued by the State Court. The first of these acts, that of May 10th, 1800, c. 209, established the present system of selling the public lands in districts, and by that statute the land in controversy was within the Marietta district. The 6th section of the act of the 3d of March, 1803, c. 343, created an additional district, and provided that the lands within it should be offered for sale, at Zanesville, under the direction of a register and receiver, to be appointed for that purpose, who should reside at that place. The 12th section of the act of the 26th of March, 1804, c. 388, directs the lands in the district of Zanesville to be offered for public sale on the third Monday of May in that year.

On the first view of the case, difficulties present themselves, on the side of the appellant, in the authority of previous decisions, and especially a decision of this court, between the same parties.<sup>1</sup> But that decision resulted from an incorrect and imperfect statement of facts in the former case. Circumstances which are now disclosed did not appear in that case. Upon the present record the following points will be insisted on:

1.—*Matthews v. Zane*, 5 Cranch, 92.



1. That even by a strict technical construction of <sup>167\*</sup>the statutes in question, the power of sale did not cease at Marietta, until after the 12th of May, 1804, the date of the plaintiff's purchase. (2) That such was the practical construction given to those laws by executive officers, which ought in the present case to be conclusive, because it fulfills every object of the law, preserves the private rights of individuals, and if set aside by a mere technical objection, would open a door for the most extensive litigation and disturbance of titles acquired under the land laws of the United States. (3) That supposing the act of March 30, 1803, had in express terms, or by necessary and inevitable implication, taken away the power of sale at Marietta, yet it could not begin to have that effect, until duly promulgated at that place, it not having in fact been transmitted to the officers at Marietta, until after the plaintiff's entry.

The land laws must certainly be considered as forming a part of the contract between the government, and each individual who wishes to become a purchaser of the public domain. If contracts between the public and individuals are to be considered in the same light as contracts between individuals, then the principle applies that a *bona fide* and innocent purchaser, from an agent who has not received due notice that his authority is superseded, shall not be injured by the negligence of the principal, in not giving notice.<sup>1</sup> The rules of interpretation applicable to the present case are laid down by <sup>168\*</sup>the elementary <sup>\*</sup>writers on the construction of statutes, and will be found in the common abridgements of the law.<sup>2</sup> All these rules necessarily resolve themselves into the intention of the law-maker, which is sometimes to be collected from the cause or necessity of making the statute, and at other times from other circumstances of equal weight.<sup>3</sup> Sir William Jones has asserted the true principles on this subject,<sup>4</sup> "Such is the imperfection of human language," says he, "that few written laws are free from ambiguity; and it rarely happens that many minds are united in the same interpretation of them." And then, after relating an anecdote of Lord Coke, adds: "I will here only set down a few rules of interpretation, which the wisdom of ages has established, when the sense of the words is at all ambiguous. 1st. The intention of the writer must be sought, and prevail over the literal sense of the terms; but penal laws must be strictly expounded against offenders, and liberally against the offense.

"2. All clauses, preceeding or subsequent, must be taken together to explain any one doubtful clause.

"3. When a case is expressed to remove any doubt, whether it was included or not, the extent of the clause, with regard to cases not so expressed, is by no means restrained.

"4. The conclusion of a phrase is not concluded by <sup>169\*</sup>the words immediately preceding, but usually extended to the whole antecedent phrase.

"These are copious maxims, and, with half

a dozen more, are the stars by which we steer, in the construction of all public and private writings."<sup>5</sup>

So, also, this court has laid it down as <sup>\*</sup>a well-established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole. It is also true, that when great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain, in which case it must be obeyed."<sup>6</sup>

1. In enforcing the construction we contend for, the further considerations which present themselves under the first point are: That all the land laws passed previous to the act of May 10th, 1800, merged in that act; and by it, the system of selling the public lands in districts, through agents called registers and receivers, was settled; so that at the passage of the act of March 3, 1803, that system, in all its relations, was the law; and to all the provisions of the act of May 10th, 1800, and the rights established thereby, that of March 3, 1803, expressly refers, and for its operative capacity necessarily depends.

The whole system is laid in two important objects—public policy, and the rights of the community generally and individually; both terminating in <sup>\*</sup>the sale of the public [<sup>170\*</sup>lands. The public policy is twofold—first, revenue; second, national growth and prosperity, by the extension of population and improvement. The right of every individual is, to appropriate to himself any tract of land within the provisions of the system. Words are not necessary to show the importance of the public policy in both its branches; and the interest felt by the community, in the right to appropriate, is of equal extent, and as strong—as distinctly marked, too, as the policy itself; and, though a right peculiar to the American people, is, nevertheless, a general right; requiring, indeed, to be regulated by law; but none will say that the government might, or could wholly repress its exercise, any more than wholly to repress the exercise of the general right to carry on trade and commerce.

The second branch of the public policy—also the right to acquire and improve new lands—did not commence with the land laws of the United States; both existed under, and the latter was exercised through, the regulations of colonial and state government, are coeval with the settlement of America; and when the same policy and right fell within the jurisdiction of the national government, laws were immediately passed to regulate them, and have been continued from time to time, until they all merged in the act of May 10th, 1800; so that the right of every individual in the community to purchase and settle any part of the lands within the provisions of that act, may emphatically be called an existing right.

The first branch of the public policy, revenue, engaged <sup>\*</sup>the attention of the national government immediately after the termination of the revolutionary war, and has been pursued by it ever since, with an unde-

1.—4 Hall's Law Journal, 16; 2 Dall. 320.

2.—6 Bac. Abr. tit, Statute, (I.) (C.)

3.—Vere v. Thompson, Hardr. 208.

4.—Ld. Teignmouth's Life of Sir W. Jones, 267.

5.—Letter to J. Macpherson, Esq., Governor-General of Bengal, Sir W. Jones' Life, 267.

6.—U. S. v. Fisher, 2 Cranch, 286.



viating aim; and it may be here observed, that one condition in the cession from Virginia is, that the lands ceded shall be sold, and the proceeds go in discharge of the public debt. It is not denied that Congress may suspend the sale of the whole or any part of the public lands; but doubtless, in such case, there would appear some distinct and good reason for doing it, as in the act of May 10, 1800, in order to attain, more effectually, the objects of the whole system; and then the intention was expressed with irresistible clearness in the repealing clause. But where nothing of this kind is pretended, where no object or motive can be perceived leading to suspension, the implication must be strong indeed to induce a court of justice to suppose a design to depart from every principle of the law in the case.

The constitution and the law show that the President had no power to establish the Zanesville offices until after the next meeting of Congress; for those offices were not vacancies to be filled during the recess; and it will not be contended, that he was bound to summon a special meeting of the senate for that purpose. Furthermore, the President had no power to cause sales to commence at Zanesville, until, in some act subsequent to that of March 3, 1803, the time for opening sales should be appointed; and we shall now endeavor to show the correctness of that position. The words of the act of March 3, 1803 (sections 5 and 6), refer, **172\*** generally, to the act <sup>of</sup> May 10th, 1800, and embrace all the regulations prescribed, among which a prominent one is, that all the land must be offered at public sale before being offered at private sale, and that a day should be appointed by law when sales are to commence at each office. The object of public sale, when any tract of country is brought into market for the first time, is principally the enhancement of price above the legal limitation, by means of competition for the most valuable tracts; but it has another of some importance, that is, settling in this way the preference between competitors.

The fair inference from these considerations is, that no sale of any part of the unappropriated lands in the military tract could legally take place, either at Zanesville or Chillicothe, under the bare provisions of the act of March 3, 1803; that some farther legislative provision was necessary, appointing the time when sales should commence. This provision is found in the act of March 26th, 1804. It is true, that in another act, passed also the 3d March, 1803, "regulating the grants of land, and providing for the sale of the public lands south of Tennessee," the time when sales are to commence is left with the President; but it is to be by proclamation, giving due notice. This is a modification only of the practice under the same principle and policy.

But it may be said, the act of May 10, 1800, excepts from public sale a part of the Marietta district, and all the Steubenville district. This is true; and the reason for this exception is not readily perceived. The only probable one is, that all the part excepted in the Marietta district **173\*** was known to be a <sup>rough, hilly</sup> country, therefore no prospect of sales being immediately effected in it. The distinction, on any other account, between the west of the

Muskingum, including the township intersected by it, and the lands lying east of those townships, seems to be idle. With respect to the Steubenville district, all the most valuable lands in it had been sold in New York, in 1787, and at Pittsburg, in 1796; therefore, the competition to be expected at public sale was not thought of sufficient importance to be secured by statutory provision. But whatever may have been the reason for excepting these lands from public sale, the principle of fixing by law the time when the private sale of them shall commence is still preserved; thus securing the equitable mode of settling by lot the preference between applicants for the same tract, provided for in the act of May 10th. In fine, the reference of the act of March 3, 1803, to that of May 10, 1800, is general, therefore embraces the general provisions only; and the correct conclusion from a whole view of this matter is, that the act of March 3, 1803, was inchoate, inoperative of itself, in respect to sales at Zanesville, and, therefore, it would be absurd to give to it a constructive repeal of the preceding statute.

All that has been urged against suspending sales at Marietta until the operative organization of the Zanesville district took place, applies with equal force to the act of March 26, 1804, as to that of March 3, 1803. The absurdity is just as great in principle; the only difference is, its effects are not of so long continuance. Besides, the act of March 26, 1804, appoints <sup>the</sup> time when sales shall com- **174** mence at Zanesville, and thus removes the only objection of the register of the Zanesville district to the construction for which we contend.

There is no difference, in regard to construction, between a law which definitively appoints the time when a certain thing is to be done in future, and a law which leaves indefinite the future time when that certain thing is to be done; and practically, there is less reason to give the subsequent statute a repealing operation from the day of its passage, in the latter, than in the former case, because, there is less inconsistency in suspending the existing rights of individuals, and the public interest and policy for a certain, than for an uncertain time. Resting with some confidence in this position, we shall here introduce a case precisely in point, to show that the repugnant words are not alone and abstractedly to be considered.<sup>1</sup>

"By a statute passed on the 9th of July, the jurisdiction of a court of requests is enlarged after the 30th of September following, from debts of 40s. to £5—and it is also enacted, that if any action shall be commenced in any other court for a debt not exceeding £5, the plaintiff shall not recover costs; yet, from a necessary construction of the whole act, a plaintiff shall recover costs in an action commenced in another court, for a debt between 40s. and £5 after the passage of the act, and before the 30th of September. Till then, he could not sue in the Court of Requests, and therefore had no other remedy but to sue in another court."

\*Here was an attempt made to give **175** to the words "if any suit shall be commenced," &c., an abstract meaning and repealing force, from the day of passing the act; but they were

1.—Whitham v. Evans, 2 East Rep. 135.



not allowed to suspend the existing right to sue somewhere.

The admissions heretofore made, that is, that had the day been appointed when sales were to commence at Zanesville, they might have been continued at Marietta up to such day, seems to render a reference to the above case unnecessary, in respect to former arguments on the other side; but those admissions may not be extended to the present hearing; and, besides, the cited case shows that the same kind of reasoning has been resorted to on other occasions, that it has been put down by the court, and that the whole law and practical reason are the only sure guides to sound construction. In every proposition importing that the lands taken from the Marietta district "shall be sold at Zanesville," these repugnant words must be used; and when the object is to give them an abstract repealing effect from the moment they are used by the legislature, it matters not when "sold at Zanesville."

2. The second point in our argument is, that the complainant's purchase was made conformably to the practical construction given to the laws in question by the proper executive officers. This relates, principally, to the Secretary of the Treasury, the superintendent of the whole; but extends also to the register of the Marietta district, who, being without instructions, had to act upon his own discretion. **176\*** The facts in the bill show, that laws affecting the land-offices are received, by the respective officers, through the treasury department, with instructions; it therefore follows, that had the Secretary of the Treasury construed the act of March 3, 1803, as suspending sales at Marietta, he would have given instructions to that effect. This deduction flows by such strong implication from the facts and the nature of the case, that direct proof, if susceptible of being had, would be unnecessary; it is, in fact, involved in the acknowledgement of the Secretary of the Treasury, that his first impressions (that is, that all sales made at Marietta, after the passing of the act of March 3, 1803, were void, as suggested by the private opinion of the register of the Zanesville district) were erroneous; and without saying anything more than has been said, in relation to the act of March 26th, 1804, we may confidently assume the fact stated as the foundation of this point; and shall now endeavor to show that the conclusion drawn from it is correct.

The true doctrine of executive construction is that, generally, it is to be considered and respected; for executive officers are officers of the constitution and laws, as well as the judges; and in the performance of their proper functions, the former are under the necessity of putting a construction on the acts of the legislature, as well as the latter; and it may be added, that they are always supposed to act under the advice of a high law officer, appointed for that purpose. When, in this necessary exercise of their judgment, they put such a construction on a statute as promotes its evident object, preserves all the rights of individuals, and which at the same time becomes a rule by which title to things real or personal is acquired, such construction ought not to be set aside by a rigid criticism of any kind; but where it injures the public interest, or abridges

and restrains the rights of individuals, it should be strictly examined and corrected.

When executive constructions and regulations form the rule by which the most interesting of all titles, the title to land, is acquired, all must see and admit the reasonableness of preserving rights growing out of them. Executive construction, in such cases, acquires all the importance, and involves all the consequences of judicial decisions. Could it be established, that the Secretary of the Treasury had misconstrued the act of March 3, 1803, in permitting sales to be made at Marietta, after its passing; and that this was so erroneous as to make void those sales; such a decision would reach, as has before been observed, two valuable interests, *bona fide* acquired as ours was, and long possessed as ours ought to have been; for their titles cannot, and ought not, to be preserved by the mere refusal of executive officers to act; neither, it is conceived, because the land cannot now be entered in tracts of the same size in which they were offered at public sale, by reason, that the law is modified in this respect; for, should this be admitted, the land officers might, through ignorance, or fraud, entangle titles to any extent. All lands, in fact, unsold at public sale are liable to be entered at private sale; and all tracts \*not legally **[\*178]** sold are still public lands and liable to be entered.

The observations of Sir William Jones, before quoted, go to illustrate and support our reasoning on this point. It may readily be supposed, that a difference might take place in construing the minor provisions of a statute, though all should agree in its main object and intent; when this is attained, the minor provisions are of little moment. Suppose the act of March 3, 1803, was actually couched in such ambiguous terms as, taken in their literal and grammatical sense, would raise a doubt whether sales were to continue at Marietta after its passage; but that the Secretary of the Treasury, in consequence of a construction formed from the exercise of his judgment, on a view of the whole law, had given actual instructions to continue them there. Would a sale made under such circumstances be declared void? We think not; and certainly not in the present case, which stands clear of every literal and grammatical ambiguity—where the necessarily implied construction of the Secretary of the Treasury runs with the obvious intentment of the whole law.

In closing our argument on this point, we beg leave to press this view of the subject with some earnestness on the consideration of the court; and confidently taking it for granted, that the not instructing the Marietta officers at all was equivalent to instructions to continue sales there, we again ask, that if actual instructions had been given, to continue sales at Marietta, until a few days before they commenced at Zanesville, giving sufficient time only \*for the proper notice to the **[\*179]** Zanesville officers; and the register of the Zanesville district had thought proper to disregard these regulations, and sell the land over again, would the court sanction his sales? or, in other words, would it now sanction a sale of the two tracts entered at Marietta in July, 1803?



3. Our third point is, that supposing the act of March 3, 1803, had, in express words, or by necessary implication, taken away the power of the Marietta office to sell; yet, that it did not begin to have that effect, until duly promulgated at Marietta, conformably to the usual manner of promulgating such acts, &c., and the same of the act of the 26th of March, 1804.

The reason of the rule, that, where no day is appointed, statutes begin to have effect from the day of their passage, seems to be this: that it being practically impossible actually to notify every person in the community of the passage of a law, whatever day might be appointed for its taking effect, no general rule could be adopted less exceptionable. The general rule may, in some instances, produce injustice; but if ignorance of the law was admitted as an excuse, too wide a door would be left open for the breach of it. Where statutes are liable to produce injustice by taking immediate effect, the legislature will, except through inadvertence, appoint a future day from whence they are to be in force. Mr. Justice Blackstone,<sup>1</sup> after treating of the promulgation of laws, and **180\*** the duty of legislatures to make \*them public, says, "all laws should, therefore, be made to commence in future, and be notified before their commencement, which is implied in the term prescribed. The fair inference from this, and, indeed, from all that he and other writers have said, in treating on the elementary principles of law, is, that where unjust consequences result from the application of a general rule to a particular case; courts have the power to except such case and bring it under the control of equitable construction; and to ask, "did the law-maker, supposing him to be an upright man, intend to include or except this case?"<sup>2</sup>

One feature in the reason of the general rule is, that it would be practically impossible to fix on any time for laws to take effect so as that each person affected by them, or liable to be affected, could, with certainty, have notice; had such notice been practicable, doubtless the rule would have been different; and where this part of the reason ceases, according to a maxim of law and reason, so much of the rule ceases also. Now, when a law, under the supposed form of that of March 3d, 1803, should be promulgated at a land-office, every person who could in any way be affected by it would have actual notice; the applicant would know that he could not purchase, and he could not complain of injury. Lord Kaimes' reasoning<sup>3</sup> goes to show, that where the claims of equity can be brought under a general rule, "a court of **181\*** equity declines not to interfere."<sup>4</sup> Promulgation of the law at each land-office is an easy rule, liable to no uncertainty or difficulty, and, besides, had been the usual practice; therefore, no general promulgation can be a substitute for it. The necessity for the usage is manifest; for, if the numerous dependents of the treasury department were permitted to construe the law for themselves, endless contradiction and confusion must be the consequence. The settled course of decision in relation to deeds

which have not been put on record within the time prescribed by law, falls exactly into Lord Kaimes' reasoning. Where it can be proved that the party who holds the second deed, though first on record, had notice of the previous deed, he shall not be permitted to take advantage of the omission to record in the holder of the first deed.

There is a case in Dallas<sup>5</sup> precisely in point, to support the restriction we contend for on the abstract taking effect of statutes, when the nature of the case affords reason for such restriction. The laws of the colonial legislature of Pennsylvania were in force until revoked by the king and council, and the question was, whether a revocation took effect at its date in London, or when notified in Philadelphia; and it was held by the court, not until notified to the governor and council in Philadelphia.

The decision and opinion of this court in the case of *Arnold v. The United States*,<sup>6</sup> will not, it is \*presumed, be found, on due examination, to impinge the foregoing reasoning on this point. The question was, so far as that case is analogous, whether double duties should commence throughout the whole country from the passage of the act, or from its notification at the proper office in each collection district. The double duties were a burden which the whole community ought, in justice, to bear equally; and without making the act take a proper and absolute effect from the day of its passage, this equality of imposition would not be produced; an importation at Washington would have been charged with an impost from which one at a more distant port would have been exempt. Had the act been for reducing the import duty, no doubt but the money received at a distance, after the passing of the act, would have been refunded; this, it is believed, was done on the repeal of the internal taxes; and thus a general reciprocity is produced in the operation of laws of this nature. In this case there was no particular injury set up, but the hypothetical possibility only of injury, and that, not such as would, necessarily, follow the act of importation, but growing out of contracts involved in, and properly referable to, the general risk of trade. Had the question been, an entire suspension of the existing right to import, without the usual equitable provisions on like occasions, allowing all vessels which had departed without knowledge of such suspension to complete their voyages, or with penalties for importation, we may well suppose the taking effect of the law would have been restrained to its due notification at the proper office; \*or to show the same [**183** principle in another point of view, it may be asked whether the penalties of the embargo laws attach before notice of their passage at the naval offices in their respective districts?

The constitution of the United States has not, in express words, prohibited Congress from passing laws impairing the obligation of contracts; but the prohibition is so strongly implied, and such laws, as well as *ex post facto* laws, are so contrary to justice, that it is presumed an act to that effect would be declared

1.—1 Bl. Com. 45.

2.—6 Bac. Abr. tit. stat. (I.) 386.

3.—Kaimes' Eq. Introduct. XI.

4.—Kaimes' Eq. Introduct. XI.

5.—Albertson v. Robinson, 1 Dall. 9.

6.—9 Cranch, 104.



void: such a law, for instance, as should go to resell any tract of land which had been legally sold. That the entry of a tract of public lands forms a perfect contract will not be denied; neither, that under the supposed form of the act of March 3, 1803, an entry at Marietta, before it was possible that notice could reach there, would come fully within the spirit and meaning of an equitable contract. Now, the established course in the administration of justice, protects equitable contracts equally with those which are strictly legal. The operation of a criminal or penal law, under the construction contended for on the other side, would render it, in its practical effects, as perfectly *ex post facto* as one made to take effect before its passage; and by parity of reasoning, that construction virtually implies a breach of contract, and so is contrary to the constitution of the United States as well as contrary to reason and justice. The pardoning power of the executive in a criminal case, might afford a remedy for the injustice which would follow; but in a civil one, the only remedy must be found in the reasonable **184\*** and equitable construction \*of the judiciary, "who have authority over all laws, and more especially over statutes, to mould them according to reason and convenience to the best and truest uses."<sup>1</sup>

But it may be said that the general promulgation of all laws, in this country, is sufficient notice; and that from the passage of the act of March 3d, until the plaintiff's entry, or even application in February, there was ample room for notice. It is true, that in this country all laws have a general promulgation; but it is equally true, that many laws are, notwithstanding, strictly local: such is the act in question, and considering the established usage, and the reason for that usage, the register of the Marietta district cannot be supposed to be bound to have acquired a knowledge of the act in a general way.

A striking analogy exists between the land laws and those for the collection of duties on importations. The two leading points in the public policy are the same in both, that is, national strength and prosperity, and revenue; and however deeply laid in the nature of political society the right to carry on trade and commerce may be, we have, it is conceived, sufficiently shown that the right to settle and improve new land enters as deeply into the nature of political society in this country; and has, too, all the force of prescription of which the right is susceptible. The government, acting for the people, have no more claim to the price of the public lands than to a part of the price of merchandise imported, and therefore have no more exclusive and arbitrary control **185\*** over \*the former than the latter; and, repeating what has been before mentioned, an attempt to suppress the settlement of new lands would be as sensibly felt by the community at large, as an attempt to suppress trade and commerce: at the same time, both require to be regulated by law. Now, suppose some newly acquired territory were to be brought within the operation of the revenue laws, and, for this purpose, it should be found expedient to annex it to a part of a former district, making a new

district, and that preparatory measures were necessary before the new district could be organized, and that acts should be passed with analogous provisions to those found in the laws in question; would they be construed to suspend the collection of duties in, and the right to import into, the old district?

We have before mentioned, that the case of *Wilson v. Mason*<sup>2</sup> was cited at the first trial in the Supreme Court of Ohio, to show that notice of an illegal act was void; a position which, we also mentioned, was not disputed: but that case, and the opinion of the court in it, suggests some considerations for direct and hypothetical illustration, which we beg leave to introduce. In the opinion it is said: "But if this opinion should be too strict, if an act entirely equivalent to an entry could be received as a substitute for one, a survey does not appear to be such an act," &c., and then the opinion goes on to show the reason why; that is, that the entry is the necessary notice of the appropriation of any part of the waste lands, and the only way to prevent others, with equal \*rights, from being misled and injured; [**\*186** that the entry was, in fact, the very remedy the law had provided against a previously existing evil. Now, in the present case, supposing suspension of sales at Marietta somehow entered into the general provisions of the law, an entry at Marietta would be an "entire equivalent" to an entry at Zanesville; for it is clear, that before sales could begin at Zanesville, notice must be given what tracts had been sold at Marietta. This, too, would have been a general notice; general, at any rate, to the extent of the object; not an individual notice merely, which the court would not, in the case of *Wilson v. Mason*, suffer to take place of the general rule.

A case may readily be supposed, under the land laws of the United States, offering arguments and objections parallel to those in the case of *Wilson v. Mason*. Suppose A purchases in one district, land lying in another; discovering his mistake, and that B is about to enter the same land in its proper district, he gives notice of his previous entry: here A might say, that as between him and the public, a purchase in one district was the same as in another, and that B had notice. In such a case a court would doubtless say, that to permit entries in one district, of land lying in another, would create confusion; that a person with equal rights would never know when he made a safe entry, and that a particular exception, notwithstanding personal notice, was inadmissible; but, as just shown, the objection would not lie in the present case; so that whatever the "if," in the opinion of the court amounts to, may fairly be placed to our side of the question.

\*But the point we propose to illus- [**\*187** trate principally, by the case of *Wilson v. Mason*, is the right to purchase, by considering that case hypothetically. The right of every individual holding a warrant to appropriate to himself waste lands, was not more substantially or forcibly given, by the laws of Virginia, than the right to purchase any vacant tract of the United States land is given, by the act of May 10, 1800. It is true, that in Virginia, money

1.—Bac. Abr. tit. statute (H.), 378.

2.—1 Cranch, 95.



was advanced on obtaining the warrant, but no priority of claim grew out of the prior date of the warrant, except in the instance of an accidental competition; and having money to pay, and applying to enter, puts the applicant under the laws of the United States on as good ground in law and equity as he stood on who came forward to enter under the laws of Virginia. Besides, by a provision in the act of May 10th, before noticed, money may be paid to the Treasurer of the United States; this corroborates and strengthens our reasons for this equality of right. The right to appropriate extended also over the whole of the waste lands in the state, though the act of appropriation must be performed in some one county. Now, let it be supposed that the question had been between Wilson and Mason, whether Mason's right to enter, in such county as he thought proper, was to be suspended for fifteen months, in consequence of similar legislative provisions to those found in the acts of March 3, 1803, and March 26, 1804, and with constructions and doings of the proper executive officers, parallel to those in the present case; can it for a moment be imagined that the better right would have been decreed to Wilson?

**188\*]** \*The phraseology of the laws for the collection of duties on imports is, that the bays, ports, harbors, &c., within certain limits, shall be districts, with some appropriate denomination; and when any new district is made, that from and after a certain day the harbors, &c., within certain limits, shall be a district by the name of the district of ———. Here the language precludes all sophistry in relation to the time when the new district is to go into operation; and its effect on the old district; but suppose the language was, "there shall be a district to be called the district of A, and from and after a certain day the duties shall, &c., be paid at B." This one very principle of sound construction would amount to precisely the same thing; and certainly the words, *shall be a district*, would not, under this supposition, be construed to stop the power of collection in the old district, until the time they were to be collected in the new one at B; yet, according to their reasoning, this would take place, for if the verbal repugnance only is to be considered, as before observed, it matters not when the practical repugnance commences.

*Mr. Hammond*, for the respondents. The first point made for the respondents is that this court has no jurisdiction.

The alleged contract and fraud of Zane constitute the sole ground for the interference of a court of equity. They are the gist of the plaintiff's case, and in respect to these, this court has no supervising control over the state court. Whether the contract alleged was one, **189\*]** the obligation of which \*a court of chancery should recognize; whether it created a trust in Zane, which a court of equity would compel him to execute; whether the fraud was such that a court of equity would relieve against it; and whether making general propositions of compromise, and delaying more than ten years before a tender of money was made, and a performance specifically required was such diligence, on the part of the plaintiff, as to entitle him to the aid of a court of equity, are all questions over which the state court has

complete control. In a court of equity the right of the plaintiff to the relief sought depends upon the decision of the questions here enumerated, and not upon the correct construction of the acts of Congress.

Let it be conceded, that the plaintiff's construction of the acts of Congress is correct, and the consequence is, that at the time of the sale at Zanesville, he held a legal right, imperfect, to be sure, but purely legal in its character. The allegations in the bill show that the plaintiff lost this right by the misconception, or misconduct of the Secretary of the Treasury, and the officers of the land-office at Marietta, and not in consequence of the alleged agreement with Zane. If the plaintiff had a right, and that right had been duly regarded by the public officers, neither the alleged contract with Zane, nor Zane's subsequent purchase could have impaired it. Upon what principle, then, does he come in equity to set up that right against Zane and M'Intire? Is it under color of an agreement with Zane to impeach the conduct of the secretary or register, and \*receiver? Can it be said that a decision against the relief sought, in such a case, is a decision against a right or title claimed under an act of Congress? Is it not a more rational inference that the decision was against the party upon the ground that the contract did not entitle him; or upon the ground that he could not have relief in equity? or that if entitled to redress, it must be against the officer, for damages, upon the principle suggested by this court?<sup>1</sup>

Suppose that this court, upon an examination of the case, shall adopt the plaintiff's construction of the different acts of Congress, does it follow that they must, or can reverse this decree? Can they do it without examining the obligation and extent of the alleged agreement with Zane? Can they do it without inquiring into the subsequent conduct of Matthews, and determining how far the whole case entitles the party to the aid of a court of equity? It seems to us that they cannot. And we insist that in this court these inquiries cannot be made; the 25th section of the judiciary act expressly forbids it.

Again, upon the construction of the acts of Congress insisted on by the plaintiff, the certificate of purchase granted to him by the register of the land-office at Marietta, on the 16th of May, 1804, vested in him a legal right to the possession of the lands in dispute. Such certificates have always been received in Ohio as evidence of title in ejectment. The bill shows no reason why this legal remedy was not pursued. If the party by his own laches \*has lost his remedy at law, can he **[\*191]** come into a court of equity for relief? Does the bill show any circumstance that prevented him from diligently pursuing his legal remedy, or does it allege that it was lost by the contrivance of the defendants? Can this court examine these allegations, or determine whether upon this ground the bill was, or was not, properly dismissed?

But last of all, the case made in the bill shows, that this is the same case, and between



the same parties, decided by this court in 1809.<sup>1</sup> That was an ejectment; the facts were agreed; the point submitted for decision was, the true construction of the acts of Congress referred to, and the decision was against the plaintiff's purchase. If the true construction of the acts of Congress constitutes the essential point to be decided in this bill, then it must be considered as a bill in chancery brought in the state courts, to review the decision of this court in ejectment. Can it be maintained that to dismiss such a bill is to decide against a right or title set up under an act of Congress? We conceive that upon an examination of this record, it will be found immaterial whether the acts of Congress separately, or the alleged agreement and conduct of Zane separately, or whether these conjointly, combined with the other circumstances of the case, constitute its material points; the general dismissal of the bill makes no case upon which the jurisdiction of this court can be made to operate.

The merits are supposed to involve the just **192\*** construction of the acts of 1803 and 1804, referred to in the bill; and what right, if any, the plaintiff can derive from the alleged agreement and conduct of Zane.

The act of May, 1800, which originated and settled the present plan of selling the public lands, directed that lands, within certain specific boundaries, should be sold at land-offices established at certain places. The uniform understanding and construction of this law has been, that the power to sell at each of the land offices was confined to the lands directed by law to be sold there. The officers at Chillicothe could not sell lands below the Little Miami, nor lands in the seven ranges. They had no power to effect such sale, and no right could be acquired by a purchase so made.

A new, and fifth land-office was established at Zanesville, by the 6th section of the act of March, 1803; and it was directed that the lands within the 11th range, and east of it within the military tract, and all the lands north of the Ohio Company's purchase, west of the seven first ranges and east of the district of Chillicothe, should be sold at Zanesville. The act containing this provision consists of eight sections. The first three are intended finally to make provision for settling claims for military bounties. The fourth authorizes warrants to be issued to General La Fayette. The fifth provides for surveying the unappropriated lands within the military tract, and directs that so much of these lands as lie west of the 11th range shall be made part of the district of Chillicothe, and shall be sold there, "under **193\*** the same regulations that other lands are within the said district." The sixth section creates the new district at Zanesville, including a large body of lands within the military tract, and a large body, also, of the lands before that time directed to be sold at Marietta. The seventh section gives longer time to the purchasers of lands within J. C. Symmes' purchase to complete their payments; and the eighth section relates to warrants, and plats and certificates of survey, within the Virginia military tract. This act was approved the 3d of March, 1803. No time is fixed for it to take

effect; and hence a question is mooted, as to the time when the sixth section commenced its effective operation, so as to put an end to the power of making sales, at Marietta, of the lands formerly within the Marietta district, but directed by the 6th section to be sold at Zanesville.

It is not pretended but that the act in question, for all its general objects, took effect from its passage. There is nothing in its terms to except the 6th section from the general operation. The other seven sections speak from their passage, from the general taking effect of the act. The 6th section says the lands "shall be offered for sale at Zanesville." When? From this time; for no other time is designated. And it is a settled maxim, that where no time is appointed, by the act itself, for it to take effect, its operation commences from its passage. We have nothing to do with cases that may be supposed, of acts committed or rights commenced before the passage of a law that affects them was, or could be known. All such cases stand upon their own circumstances, \*and are **194** exceptions to the general rule. The 6th section directs that the lands shall be sold at Zanesville, and as no time is appointed for commencing the sales there, the act, in the natural import of its terms, according to settled rules of construction, must be understood to direct the sales to commence immediately, and by necessary consequence, annuls the power to sell the same lands at Marietta, that existed before the act was passed, from the same period of time. Such being the plain import of the words used, when interpreted by a standard maxim of interpretation, those who undertake to render the 6th section inoperative for an indefinite time, by connecting it with the preceding laws, and with other circumstances, take upon themselves the burthen of proof, and are bound to make out their case. It is not maintained by anyone, that lands within the Zanesville district could be sold at Marietta, after the taking effect of a legal provision, directing them to be sold at Zanesville. The true point in dispute, then, is this: When did this 6th section take effect.

The proposition of the plaintiff, if I have been able to comprehend it, seems to be something like this: The 6th section of the act of March 3d, 1803, ought not to be construed as containing any determinate, positive operative provision; but should be regarded as merely provisional, or inchoative, dependent upon some future act of legislation to give it force and effect. To sustain this position, various arguments are urged, all of which appear to be predicated upon three principles:

First. A construction which would withdraw any \*part of the public lands from **195** market is against the public policy.

Second. It is against the right of every individual to purchase.

Third. It is inconsistent with the practical construction given by the Secretary of the Treasury.

If the truth of every one of these dogmas were admitted, it would seem a sufficient reply, that the positive provisions of positive law never can be made to yield to any such considerations. When determining upon the construction to be given to an ambiguous provision,

Wheat. 7.

1.—Matthews v. Zane, 5 Cranch, 92.

they ought to have their influence. But they cannot be legitimately used, first to render a plain provision ambiguous, and then to determine its meaning.

The sixth section, as I have already insisted, stands clear of any ambiguity, and to decide that it takes effect from its passage, does not necessarily determine that its operation must be to withdraw any part of the public lands from market.

So far from being merely inchoative, the sixth section was capable of being carried into immediate practical effect, according to its terms. The officers might have been immediately appointed and furnished with plats and surveys of the unsold lands within the lands taken from the Marietta district; sales might have commenced immediately, and so soon as the military lands were surveyed, they, too, might have been brought into market. Certainly it cannot be contended but that the lands within the military tract, attached to the Chillicothe district, by the fifth section, might have **196\*** been brought into market as soon \*as surveyed, without any additional legislative provision. The plaintiff is, therefore, totally mistaken as to the legitimate consequence of giving to the 6th section an immediate operative effect. Such construction tends to bring the public lands into market, not to shut them out. That the officers were not, in fact, appointed, and that the sales did not commence, are matters that have no bearing upon the argument. The true meaning of a statute must be determined by an examination of its provisions; not by the conduct of those appointed to carry it into execution. This view of the subject is also a satisfactory answer to the allegation respecting the rights of individuals to purchase. If that right exists, in the extent contended for, it could not be impaired by giving the 6th section immediate effect. So far as it was affected, it was by circumstances of a character very different from giving to the law a correct construction.

But the principles assumed, both with respect to the public policy, and the individual right to purchase, are not admitted to be correct. Of the public policy the legislature are exclusively the judges, and the individual right to purchase is also, before its actual application to any particular tract, entirely subject to legislative regulation. Now, I can well conceive, that it might be deemed good policy to withdraw, for a time, a portion of the public lands from the market. And if the legislature should do so, it is conceived that their act would be, at once, decisive of the public policy of the measure, and, so far, must absolutely control the individual **197\*** right to purchase. \*If, then, the just construction of the 6th section should have the effect alleged, of withdrawing from the market a portion of the public lands, that circumstance would furnish no ground whatever upon which a court of justice should, or could, properly interpolate a fanciful construction of their own. They could not rightfully assume a course of policy different from that prescribed in the law, and make their own imaginations a standard of construction.

In fact, it was a part of the public policy, until long after 1803, to withhold a portion of the public lands from market. The three sec-

tions in each township reserved for future disposition, was kept back by this policy, and sold at a much higher price in consequence of it, when actually offered for sale. Can it be pretended, that any citizen had a right to purchase these reserves, until their sale was authorized by law, and the terms of the purchase defined? We are required to examine whether the Zanesville district is erected, established, or settled by that section. We maintain that the Zanesville district was fully and completely established by the 6th section. If it was not, it is not yet established. It is recognized as an existing district by subsequent acts; but is, in no other way, authorized or established. It could not be essential to the existence of the district, that a time for commencing sales should be fixed, or that the register and receiver should be appointed. Indeed, until the district was established, no such appointment could be made. The perplexity in which the plaintiff involves his own propositions; at one time considering the section as designating the limits of a new district; at another, regarding it **\*198** as only providing that a new district should be erected, at some time indefinitely future; and again declaring it inchoate and inoperative; telling us, in one breath, that some subsequent legislative provision is required, fixing the time when it should be established, and in the next, fixing that time upon a speculation of his own, without any such legislative act, is, of itself, very strong evidence that he is in error. The terms of the statute are simple and unambiguous. All this glossing is not required to find out their obvious import. It is not an effort to elucidate, but to establish an hypothesis.

For the defendants, it is contended, that from the passage of the act of March 3d, 1803, the Zanesville district was established, and the power to sell at Marietta determined. We have shown that this construction involves none of the inconveniences suggested by the plaintiff; but that if they actually existed, it resulted not from the provisions of the law, but from other causes. Our interpretation is founded upon a plain, palpable, and consistent doctrine, in every respect definite and certain. Its only possible evil, a suspension, for a short period, of the sales of a small portion of the public land. The construction insisted upon by the complainant is destitute of all certainty, and calculated to involve the whole subject in perplexity and doubt. There is a district, the lands within which must be sold at Zanesville. Was it established by the 6th section of the act of 3d March, 1803? No, says the opposite argument, that section only defined the limits to enable the Surveyor-General \*to prepare the **\*199** plats and surveys. No, says the opposite argument again, that act was only inchoative and inoperative, it provided that the Zanesville district should be erected at some time indefinitely future. Was it established by the act of the 26th of March, 1804, appointing the time of the commencement of the public sales? No, again, says the opposite argument, that act "in relation to the present question, only fixes the future time when it shall be established." Was it established by the appointment of the officers? No, says the complainant, the new district was not established and settled by appointing the officers. And this negative involves the



very singular circumstance, that officers should be appointed for a district not established and settled. By the strict terms of the law, the complainant insists that the Zanesville district was not erected, legally established, and settled until the 19th of May, the Saturday before the sales commenced on the Monday (21st) following. But by a reasonable construction, he concedes that the Zanesville district might be considered as established and settled after the 12th of May. At what time after, and before the 19th, he has not informed us, and, no doubt, for this very good reason, that after he made his entry, on the 12th of May, he had no interest in the question. We have the voluminous bill and the elaborate argument of the complainant before us, do they show how the Zanesville district was established, and when it was established? There are, undoubtedly, a multiplicity of allegations, to show that it was not established until after the 12th 200\*] of May, but all the \*rest is left in obscurity. We have not been able to perceive one single sound reason for considering the 12th of May an era of any importance, except that it was the day upon which the plaintiff made his entry. Ought a court of justice thus to depart from the direct and plain import of unequivocal terms.

Another point labored in the bill, and strongly urged in argument, is, that the whole conduct of the Secretary of the Treasury, as superintendent of the sales of public lands, was in accordance with the hypothesis maintained by the complainant. The act in question, March 3d, 1803, was never specially promulgated at the Marietta offices. No instructions with respect to it were ever sent to the officers; and sales made at Marietta within the tract directed to be sold at Zanesville, after the passage of the act were confirmed by the secretary.

One general observation must be made with respect to all these allegations. The secretary was the agent of the law, and was subject to its provisions, which he could neither restrain nor extend. If he fell into error, that error can avail nothing in a court of justice, bound to declare their own interpretation, not to adopt that of others.

We think we have shown that the three principal propositions upon which the plaintiff rests his construction of the act of 3d March, 1803, are equally unfounded in fact, and untenable in argument; our interpretation of that act is not shaken by them; and it is moreover sustained by the unequivocal decision of the court, in this very case.<sup>1</sup>

201\*] \*It is alleged, that the act of the 3d of March, 1803, is a mere affirmative act, in no respect repugnant to the act of May, 1800, until, by an actual commencement of sales at Zanesville, it shall be rendered practically repugnant. Very little examination will show that this is the old question, in a new dress. The power to sell at Marietta was created by the act of May, 1800, and depended upon that act for its existence. The act of March 3d, 1803, creates a power to sell the same lands at Zanesville. These two powers are inconsistent with, and repugnant to, each other. Both cannot

subsist at the same time. In deciding the question of repugnancy, we are not to inquire only, whether the two powers can be concurrently executed; it is indispensable to determine whether they can exist together. Now, the power to sell at Zanesville, given by the act of March, 1803, is a complete, not an inchoative power. Although no time is fixed at which that power shall be executed, yet the power itself is created; and if it exist, then it is repugnant to the previous power, given to sell at Marietta, and repeals that power. It is impossible that the court cannot at once perceive the distinction between creating the power to sell, and providing for the immediate execution of that power. It is because the complainant has not regarded the distinctive character of these two circumstances, that he has involved his argument in so much perplexity. And here, if it were essential to the argument, it might be shown, that should it be conceded that Congress did not intend to suspend the sales, and that such is the effect of our construction, yet it results \*from the force of the terms [\*202 used, contrary to the intention. They created a complete and perfect power to sell at Zanesville, and omitted to provide that the legal effect of that power should be suspended until measures were arranged for its immediate execution. So that the question still recurs, when was the power to sell at Zanesville, under the act of March, 1803, actually created? If, as we contend, that power existed the moment the act took effect, it was from that moment repugnant to the power of making sales of the same lands at Marietta. The two acts are, in no single view, affirmative of each other on this point, although they both relate to the sales of public lands. The legal power to sell at Zanesville must have existed, separately and substantively, before any measure could be taken to carry that power into effect. This consideration alone exposes the fallacy of connecting the power to sell, the appointment of the officers, and the commencement of the sales, as all essential to the erection of the district.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court:

This suit was brought in the State Court of Ohio for the purpose of obtaining a conveyance of a tract of land to which the complainant supposed himself to have the equitable title, founded on an entry prior to that on which a grant had been issued to the defendants. The State Court decreed that the bill should be dismissed, and that decree is now before \*this court, on the allegation that the [\*203 court of the state has misconstrued an act of Congress.

The plaintiff has stated several equitable circumstances in aid of the title given by his entry; but unless his entry be in itself valid, there can have been no misconstruction of an act of Congress in dismissing the bill, and this court cannot take into consideration any distinct equity arising out of the contracts and transactions of the parties, and creating a new and independent title.

The validity of the plaintiff's entry depends on the land laws of the United States.

In May, 1800, Congress passed an act dividing an extensive territory north-west of the river

Wheat. 7.

1.—5 Cranch, 92.

Ohio, into four districts; and establishing a land-office in each, for the sale of public lands within that district. This act prescribes the time, place, and manner in which the lands of each district shall be offered at public sale; and directs, also, the manner and terms in which those not sold at public sale may be disposed of at private sale. The lands of the district comprehending the tract in controversy were to be offered for public sale at Marietta, on the last Monday of May, 1801.

On the 3d of March, 1803, Congress passed an act, the 6th section of which creates a fifth district, and enacts that the lands contained within it "shall be offered for sale at Zanesville under the direction of a register of the land-office and receiver of public moneys, to be appointed for that purpose, who shall reside at that place."

This district includes the land in controversy. **204\*** On the 26th of March, 1804, Congress passed an act entitled "an act making provision for the disposal of the public lands in the Indiana territory, and for other purposes."

This act comprehends the lands directed to be sold under the act of 1800 and 1803, as well as the lands in Indiana.

The 5th section enacts, that "all the lands aforesaid" (except certain enumerated tracts, of which the land in controversy forms no part), "be offered for sale to the highest bidder, under the direction of the Surveyor-General, or Governor of the Indiana territory, of the register of the land-office, and of the receiver of public moneys at the places respectively where the land-offices are kept, and on such day or days as shall, by a public proclamation of the President of the United States, be designated for that purpose."

On the 7th of February, 1804, Matthews applied to the register of the Marietta District, and communicated to him his desire to purchase the land in controversy. The office of receiver being then vacant, no money was paid, and no entry was made; but the register took a note or memorandum of the application.

The counsel for the plaintiff insists, that the title of his client commences with this application.

The law authorizes the respective registers to sell at private sale all the lands which may remain unsold at the public sales, and says the sales "shall be made in the following manner, and under the following conditions, to wit:

**205\*** "1. "At the time of purchase, every purchaser shall, exclusively of the fees hereafter mentioned, pay six dollars for every section, and three dollars for every half section he may have purchased, for surveying expenses; and deposit

one-twentieth part of the amount of purchase money, to be forfeited if within forty days one-fourth part of the purchase money, including the said twentieth part, is not paid."

The payment of the money required by the act is obviously indispensable to the purchase. Without such payment, the sale prescribed by law could not be made; and certainly no sale, had the register attempted to make one, could be valid if made in opposition to the law. But the register has not attempted to sell, nor could Mr. Matthews have so understood the transaction. He took a note of the land the plaintiff attempted to purchase; and, had the receipt of the receiver been produced, might, perhaps, have made the entry. In so doing he would have acted in the double character of register and agent of the purchaser.

That there was no receiver was undoubtedly not the fault of Mr. Matthews; but this circumstance as completely suspended the power of selling land in the Marietta District as if there had been neither register nor receiver; as if there had been no land-office.

The transactions, then, between Mr. Matthews and the register on the 9th of February, 1804, may be put entirely out of the case.

On the 12th day of May, 1804, soon after the receiver \*had entered on the duties of [**\*206** his office, Matthews paid the sum of money required by law, and made an entry for the land in controversy with the register of the Marietta District.

The 12th section of the act of the 26th of March, 1804, directed that "the lands in the District of Zanesville should be offered for public sale on the third Monday of May."

In pursuance of this act, and of instructions from the Secretary of the Treasury, the sale of the lands in the district did commence on that day; and, on the 26th day of that month, the defendants became the purchasers of the land in controversy.

There are many charges of fraud in the bill, and a contract between the parties is alleged. But this court cannot look into those circumstances, unless they had induced the court of Ohio to determine against the person having title under the laws of the United States. As this case stands, the opinion of the State Court on the fraud and the contract, is conclusive; and the only question to be discussed here is, the title of the plaintiff, under the acts of Congress.<sup>1</sup> This depends entirely on the validity of his entry made on the 12th of May, 1804.

\*This question has already been decided in this court. [**\*207**

\*The plaintiff brought an ejectment [**\*208**

1.—The constitution of the United States declares (art. 3, s. 2), that "the judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls," &c. And that, "In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

The judiciary act of 1789, c. 20, s. 25, provides, Wheat. 7.

"that a final judgment, or decree, in any suit, in the highest court of law or equity of a state, in which a decision of the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity," &c.; "or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exception, specially set up by either party, under such clause of the said constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error," &c. "But no other error shall be assigned or regarded as



against the defendants for the lands in controversy; and, the judgment of the State Court being against him, the cause was brought by **209** writ of error into this court. \*In February, 1809, the judgment of the State Court was affirmed, this court being of opinion that the creation of the Zanesville District suspended the power of selling the lands lying within that district, at Marietta.

The counsel for the plaintiff contends, that several material circumstances which are now disclosed, did not appear in that case. But the court is of opinion that the additional circumstances relied on in argument can, in no degree, affect the point decided in that case, which was, that the power of selling at Marietta ceased when the new district was established, so far as respected the land in that district.

This point has been re-argued with great labor and talent, and has been reconsidered by the court. The result of that reconsideration is, that the original opinion is correct. We still think, that on the passage of the act by which the district of Zanesville was created, and the land within it directed to be sold at that place, the power of selling the same land at Marietta necessarily ceased.

It is, we think, impossible to look at these acts without perceiving that the lands lying in one district could not be sold in any other. Their words and their policy equally forbid it. The land in controversy might have been sold at Marietta by the register and receiver of that **210** place, previous to the 3d of March, 1803, because it lay in the district, the lands of which were directed by law to be sold at that place by those officers. Had the land been out of that district, it could never have been sold at that place, or by those officers. When, by law, a new district was formed, comprehending this land and its sale was directed at a different place, and by different persons, the land is placed as entirely without the district of Marietta as if it had never been within it. The power of the officers of the land-office at Marietta to sell, is expressly limited to the lands within the district, and land which ceases to

be within the district, is instantly withdrawn from that power.

That the effect of this construction is to suspend the sales of land in the new district until the proper officer should be appointed, does not, we think, operate against it. An immense quantity of land was in the market, and the laws furnish no evidence in support of the opinion that the eagerness to keep the whole continually within the reach of every purchaser, was so great as to hazard the confusion which might arise from any uncertainty respecting the office at which any portion of it might be acquired. If this intention had been so predominant, the legislature would certainly have provided that the lands in the Zanesville district might still be sold at Marietta until some day to be fixed in the law by which it might be supposed that the office at Zanesville would come into operation. The omission to make such a provision forbids the opinion that Congress considered the necessity of keeping all their lands in a state to be instantly **211** acquired, as being so urgent that a court would be justified in construing one of their statutes contrary to its words. The known rule being, that a statute for the commencement of which no time is fixed, commences from its date, the act of the 3d of March, 1803, separated this land from the Marietta district on that day, and withdrew it from the direction and power of the officers of that district. It was legally competent to those who possess the power of an appointment immediately to appoint necessary officers to carry on the sales at Zanesville, and Congress did not think proper to provide for continuing the sales at Marietta until such officers should be appointed.

This court, then, retains its opinion, that, independently of the act of the 26th of March, 1804, the entry made by Matthews on the 12th of May, 1804, would be invalid. That opinion is still further strengthened by the act last mentioned. That act, considering its 5th and 12th sections together, directs all the lands in the Zanesville district to be sold under the authority of the proper officers, on the third

a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities, in dispute."

Under these provisions, with a view to the questions of jurisdiction in the above case (*Matthews v. Zane* and others), the following points have been determined by this court. In an action of ejectment between two citizens of the same state, in the state court, for lands within the state, if the defendant sets up an outstanding title in a British subject, which he contends is protected by the 9th art. of the treaty of 1794, between the United States and Great Britain, and that therefore the title is out of the plaintiff; and the highest court of law or equity of the state decides against the title thus set up, it is not a case in which a writ of error lies to this court. The words of the judiciary act must be restrained by the constitution, which extends the judicial power to all cases arising under treaties made by authority of the United States. This is not a case arising under the British treaty; and whether an outstanding title be an obstacle to the plaintiff's recovery is a question exclusively for the decision of the state tribunal. But it must be understood that this court has appellate jurisdiction where the treaty is drawn in question, whether incidentally or directly. Whenever a right grows out of, or is protected by, a treaty made under the authority of the United States it is sanc-

tioned against all the laws and judicial decisions of the respective states; and whoever may have this right under such treaty, is to be protected. Thus, if the British subject, in whom was supposed to have been vested the outstanding title protected by the treaty, or his heirs, had claimed in the cause, it would have been a case arising under the treaty. But as neither his title, nor that of any person claiming under him, could be affected by the decision, it was held not to be a case arising under a treaty. *Owings v. Norwood*, 5 Cranch, 344. But where the decision is against the validity of the treaty, or against the title, specially set up by either party to the cause, under the treaty, this court has jurisdiction to ascertain that title, and determine its legal validity, and is not confined to the mere abstract construction of the treaty itself. *Smith v. The State of Maryland*, 6 Cranch, 286; *Martin v. Hunter, ante*, Vol. I., p. 304, 357. The last clause in the 25th section of the judiciary act, which restricts the grounds of reversal to such as appear on the face of the record, and immediately respect the construction of the treaty or statute in dispute, applies only to cases where the parties claim under various titles, and assert various defenses, some of which may and others may not regard the construction of a treaty or statute, and was intended to limit what would otherwise unquestionably have attached to this court the right of revising all the points in dispute, and to confine it to such errors as respect the questions specified in the section. *Martin v. Hunter, ante*, Vol. I., 357.

Monday of the ensuing May. Consequently there could be no power to sell any of the land within that district at Marietta.

The case of the plaintiff may be, and probably is, a hard one. But to relieve him is not within the power of this court. We think the plaintiff is not entitled under the laws of the United States to the land he claims, and that the decree ought to be

*Affirmed with costs.*

See S. C. 4 Cranch, 382; 5 Cranch, 92.  
Cited—17 Wall. 198; Blatchf. Pr. 5; 3 Blatchf. 339;  
3 McLean, 285; 2 Paine, 517.

212\*] [\*LOCAL LAW. CHANCERY.]

HOOFNAGLE ET AL.

v.

ANDERSON.

A patent is a title from its date, and conclusive against all those whose rights did not commence previous to its emanation.

Courts of equity consider an entry as the commencement of title and will sustain a valid entry against a patent founded on a prior defective entry, if issued after such valid entry was made.

But they never sustain an entry made after the date of the patent.

This case attempted to be taken out of the general rule, upon the ground that the equity of the party claiming under the entry commenced before the legal title of the other party was consummated.

But the circumstances of the case, and the equity arising out of it, were not deemed by the court sufficient to take it out of the general rule.

**A**PPEAL from the Circuit Court of Ohio.

This cause was argued by *Mr. Scott* and *Mr. Doddridge* for the appellants, and by *Mr. Talbot* and *Mr. Brush* for the respondent.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court:

This suit was brought by the appellants, who were plaintiffs in the Circuit Court for the District of Ohio, to obtain a decree for the conveyance of a tract of land of which the respondent has the legal title.

The land lies within the tract of country reserved by the commonwealth of Virginia, out of her cession to the United States for the officers 213\*] and soldiers of the Virginia continental line. The respondent's patent is dated on the 9th day of October, 1804, and is founded on a warrant for military services, issued from the land-office of Virginia, to Seymour Powell, heir of Thomas Powell, on the 29th day of May, 1783, which was entered in the office of the principal surveyor on the 16th of June, 1790, and was surveyed on the 30th of October, 1796. The survey was assigned for a valuable consideration to the appellee, in whose name the patent was issued.

The entry under which the plaintiffs claim was not made until the 28th day of May, in the year 1806; and was consequently eighteen months posterior to the emanation of the defendant's grant. They insist, however, that this grant ought not to stand in their way, because

it was obtained contrary to law, being founded on a warrant, which was issued by fraud or mistake.

It is admitted, that the service of Thomas Powell was performed in the state, and not in the continental line of Virginia; consequently, the recital of his military service is erroneous. The warrant ought to have been for services in the state, instead of the continental line. How far the patent ought to be affected by this error is the question on which the cause depends.

It is obviously the error of the register of the land-office, because the certificate on which the warrant issued states the service correctly. There can be no ground for suspecting that any fraud is mingled with this mistake. At the time the warrant was made out, [\*214 its value was precisely the same if for services in the state, as if for services in the continental line. The quantity of acres allowed to the officer was the same; and precisely the same land was subject to be appropriated by each warrant. Virginia considered the services of the continental and state officers as equally meritorious, and had equally awarded them. There could exist, then, no possible motive for the erroneous statement on the face of the warrant, that it was issued for services in the continental instead of the state line. It was of no advantage to Seymour Powell, whose father had performed service which the law deemed a full consideration for a warrant of equal value with that which was given him by mistake.

This warrant was assignable, and carried with it no evidence of the mistake which had been committed in the office. It has been assigned for a valuable consideration, and the purchaser has obtained a patent for a part of it, without actual notice that there was any defect in the origin of his title. Should he lose this land his warrant is lost. There is no longer any tract of country in which it can be located.

The title of the respondent to the particular tract included in his patent, was complete before that of the appellants commenced. It is not doubted that a patent appropriates land. Any defects in the preliminary steps, which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation. Courts of equity have considered an entry as the commencement of title, and have sustained [\*215 a valid entry against a patent founded on a prior defective entry, if issued after such valid entry was made. But they have gone no farther. They have never sustained an entry made after the date of the patent. They have always rejected such claims. The reason is obvious. A patent appropriates the land it covers; and that land, being no longer vacant, is no longer subject to location. If the patent has been issued irregularly, the government may provide means for repealing it: but no individual has a right to annul it, to consider the land as still vacant, and to appropriate it to himself.

The counsel for the appellants attempt to take this case out of the general rule, because their equity, they say, commenced before the legal title of the respondent was consummated, and their pre-existing rights were impaired by



his intrusion into the military lands reserved for the Virginia continental troops. The officer under whom they claim had a right to elect among all the vacant lands in the reserved territory, and this right of election was narrowed by the respondent's patent.

This is a general indefinite equity, not applicable to one tract of land more than to another, and which has, perhaps, never been allowed under circumstances resembling those which exist in the present case. It is a *scintilla juris* which we should find much difficulty in supporting against a complete legal title founded on an original claim of equal merit of the same character. When it is recollected that, in their origin, these claims stood equal, and were equal-<sup>216\*</sup> ly \*eapable of appropriating the same land, it might well be urged that the rights of the state officers were not sufficiently respected, when the legislature omitted to insert them, as well as their brethren of the continental line, in the reservation for military warrants; and that the mistake in the land-office has only retained for Mr. Powell rights which he ought never to have lost. The act which authorizes surveys on the north-west side of the Ohio, on warrants granted to the officers and soldiers of the Virginia continental line, likewise authorized the surveying of those which had been granted to the officers and soldiers of the state line. The laws granting these bounties, setting apart this tract of country, and authorizing these surveys, were public laws. They were known, or might have been known, to the government of the Union, when the cession was made and received. This right of election which the appellants would now set up against a complete legal title, originated in them, and was common to both parties. The equity of the one cannot be so inferior to that of the other as to justify the court in considering the patent of the one as an absolute nullity, in favor of the other who has attempted to appropriate the same land after such patent had been issued.

But this right of election, for which so much efficacy is claimed in this case, has some existence in the common case of treasury warrants. The holder of such warrant has a right to locate it on any land, and no land can be regularly patented unless it be first located and surveyed.<sup>217\*</sup> If a survey be made on \*a place different from the entry, it is as if made without an entry, and the holder of any other warrant has a right to take the land. A patent for this land, not founded on a previous entry, narrows his right of election; yet it has always been held, that such patent, though it must yield to a prior entry, would hold the land against a subsequent entry. The entry, and not the warrant, has always been considered as the commencement of title.

The principle is well settled, in other cases, that a patent is unassailable by any title commenced after its emanation; and we perceive no sufficient reason against applying the principle to this case.

It is contended, also, by the appellants, that as the warrant refers to the certificate of the executive, as the authority on which it is issued, it conveys notice of the contents of this certificate to every purchaser. But this reference to the certificate of the executive appears on the face of every warrant, and con-

tains no other information than is given by law. The law requires this certificate as the authority of the register. It is considered as a formal part of the warrant. These warrants are, by law, transferable. They are proved by the signature of the officer, and the seal of office. This signature and this seal are considered as full proof of the rights expressed in the paper. No inquiry is ever made into the evidence received by the public officer. If the purchaser of such a paper takes it subject to the risk of its having issued erroneously, there ought to be some termination to this risk. We think it ought to terminate when the warrant is completely merged in a patent, \*and the title consummated [<sup>218</sup> without having encountered any adversary claim.

The title under this warrant was considered in the case of *Miller v. Kerr and others*.<sup>1</sup> In that case, the claimant under Powell had the junior patent, and the court thought that the equity growing out of a prior entry might be rebutted, by the person holding the legal title, by showing any defect in that equity; but nothing was said in that case which indicates an opinion that a complete legal title might be overthrown by an entry made after the consummation of that title.

*Decree affirmed with costs.*

Cited—9 Wheat. 510, 511; 3 Pet. 341; 6 Pet. 672, 677, 732; 12 Pet. 298; 15 Pet. 106; 20 How. 272.

[CHANCERY.]

BROWN ET AL. v. JACKSON.

The decisions of the board of commissioners under the acts of Congress providing for the indemnification of claimants to public lands in the Mississippi Territory (commonly called the Yazoo lands), are conclusive between the parties in all cases within the jurisdiction of the commissioners.

This determination reconciled with that of the court in *Brown v. Gilman*, *ante*, Vol. IV., p. 255.

APPEAL from the Circuit Court of New York.

This suit was brought in consequence of the decision of this court in the case of *Brown v. Gilman*,<sup>2</sup> \*and for the general history [<sup>219</sup> of the facts, reference was made to that case.

The bill charged, that on the 13th of January, 1795, the state of Georgia was seized in fee of a certain territory within the boundaries of said state, &c., estimated to contain 11,380,000, and bounded, &c.; that on the same day, by force of an act of the legislature of said state, passed on the 7th of January, 1795, George Matthews, the Governor, by letters patent, conveyed said territory to Nicholas Long and others, and their associates, called the Georgia Mississippi Company, reserving 620,000 acres for the use of the citizens of Georgia; that afterwards, on the 20th of January, 1796, certain articles of agreement were made between the defendant Amasa Jackson and William Williamson, authorized by said company

1.—*Ante*, p. 1.

2.—*Ante*, Vol. IV., p. 255.

to sell, and George Blake and sundry persons, who became the New England Mississippi Land Company; that it was stipulated in the said articles, that on or before the 12th of February, then next, said Jackson and Williamson should fill up and complete to said B. and others, a deed of conveyance (which had been executed by the G. M. Company in Georgia), of all the right and title of the G. M. Company, derived of the state of Georgia; that said Blake and others agreed by the articles to deliver their notes for the payment of two cents for each acre of land by them subscribed for, previous to the first of May, then next; and for the further payment of one cent more for each acre, on or before the 1st of October, then next; and a further payment of two and a half cents per acre, within twelve months from said 1st of May; and a further payment of two and a **220\*** half cents, &c., on the 1st of May, 1798; and a further payment of two cents more, on the 1st of May, 1799, in the whole, ten cents per acre, &c. And thereby it was agreed, that as soon as said deed should be prepared, &c., said deed should be delivered by said defendant, Jackson, to some person appointed by said parties, to be held as an escrow, on condition that if the notes or moneys due on the 1st of May, should not be paid, the deed should be re-delivered, and the associates should not be liable for the failure of each other; but if the notes were paid, the deed should be delivered to said Blake, &c., who were then to be severally liable for their own notes. That on the 11th of February, 1796, said Blake and others entered into articles of association, by the name of the N. E. M. L. Company, by which it was agreed that Leonard Jarvis, Henry Newman, and William Wetmore, should be a committee to receive a deed from the defendant Jackson, and William Williamson, of the said lands, belonging to the G. M. Company, for the use of the N. E. M. L. Company; and should execute to the several subscribers thereto, deeds of their respective proportions, to hold as tenants in common, and also, a deed of trust to trustees, &c., and a board of directors should be appointed; and it was agreed the trustee should give each proprietor a certificate in the form, &c., which should be complete evidence, &c., and transferable by indorsement. And to carry such articles of agreement into effect, a deed of indenture, dated 13th of February, 1796, purporting to be made by said Long and others, of one part, and Wetmore, Jarvis, and Newman, of the other, was executed, whereby they **221\*** conveyed said territory (excepting \*said 620,000 acres) to said W., J., and N., and the survivor, in fee; and was delivered to G. R. Minot, as an escrow, with an indorsement. The first payment to be made on the first of May, aforesaid, was duly made by every member, except, &c.; and the defendant Jackson, and Williamson, personally delivered said deed to said grantees, and indorsed thereon, &c., "free of conditions." That prior to said absolute delivery, to wit, on the 10th of December, 1796, an agreement of two parts was entered into between the associates of the N. E. M. L. Company, and the defendant Jackson, wherein it was agreed that certain proceedings of certain scrip-holders of the G. M. Company, being also members of the N. E. M. L. Company, so

far, &c., should be void; and that the associates of the N. E. M. L. Company should have no control over papers of the G. M. Company; but would deliver to the defendant, Jackson, so many of their certificates or scrip as amount to 103,480 acres, computing the whole at 11,380,000 as an equivalent to the G. M. Company, for a loss by failure of Seth Wetmore, &c., subscriber for 100,000, who had not paid; said defendant, Jackson, to be accountable to said associates for such portion of Wetmore's notes, if recovered, as was equivalent to the debt assumed to be paid, *i. e.*, \$10,348; and thereupon said defendant, Jackson, should deliver said deed of conveyance absolutely, and within, &c., procure from the G. M. Company a confirmation, and deliver the same to said associates; and the defendant, Jackson, covenanted not to negotiate the notes until the confirmation was procured. And on the 17th of February, 1797, said defendant, Jackson, delivered to Wetmore, \*Jarvis, and New- **[\*222** man, a deed of confirmation from Long and others, reciting, &c., and ratifying said deed of conveyance of said tract of land, excepting said 620,000 acres. That on the 28th of February, 1797, an indenture of two parts, between Oliver Phelps and others, of the one part, and Jarvis, Newman, and Hull, of the other, was made, wherein reciting said conveyances, said associates conveyed to J., N., and H., and survivor, to hold said land in trust, &c., according to articles of agreement, constituting the N. E. M. L. Company. That William Wetmore, Jarvis, and Newman, still retained their shares of said purchase as subscribed, viz., the said W. 900,000 acres, N. 2,000,000, and J. 500,000, who, to place their shares in the same condition, on the same 28th of February, 1797, by deed poll, released to John Peck, their several proportions being  $\frac{3,400,000}{11,380,000}$  in trust, to convey the same to J., N., and H., and survivor, to be held by them in trust for same uses as expressed in deed of associates; and on same day, said Peck conveyed the same land to said J., N., and H., to be held accordingly; by which means J., N., and H., were seized of all said tract; and H., the survivor, continued so seized until his deed to the United States. Trustees delivered certificates to the members of the N. E. M. L. Company, expressing, &c., whereby each became entitled to an equitable interest in his share.

That on the 31st of March, 1814, the Congress of the United States passed an act for the indemnification of claimants of public land in the Mississippi territory, &c., by which act, 1,550,000 were appropriated \*for per- **[\*223** sons claiming under the G. M. Company. That \*on the 25th of January, 1815, Congress made a supplementary act, appointing a board of commissioners, instead of the first, to meet on the fourth Monday of January, &c. That on the 3d of March, 1815, Congress passed another act, &c., providing that in certain cases, the commissioners might allow further time, not over two months from the 3d Monday in March, and to adjust all such claims as should be, or might have been released, &c., within the time limited; and empowering the President to issue certificates for decided claims. That on the 18th of January, 1814, the members of the N. E. M. L. Company authorized their directors



to release to the United States the whole claim of said company, under the act of Georgia, and required the trustees to execute deed, &c.; and certificates to be received therefor from the United States, should be held by the treasurer, to be disposed of by order of the directors for the use of the claimants. And on the 24th of November, 1814, W. Hull, sole surviving trustee, made a deed poll to the U. S., releasing, &c., territory described, being the same conveyed by Georgia, as aforesaid, and on the 25th of January, took the oath. And that the directors on the 7th of December, 1814, made their deed poll, releasing all right of said company and the members thereof, to said land; also all claim to money, &c., to the United States, in fee.

The said directors conformed in all things, &c., and became entitled to the whole indemnity, provided, &c., amounting to 1,550,000. Nevertheless, said commissioners did de- **224\*** cret that certain individuals \*holding scrip under the N. E. M. L. Company, to the amount of 2,795,017 acres in all, who personally applied to said commissioners, among whom was said defendant, Jackson, who (said Jackson) held scrip to the amount of 691,677 acres, should receive their indemnity directly, without permitting the same to go through the hands of the directors, &c.; and said individuals have received their several proportions accordingly, estimating the same at \$13.62 per acre, deducting a certain sum for expenses. Whereas said commissioners did not estimate said expenses correctly, by a sum exceeding \$7,000, and no provision was made to compel said individuals to contribute to future expenses, or any subsequent diminution of the remaining amount of indemnity, as hereafter stated, which reduces the amount to more than two cents per acre less than the amount received by said individuals. Commissioners did secondly decree that indemnity upon 957,600 acres, amounting, at the rate of \$13.62, to \$130,425.12, should be deducted from claims, by the N. E. M. L. Company, on account of certificates issued to its members who appeared to be in default in payment of purchase money to the G. M. Company; and determined said certificates to be bad, and the parties claiming under them not entitled to indemnity; and allowed said sum of \$130,425.12, to be issued to the defendant, Jackson, for the benefit of himself and the other members of the Georgia Mississippi Company, or to him for his own benefit, or on pretense that he was entitled to it as being a creditor of said G. M. **225\*** Company, whereby manifest \*injustice was done to the N. E. M. L. Company, because:

(1) No deduction was made or allowed by the commissioners from the said sum of \$130,425.12 for expenses incurred in managing the affairs of said company. (2) It appears among the notes exhibited by the said Jackson, as given for purchase money to the G. M. Company, on which indemnity was claimed as unpaid, there were certain notes of said Seth Wetmore, for \$25,760, which, at the rate of ten cents, would have been the price of 257,600 acres; whereas, in truth, said Wetmore was purchaser for 100,000 acres, and no more, as appears by his original deed, so that the great-

est part of said notes must have been given for other consideration. (3) It appears by the decrees, indemnity was allowed to Jackson for 957,600 acres, and by certificates filed by the commissioners, that there issued certificates to individuals for 2,795,017 acres; and by certificates issued to other original purchasers, and delivered by the plaintiffs to the commissioners, that there is still 7,734,983 acres entitled to indemnity under said acts. But these quantities amount to 11,487,600 acres, which is 107,600 acres more than the whole purchase of 11,380,000; so that 107,600 acres too much have been allowed to the said Jackson, even upon the principles of the commissioners, amounting at the rate of \$13.62 per acre, to \$14,655.12. (4) The commissioners were wrong in determining, that persons claiming under certificates of purchasers who had not paid, should lose their indemnity. One Mary \*Gilman, holder of three scrip cer- **226\*** tificates, under the N. E. M. L. Company for 20,000 acres each, the same having been issued to R. Williams, and indorsed, he being assignee and grantee of William Wetmore, an original purchaser in default, whose unpaid notes were before the commissioners, as appears by the 3d decree, which notes entered into the reason of deducting from indemnity to said Jackson, exhibited to the Circuit Court of the United States for Massachusetts District, her bill in equity; and recovered for the whole amount of her claim against the plaintiff, without deducting on account of the proportion of indemnity she might be entitled to claim of individuals who received indemnity in person, which decree was affirmed in the Supreme Court. By reason of all which, the plaintiffs were entitled to recover of Jackson the whole \$130,425; also, his proportion of the expenses of said company, since said decrees were made, including said \$7,000 as aforesaid, and also, the costs recovered by M. Gilman, and all future expenses. The bill further stated, that the defendant, Jackson, ought to deliver all the stock or indemnity of said \$1,550,000, excepting thereout so much as he is entitled to, as holder of scrip under the N. E. M. L. Company.

The defendant (Jackson) in his answer, admitted the several conveyances set forth in the bill, and that the commissioners, by first decree, decreed to reserve indemnity upon 691,677 acres on account of scrip of the N. E. M. L. Company, then in the hands of the defendant, and did so reserve it; but avers the truth to be, that neither he, nor any other person in his stead, or by his direction, received any part of indemnity for \*claimants under the G. M. Com- **227\*** pany. That the certificates of the N. E. M. Land Company came to his hands as follows: At the time of maturity of several of the notes, such notes being dishonored, or the parties being insolvent previous to maturity, they proposed to defendant (who agreed) to pay such notes by certificates of the N. E. M. L. Company; that accordingly, scrip to the amount of 691,677 acres was delivered to him, and notes to equal amount were given up by defendant, and that he never had any other certificates of the N. E. M. L. Company, and these have been given

up to the commissioners, and appropriated by them to account of the G. M. Company. Admitted that commissioners deducted from indemnity awarded to the individuals a sum as their proportion of expenses of the N. E. M. L. Company; but avers, that said N. E. M. L. Company produced statements, and litigated before the commissioners as to such expenses, and such sum as was allowed, was allowed after deliberation; but insisted, that the decree as to expenses is conclusive as to the amount, and that any portion of any extra expenses could not be recovered of him; and that no deduction or provision for payment of future expenses of the N. E. M. L. Company, ought to have been made. Commissioners awarded that, indemnity upon 957,600 acres, amounting to \$130,425.12, should be deducted from the whole amount claimed by said N. E. M. L. Company, on account of certificates issued by the company to purchasers who were in default of payment to the G. M. Company; that they determined such scrip void, and parties **228\*** claiming under it \*should lose indemnity; but avers he did not receive certificates for said \$130,424.12, on behalf of the G. M. Company, or himself, as such member; on the contrary, he was not then a member thereof, and never received any part of indemnity or certificates therefor, save for the amount found due him for the balance of his account with the G. M. Company, as their agent; that, as to said award, there remained, at the time it passed, unpaid notes of members of the N. E. M. L. Company, given for purchase money to the amount of \$95,760, and the indemnity of \$130,421.25, was ordered on account of such unpaid notes; that he delivered up said unpaid notes, being required so to do; that the said company contested the allowance, and are concluded by the decree. That, after said decrees, deducting the amount of the unpaid notes, and also the amount of scrip of said company, taken in payment of other notes, and held by defendant as aforesaid, the members of the company, separately and individually, according to their shares, did apply to the commissioners, and received certificates entitling them to the indemnity. That the commissioners made no allowance on said \$130,425.12, on account of expenses incurred by plaintiffs in managing the affairs of the company, and insists they did right, and their decree is conclusive. That it appeared from the schedule to the articles of agreement between him, Williamson, and Blake, of 26th January, 1796, that Seth Wetmore subscribed for only 100,000 acres. That between the date of said agreement, and the complete delivery of said notes to him, many changes were made in the amounts and purchasers from those in the **229\*** schedule; \*that it appears by an account of said notes and scrip, kept by the defendant (a true copy of part whereof was annexed), that defendant received from Seth and Samuel Wetmore, notes to the amount of \$25,760, together with scrip of company, to amount of \$11,740, making \$37,500, which is the purchase money of 375,000 acres, and therefore Seth and Samuel were interested in the purchase to that amount. Whether notes were made jointly by them, or as principal and indorser, could not answer, but believes joint-  
Wheat. 7.

ly, because, in said amount in other instances he distinguished whether drawers or indorsers. That he took an oath before commissioners, that said notes were not taken on any other account than purchase money of said land. And avers the same in answer; and therefore, whether Seth or Sammel were joint drawers, or one drew and the other indorsed, or were reciprocally drawers and indorsers for each's part, or whether Seth was really interested to the amount of the notes, cannot answer; but insists, that being in his hands, and given for no other consideration, whether given for his own interest or that of another, was immaterial, and the decree was right. That, after passing the first decree, defendant was summoned as witness before the board, and required to deliver up all vouchers, papers, notes, scrip, and accounts, touching purchase by the N. E. M. L. Company; he complied, and the commissioners stated an account between him and the G. M. Company, leaving a balance of \$24,631.90 in his favor. In stating the account, the G. M. commissioners credited the N. E. M. L. Company with the total amount of sales to the company, deducting \*a number of [**\*230** acres of W. Williamson, and debited the company thus: (1) For 292 full scrip of said company, which scrip was received by defendant, in payment for part of the purchase money, engaged to be paid by members of the N. E. M. L. Company; and it having depreciated in consequence of the repeal of the act of Georgia, and purchased by the members of the N. E. M. L. Company, at a low price, was received in payment as aforesaid, by defendant, at their original value. (2) For amount of unpaid notes, as delivered to commissioners. (3) For said company's proportion of loss on notes of members of the N. E. M. L. Company, consequent to compromise, to which he was compelled by said repeal, nine-tenths of which loss only was charged to said company, the other upon defendant's commissions. (4) For amount of scrip of N. E. M. L. Company, delivered up to commissioners. (5) For commissions at 10 per cent. on sales to the N. E. M. L. Company; and that the commissioners by decree (copy exhibited) awarded said balance to defendant, and issued to him a certificate for so much indemnity; which sum was the whole amount of the indemnity received by defendant, or any other person for him on his own account, or the account of any persons or company whatever. Insisted, that said decree is wholly irreversible; and defendant having received the amount of indemnity, as agent of the G. M. Company, could not be called upon to account to complainants. Admits that indemnity was reserved upon 957,600 acres, on account of notes unpaid, but never allowed to defendant, as stated in bill. Avers the same was the true amount of unpaid notes. That according to the \*schedule annexed [**\*231** to bill of certificates surrendered by individuals, it is certified that the total amount so surrendered was upon 2,795,017 acres; but whether said schedule is a true list, or whether the amount stated is the true amount, defendant is ignorant. As to the amount of certificates by members represented by complainants, defendant is ignorant; but avers, there was no allowance to him, nor was there a re-



servation of indemnity for 107,600 acres too much, but the excess (if any) between the total amount of acres reserved for individuals, or for unpaid notes, together with the amount represented by plaintiffs, and the original purchase, is owing to error in amount surrendered by individuals, or the amount represented by plaintiffs.

Edward Stow, a witness examined on the part of the plaintiff, testified, that the agent of the Georgia Mississippi Company, and the members of the N. E. M. L. Company, agreed, that the deed of the land purchased of the former, should remain, for certain purposes, an escrow; and on the failure of Seth Wetmore to pay his notes of \$10,000 for his 100,000 acres of land, the defendant, Jackson, as agent of the G. M. Company, declined delivering said deed to the N. E. M. L. Company, unless they would agree to deliver him, or some other agent of the G. M. Company, certificates for 103,480 acres, in the stock of the N. E. M. L. Company; and in consequence thereof, they entered into a contract with the defendant, Jackson, on the 10th of December, 1796, to deliver to him, or some other such agent, said certificates; but, as they have never been demanded, the certificates have **232\*** never been issued. In said contract \*the defendant, Jackson, stipulated to account with the N. E. M. L. Company, for such sums as he might recover from the notes. The amount of the expenses incurred by the company, when the directors' accounts were exhibited to the commissioners, in 1815, was, in Mississippi stock, \$153,030.90, and in specie, \$20,744.36; but \$1,500 was by them deducted from the last sum, which had been charged to support the future expenses of the company. In part of such expenses, in Mississippi stock, the company received from their agents, on account of the proportionate part thereof, due from the proprietors, who surrendered individually their certificate to the commissioners, \$36,355 22-100, 10-100, in certificates of that stock; and for the debt incurred in specie, \$4,688.26, in specie. Seth Wetmore, in and by the contract of the 26th January, 1796, between the defendant Jackson and Williamson, agents of the G. M. Company, of the one part, and the N. E. M. L. Company, of the other part, signed and executed the same, as proprietor of 100,000 acres of land, in said company, and no more; and a deed was executed to him by the committee of the commissioners for that number of acres; and he appeared, by the records and books thereof, to be a proprietor of that number and no more. The number of certificates, on which the indemnity was received from the commissioners, by individual proprietors of the company, was 262, and the number of acres, 2,795,017. The whole number of acres of land, in the N. E. M. L. Company, was 11,380,000; the indemnity on 957,600 acres of which was awarded to Jackson and others, being \$130,445.12. The **233\*** indemnity on \*2,795,017 acres was awarded to certain proprietors of the company, who surrendered their certificates individually, being 380,681 31-100 54-100. The indemnity on the remaining 7,627,383 acres was awarded to the N. E. M. L. Company, being 1,038,849, 56-100 46-100; which was on 107,600 acres less than it was entitled to, as the numbers of acres held by the proprietors represented by the di-

rectors, was, at the time said awards were made, and now is, 7,734,983 acres; and there could be no error in the number, as the books have been regularly kept. The witness being interrogated whether among the notes surrendered to the commissioners by defendant, there were any notes of Seth Wetmore, answers, that at the request of the directors, the secretary of the commissioners at Washington had transmitted to them copies of ten notes, amounting together to \$25,760, signed by Seth and Samuel Wetmore; and it was understood from him that they made a part of the notes presented by the defendant, Jackson, to the commissioners, and represented by him to have been unpaid by the signers of them; but whether the notes were received by any members of the N. E. M. Land Company, in payment of the land they purchased of the G. M. Company, the deponent could not answer. The expenses of the N. E. M. L. Company, since its accounts were exhibited to the commissioners, exceed \$4,000, and are daily accumulating. Besides, the members of the company represented by the directors, have been obliged to pay upwards of \$80,000 in Mississippi stock, out of their own indemnity to the holders of the certificates \*in the [**234** company which were considered bad by the commissioners.

Being cross-examined, the witness stated, that S. Dexter and B. Joy appeared before the commissioners as agents of the N. E. M. L. Company, and exhibited the accounts of the company, showing the amount of the expenses incurred in the pursuit of its claims, and endeavored to obtain a full proportion of the said expenses from the individual proprietors who had surrendered their scrip, but did not succeed in this endeavor; as in the apportionment of the expense, a manifest error was committed, it being apportioned on 11,380,000 acres, when it ought to have been apportioned on 1,138,000 minus 957,609 acres, viz., on 10,422,400 acres; the commissioners exempting the indemnity awarded to the defendant, Jackson, and others, on account of the said 957,600 acres, from the payment of any part of the expenses incurred by the company. The witness repeated the same statement respecting the proprietary interest of Seth Wetmore, as is contained in his direct examination, with this addition, that Wetmore signed the deed of trust to the trustees of the company, as a proprietor therein, of 100,000 acres only, and does not appear to have been a proprietor in the company at any time, in his own name, nor jointly with Samuel Wetmore, or any other person for more than said 100,000 acres of land therein, which was in his own name only. Nor does it appear by the records of the company that Samuel Wetmore in his own name, or jointly with any other person, was ever \*a [**235** proprietor, directly or indirectly, of the company, for any land therein.

A decree was entered in the court below dismissing the plaintiff's bill, *pro forma*, by consent, and the cause was brought by appeal to this court.

*Mr. D. B. Ogden*, for the respondent, argued, (1) That there was a defect of parties to the suit, both plaintiffs and defendants. There is no express averment that the plaintiffs are the present directors of the N. E. M. Land

Company. Nor are the plaintiffs trustees in the view of a court of equity, nor the *cestui que trusts*. There is no example of an agent filing a bill, in his own name, for the benefit of his principal. The release to the United States, under the act of Congress, left the property a personal fund. The association has then become a mere partnership, and all the partners must be before the court.<sup>1</sup> So also as to the defendant; he is a mere agent of the Georgia Mississippi Company. His principals ought therefore to be made parties defendants; and if it be insisted that the defendant is personally liable as having received money to the use of the plaintiffs, an action at law would lie for money had and received. (2) Even if all the proper parties were now before the court, the decrees of the commissioners, acting within the sphere of their authority, would be conclusive. In the former decision of this court connected **236\***] with the same \*subject, the true distinction is stated that, as to the party there suing, and as to the subject-matter of that suit, the decrees of the board were *res inter alios acta*.<sup>2</sup> But here the case was within their jurisdiction under the very terms of the act of Congress; the same parties were heard before them, as to the same controversy; and it would overthrow all sound principles to permit their decision to be attacked either directly or collaterally.

Mr. Webster, contra, insisted, (1) That the plaintiffs were sufficiently described in the bill as directors, and that it was within the discretion of a court of equity, where the parties were numerous, to permit some to sue for all. Such is the practice in the familiar case of parishioners, societies, commercial companies, and others of the kind. But here the plaintiffs are trustees of the fund which has been produced by selling the land. Besides, the equity jurisdiction of the federal courts would be imperfect, and incompetent to the purposes of justice, unless parties merely formal were dispensed with. As all the parties on one side must be citizens of one state, and all the parties on the other side citizens of another, this court has held that the Circuit Court may dispense with merely formal parties, wherever the real merits of the cause can be determined, without essentially affecting the interest of absent persons.<sup>3</sup> (2) The plaintiffs are not concluded by the decrees of the commissioners. The former **237\***] decision of this \*court proceeded entirely upon the ground that their decrees were not conclusive, and it cannot be reconciled to the notion of their conclusiveness.<sup>4</sup> Besides, an accurate examination of the acts of Congress will show that the present case was not within the jurisdiction of the commissioners. Here the learned counsel entered into a minute analysis of the statutes, in order to support this position.

Mr. Justice LIVINGSTON delivered the opinion of the court:

This suit was commenced in the Circuit Court for the Southern District of New York, where

a decree, *pro forma*, was pronounced dismissing the bill, from which sentence the present appeal is taken.

From the very great and unusual length of the appellants' bill, and the generality of its prayer, which points to no particular relief, it is not easy to say to what extent they originally contemplated a decree against the respondent.

The material facts of this case are the same with those in the case of *Brown v. Gilman* (4 Wheat. Rep., 255). In addition to the detail there given it appears that Jackson, who had been agent of the Georgia Company, had in his possession on the 29th of June, 1815, certificates of the New England Company, to the extent of 691,677 acres, which came into his hands as follows: Several of the notes which had been given by members of the New England Company being dishonored, or the parties insolvent, \*it was proposed by them to Jackson. [**238** and acceded to by him, as agent as aforesaid, that such notes should be returned to the makers, on their transferring to him an equivalent amount in lands of the scrip or certificates of the New England Company; such certificates were accordingly transferred to him, for the number of acres just mentioned, whereupon notes equal in value, computing the land at ten cents per acre, were delivered up by Jackson. For this number of acres an indemnity was reserved by the first decree of the commissioners, out of the whole indemnity claimed by the New England Company, no part of which appears ever to have been received by Jackson as a person entitled to any portion of the indemnity, as such an indemnity was also reserved for the certificates in the New England Company, issued to such purchasers as appeared not to have paid the purchase money to the Georgia Company. The deduction on this account from the indemnity awarded to the New England Company, amounted to \$130,425.12, and was made because the commissioners were of opinion that such certificates were void, and that the parties claiming under them should lose their indemnity; or, in other words, that the Georgia Company had a lien to that extent on the lands which had been sold to the New England Company.

It appears, further, that neither Jackson, nor any one for him, ever did receive certificates for the said sum of \$130,425.12, nor for any part thereof, on behalf of the said Georgia Company, \*or any of them, or for him- [**239** self, he not being then a member thereof; and that he never did, at any time whatever, receive any part or portion of the indemnity provided by Congress, nor certificates for any portion thereof, save for the amount due to him on the balance of his account as agent for the Georgia Company, which was settled by the commissioners at \$24,831.90; that for the amount allowed to the Georgia Company as an equivalent for the unpaid notes aforesaid, and also for the scrip taken back by Jackson, as agent as aforesaid, in payment of other notes, the members of that company who were entitled to the sums so deducted did separately apply to, and did receive from the commissioners, certificates entitling them to their respective proportions of the indemnity so awarded in their favor; and that the notes before mentioned, and the scrip received in lieu of those which were given up,

1.—2 Bro. Ch. Cas. 331.

2.—*Brown v. Gilman*, 4 Wheat. Rep. 255; S. C. 1 Mason, 191.

3.—*Russell v. Clark's Ex'rs*, 7 Cranch, 98.

4.—*Brown v. Gilman*, 4 Wheat. Rep. 255. Wheat. 7.



were by the commissioners' orders delivered by Jackson into their hands.

This suit appears to have been suggested by the judgment of this court in the case of *Brown v. Gilman*; and a belief on the part of the plaintiffs, that Jackson had received the whole sum of \$130,425.12, awarded to the Georgia Mississippi Land Company, on account of the notes which had been given to them, by the members of the New England Land Company, and which remained unpaid by them, and also, the indemnity for the 691,677 acres aforesaid. Although there be no specific prayer in the bill to have these sums decreed to the complainants, **240\*** it is difficult to perceive any \*other adequate objects of litigation between these parties. As these grounds of relief were not much insisted on at the bar, the court might be justified in considering them as abandoned, and pass at once to an examination of the appellants' title to the whole or any part of the sum which was awarded to the respondent, and received by him as agent of the Georgia Mississippi Company. But as all the facts which exist in the case are probably before us, and as the appellants may expect an opinion on the whole of their bill, which may also prevent future litigation, not only between the parties now here, but between the appellants and the Georgia Company, and the individual members of these two companies, it may be useful to inquire whether the appellants have any remedy either against Jackson, or the members of the Georgia Company, collectively or individually, in consequence of any alleged mistake in distribution or apportionment of the sum allowed by government, for the indemnification of claimants of public land in the Mississippi territory. A proper decision of this question will depend not so much on an examination of the correctness of the several acts and doings of the commissioners, as of the powers conferred on them by law; for as no appeal is given by any of the acts of Congress on this subject, to any other tribunal, and as all the parties concerned have submitted to their jurisdiction, this court claims no right to review or disturb any judgment or decision, in any of the cases in which they have acted, within the authority delegated to them. Considering, indeed, the very great inconvenience **241\*** which would result from a different course, and the fruitful source of litigation, which would be opened between the parties whose rights have been settled by them, if their decision were not conclusive, the court would feel reluctant unless in a very clear case, to say that they had transcended the limits prescribed them by the legislature.

The first law on this subject is that of the 31st of March, 1814. By this act, it is declared, that every person, or persons, claiming public lands under the act of the state of Georgia, passed 7th of January, 1795, who have exhibited the evidence of their claims to the Secretary of State, conformable to a preceding act of Congress, shall be allowed until the first Monday of January then next, to deposit in his office a sufficient legal release of all such claim or claims to the United States, and the Secretary of State, the Secretary of the Treasury, and the Attorney-General of the United States, for the time being, were thereby constituted a board of commissioners to adjudge and determine upon the suf-

ficiency of such releases, and, also, to adjudge and finally determine upon all controversies arising from such claims so released, which might be found to conflict with, and to be adverse to, each other. On the 23d of January, 1815, a supplemental act was passed, by which the President of the United States was authorized, by and with the advice and consent of the senate, to appoint three persons to act as commissioners under the former law, in place of the two secretaries and the Attorney-General, who were to execute all the powers granted to, and to \*perform all the duties enjoined [**242** upon the original board of commissioners. The persons thus appointed were, from time to time, to certify and report to the President of the United States, as to the sufficiency of the releases which should be made, and the claims which they should finally adjudge and allow. By a third act, passed the 3d of March, 1815, the commissioners are authorized to admit, and finally settle, all such claims as have been, or may be, within the time limited, duly released, assigned, and transferred to the United States. And the President is authorized, from time to time, to cause to be issued such certificates of stock as are specified in the first act and the supplement thereto, to such claimant or claimants, whose claim may be decided and reported by the commissioners, on receiving such report in relation to such claim from the commissioners.

The court will now proceed to examine those proceedings of the commissioners, which are complained of by the appellants, which, it is believed, will be found to be not only within the spirit, but within the letter of the powers expressly delegated to them.

One ground of complaint is, that there was deducted from the indemnity allowed to the New England Company, a sum equal in value to 691,677 acres, on account of scrip of this company, then in the hands of the respondent, and which had been delivered to him in payment of notes which had been dishonored, or the parties to which had become insolvent. It cannot be a question that the holders of these \*scrip, whether Amasa Jackson, the [**243** Georgia Company, or any other person, had as just and valid a claim for the quantity of land therein mentioned, upon the indemnity set apart by Congress, as the New England Company would have had for the same scrip, if they had not been assigned to Jackson. Their returning to the hands of the original vendors, or their agent, could make no difference. The holder or holders, whoever they might be, could not but be regarded within the obvious and plain meaning of the act of the 31st of March, 1814, as a person or persons having a claim on the lands in question; and the commissioners could not, without a violation of duty, have refused to take cognizance of it. It might have been a question, whether the stock which was a portion of the indemnity intended for the Georgia Company, as the holder of these certificates, should not have been transferred for their use, to the directors of the New England Company; that, however, was a subject on which the commissioners were competent to decide, as well as on the validity of the claim itself. There is nothing in the conduct of the commissioners, in this particular, inconsistent with the act under which they



were sitting; on the contrary, the act appears to contemplate a settlement by them of an individual, as well as of a company or joint claim; for the President is to issue certificates to such claimant or claimants, whose claim may be decided and reported by the commissioners. All the commissioners had to do was to decide on the validity of the claims, however subdivided, and to determine on the sufficiency **244\*** of the release made by such \*claimant to the United States. The court is, therefore of opinion, that this claim was clearly within the jurisdiction of the commissioners, and that their award on the subject is final and conclusive.

The next subject of complaint in the appellants' bill, is the award of the commissioners that the indemnity upon 957,600 acres, amounting to \$130,425.12, should be deducted from the amount claimed by the New England Company, on account of certificates issued by that company to purchasers who had not paid their notes to the Georgia Mississippi Company. These scrip the commissioners determined to be void, and that the parties claiming under them should lose their indemnity. The Georgia Company, thinking they had a lien on the lands sold by them to the New England Company, to the extent of the same thus unpaid, appear, as well as the New England Company, as claimants before the commissioners, who, being of opinion that the former were entitled to the indemnity, *pro tanto*, decreed accordingly. A decision of this question was also clearly within the power of the commissioners. The act made no distinction between an equitable or a legal claimant. To satisfy the words of the act, it is sufficient that both parties were claimants, and if these claims were found to conflict with, and to be adverse to each other, as was the case here, the commissioners were to adjudge, and finally to determine on them. On this point, also, the court is of opinion that the decision of the commissioners, as between the New England and Georgia Company must be regarded as conclusive. Nor does this opinion in any degree conflict, as has been supposed, **245\*** with our decision in \*the case of *Brown v. Gilman*. It is true that the court, in that case did say, that the lands which had been granted to the New England Company were exempt from any lien of the Georgia Company, notwithstanding the non-payment of these notes, to which opinion it still adheres; it was not, however, on that ground, or with any view of disturbing the decision of the commissioners, that it decreed in favor of Mrs. Gilman. This decision proceeded on the ground, not of an error in the commissioners, but of a wrong done to Mrs. Gilman by the New England Company, in the distribution which they made of the indemnity awarded to them. This court thought that the sum deducted by the commissioners from the indemnity claimed by the New England Company, was chargeable on the fund generally, and not individually on the share of Mrs. Gilman. Her share was exempted from bearing the whole of the loss, because, according to the laws of the association of the New England Company, she had received a certificate which on its very face purported to be, and was regarded as complete evidence of title, whether the person from whom she had pur-

chased had paid his note or not. After issuing to her a certificate in the form which had been devised, in order to render them more valuable, and to enable the holders the more easily to dispose of their interest, the court thought that whatever the commissioners might think proper to do, as between the two companies, the New England Company was bound to let Mrs. Gilman in for a portion of the indemnity awarded to them, notwithstanding \*a failure of [**246** payment by any person under whom she claimed.

If the court be correct thus far, there is an end of every demand by the appellants on the respondent; for if the commissioners had a right to make the deductions which they did from the indemnity claimed by the New England Company, it can be of no importance to them how the stock, which has thus been deducted, has been disposed of. But even if the commissioners had exceeded their authority, and improperly awarded the sums which they did to the Georgia Company, it would be difficult to afford the appellants any relief against the respondent. He has received nothing more than the sum awarded to him for his services as agent of the Georgia Company. Whether this sum were too small or too large, is a matter between him and that company; but it cannot here be a proper inquiry out of what fund it was paid. If any persons could be liable to the appellants for a mistake of the commissioners, it ought to be shown in whose favor the deduction from the indemnity claimed by the New England Company was made, and not those to whom the stock awarded to them may have been transferred, in satisfaction of the debt of the company. This would be giving what the court would not be disposed to do, even if the proceedings of the commissioners were not conclusive to the New England Company, a lien on the stock awarded to the Georgia Company, into whose hands it may be passed.

It is also stated in the bill, that 107,600 acres have been allowed to Jackson, which, even upon the principles \*established by the [**247** commissioners, were too much, and that this sum amounted to \$14,655.12, and this sum it is alleged, ought to be decreed to the appellant. It is a sufficient answer to the allegation to say, that there is no proof of such allowance being made to the respondent, and that his answer, which is uncontradicted, denies that he ever received it. As to the allegation of his being liable for \$1,163.90, for his portion of expenses chargeable on his stock in the New England Mississippi Land Company, and for the sum received as indemnity on Seth Wetmore's purchase beyond the amount of his notes, the same answer may be given. It does not appear that he ever was a member of the New England Company; and by his answer, which stands uncontradicted, the court is informed that he never received out of the indemnity any other sum than the \$24,831.90, which was awarded to him not as a member of either company, but for his services as agent of the Georgia Mississippi Land Company.

The court, however, does not mean to be understood as saying, that the appellants, or those who represent the New England Mississippi Land Company, may not have a remedy against the Georgia Mississippi Land Company for a



contribution towards the loss which the former has sustained by the decree in favor of Mrs. Gilman, or for other losses of a similar nature. In this respect, as far as the indemnity extended, which the latter received for the scrip which they held, by their agent, Jackson, they must be considered as coming in under the New **248\*** England \*Company, and contribute with the other members thereof, in making good what they may lose in consequence of the demands of individuals, who stand in the predicament of Mrs. Gilman, for their proportion of the indemnity actually awarded to those whose certificates of land on the New England Company were adjudged to be valid.

An objection was made by the respondent to the want of parties; but the conclusion to which the court has come renders it unnecessary to give any opinion on this point. The court, however, would have hesitated in making any decree against Mr. Jackson in the absence of his principals in whose favor the award was made, and who ought, if its merits were examinable, to have been afforded an opportunity of vindicating the grounds on which it was made.

It is the judgment of this court, that the decree of the Circuit Court dismissing the appellants' bill, be affirmed with costs.

*Decree affirmed with costs.*

[LOCAL LAW.]

BLUNT'S LESSEE *v.* SMITH ET AL

The decision of the court below, granting or refusing a motion for a new trial, is not matter for which a writ of error lies to this court.

In Kentucky and Virginia the rule is, that a court of common law cannot look beyond the patent; but in Tennessee the courts of law, under their construction of the land laws of North Carolina, permit the parties in an ejectment to go back to the original entry, and connect the patent with it.

**249\*** \*This construction is not limited to a comparison of the dates of the entries, but admits of an inquiry into their legal effect as they stand in relation to each other.

The statutes of North Carolina, which have been construed to justify a court of law in considering the entry as the commencement of title, are applicable to military warrants as well as other titles.

By the decisions of the courts of Tennessee, the validity of surveys does not depend on the will or directions of claimants; and though the mistakes of surveyors may be corrected, they cannot be corrected so as to injure a subsequent adjoining enterer.

The laws of North Carolina do not require that an entry should express the water-courses and remarkable places which are remote, but only those which are contiguous, and which may assist in designating the land intended to be acquired.

Notoriety is not essential to the validity of an entry in Tennessee, as it is in Kentucky. The statute of Virginia, which is the land law of Kentucky, requires that entries shall be so special and certain that any subsequent locator may know how to appropriate the adjacent residuum. But the land law of North Carolina contains no such provision, and the doctrine which requires notoriety as well as identity, has never been received in Tennessee.

**E**RROR to the Circuit Court of West Tennessee.

This was an action of ejectment, brought by the plaintiff in error, in the Circuit Court, against the defendants in error, to recover the possession of lands in the state of Tennessee. The title of the plaintiff, as spread upon the record, originated in an entry made on the 17th of March, 1785, in the following words: "General Sumner enters 12,000 acres of land, lying east of the upper south road, between the head of Mile Creek, Little Harpeth, and Stewart's Creek, and on the waters of some of the aforementioned creeks, including some deadened trees, marked I. F." The deadened trees were never found. On this entry a patent was issued by the state of North Carolina, on the 27th day of April, 1793, to which \*was attached [**\*250** a plat and certificate of survey purporting to be made by Thomas Malloy, a deputy-surveyor, on the 20th of November, 1786.

The defendants claimed under a patent issued to William Tyrrell, assignee, on the 10th of April, 1797. This grant was founded on an entry made in the name of John Gee, on the 1st of June, 1785, in the following words: "John Gee, heir of Captain James Gee, enters three thousand eight hundred and forty acres of land, lying and adjoining the northern boundary of Brigadier-General Jethro Sumner, running west along his line for complement."

The defendants gave in evidence the record of a former trial in ejectment for the same land, in which the verdict and judgment were against the plaintiffs, and the testimony of Burklely Pollock, a witness examined at that trial, who is since dead, and who swore that he made the survey for General Sumner before Gee's entry was made. A copy of the plat and certificate of survey made by Pollock, and recorded in the Secretary's office of North Carolina, properly authenticated, was also given in evidence. By the plat and certificate of survey, it appears that the land of Sumner was laid off by Pollock, in a parallelogram, the base or first line of which extending from west to east, was 1292 poles, and the side lines 1486 poles. The patent which was issued on the plat and certificate, returned by Malloy, had the same base line, but the side line is extended to 1737 poles, and the survey is said to include 2,026 acres, belonging to Lieutenant Thomas Pasteur.

\*The defendants also gave in evidence [**\*251** copies of a petition presented to the General Assembly of North Carolina, at their session held in November, 1786, by the guardian of the plaintiff, praying that a separate warrant might be issued to the heirs of General Sumner for the quantity of land included in his survey to which Lieutenant Pasteur had a prior title, and the proceedings of the legislature, granting the prayer of the petition. The defendants also gave in evidence a certified copy of a certificate granted by the Commissioners of West Tennessee to the heirs of General Sumner, for so much land as was equal to the quantity lost by the prior title of Lieutenant Pasteur, and a copy of the testimony on which this certificate was founded.

To the admission of all these copies, it is stated in the bill of exceptions the plaintiff's counsel objected, but his objections were overruled, and the papers were read.

Some testimony was offered by the defendants, to prove that in the survey of Sumner's land

Wheat. 7.

Note.—See note to Watts v. Lindley's heirs, *ante*, 158.

by Pollock, a second as well as the first line was run, and corner trees marked at the end of that line, so as to fix the northern boundary of Sumner's land; but other testimony was offered by the plaintiff to prove that only the first line, which established the southern boundary, was run.

After the testimony was closed, the counsel for the plaintiff moved the court to instruct the jury, "that they should not regard the said copies from the secretary's office of North Carolina, and of the proceedings before the Commissioners of West Tennessee as having **252**"] any effect in the said cause; and that the entry in the name of Gee, on which the grant to Tyrrel purported to be founded, could not be located as a special entry to any place, or if to any place, only to the northern boundary of Sumner's land on which the grant was founded, as granted and described in the plat and certificate;" but the judge refused so to instruct the jury, but informed them that all said documents, except the proceedings before the commissioners, which should have no weight in the cause, should be considered as testimony by them; and that the plat and certificate made by Pollock, if he marked no more of the corners and lines of Sumner's tract, but the southern boundary, and south-east corner and south-west corner, would show, by calculation, where the northern boundary of his tract should be according to the said plat, and locate said Sumner's entry and land to the south of that line, and fix said entry in the name of Gee to the north of that line, and make it special from the date of the survey made by Pollock for that place; and that the grant to Tyrrel, although founded on a survey made long after the grant to Sumner was issued, should relate back to the date of said entry, and give a good title to those holding under the said grant to the land north of the north boundary as represented in the plat, &c., made by Pollock, against the title derived from Sumner's grant and entry; and that Sumner's grant should be considered as made on a removed warrant, for all the land north of what is represented in said plat, made by Pollock, as his northern boundary."

**253**"] \**Mr. Gaston*, for the plaintiff in error, argued, that the practice which prevails in the state of Tennessee, of permitting a younger to compete with an elder grantee in ejectment, by reason of the elder and better entry of such younger grantee, was admitted in the Tennessee adjudications to be an usurpation on the part of the courts of law introduced since the year 1798, and now too long established to be questioned.<sup>1</sup> All agree that this innovation is not to be carried beyond its ascertained limits.<sup>2</sup> To this well-meant but impolitic assumption of power in their courts of law is ascribed, with one voice, the fatal uncertainty of the Tennessee land laws.<sup>3</sup> The eldest grant is esteemed conclusive evidence of title except in the single case of an elder legal entry.<sup>4</sup> And every species of evidence to make a younger compete

with an elder grant, shall be rejected except the entry.<sup>5</sup> The acts of North Carolina of 1786, c. 20, and 1787, c. 23, are the only statutes authorizing a court of law to go beyond the grant in the examination of land claims, and under these the courts have gone far enough, to say the least of it, when they look to the entry.<sup>6</sup> Under these statutes, declaring an elder grant founded on a younger entry \*void, the [**254** Tennessee courts have decided that the priority of entries is examinable at law, and that a junior patent founded on a prior entry shall prevail in an action of ejectment against a senior patent founded on a junior entry; but this doctrine has never been extended beyond the cases which have been construed to be within the express purview of these statutes.<sup>7</sup>

It must be conceded, that in some of the Tennessee decisions military grants have been regarded as liable to the application of the same rule of preference from priority of entry or locations, as had been established in cases of grants founded on ordinary entries. It is difficult to say, when an error shall be deemed too inveterate to be corrected. Perhaps this may be the case with respect to the application of this rule to military grants. If it be not, nothing can be more easy than to show, that admitting the rule to be correct, military grants ought not to be brought within the sphere of its operation. The act of 1777, c. 1, opened a land-office in North Carolina for the sale of vacant and unappropriated lands. The 4th and 5th sections prescribe as terms and conditions of the sale, payment by the purchaser of the required price, and a description in writing specifying the quantity and defining the situation of the land which he buys. This land-office was shut by the act of 1781, c. 7. It was again opened by the act of 1783, c. 2, entitled "An act for opening the land-office, for the redemption of \*specie and other certificates [**255** and discharging the arrears due to the army." The 10th and 11th sections of this act require that the individual wishing to enter a claim for vacant land, shall pay the price of it to the entry-taker, and deliver a writing signed with his name, setting forth where the land shall be situated; and that the entry-taker shall endorse this written claim (or location) with the name of the claimant, and record it in his entry-book, and in due time shall issue to the surveyor a warrant commanding him to survey for the claimant the land described in such entry. When the act of 1777 was passed, an appropriation of lands as a retribution for military service had not been contemplated, and the act of 1783, above referred to, expressly excepts from entry (sec. 12) all lands lying within the bounds reserved for the officers and soldiers of the continental line. The act of 1779, c. 6, which was also passed before an appropriation of lands for military services, directs the surveyor, where entries interfere (sec. 6), to survey the eldest entry first. The act of 1783, above referred to, under which military lands are forbidden to be entered, provides that

1.—Wilson v. Kilcannon, 1 Tenn. Rep. 205.

2.—1 Tenn. Rep. 409, 411; 2 Tenn. Rep. 153, 154; 1 Cooke's Rep. 32; 5 Hayw. Rep. 402.

3.—2 Tenn. Rep. 17; 5 Hayw. 102; Polk's Lessee v. Wendel, 5 Wheat. Rep. 302.

Wheat. 7.

4.—1 Cooke's Rep. 133.

5.—Reid v. Buford, 1 Tenn. Rep. 420.

6.—Lester v. Craig, 1 Cooke's Rep. 485, 487.

7.—Robinson v. Campbell, 3 Wheat. Rep. 221.



all the warrants for entries shall be delivered by the entry-taker to the surveyor on certain prescribed days, and that the surveyor shall proceed in his surveys in the order of the numbers and dates of the entries. All these enactments proceed upon the obvious principle that the first person who has bought and paid for any particular tract of land shall be entitled to a grant for it. The act of 1786, c. 20, and the act of 1787, c. 23, "from which alone the courts of law claim an authority to go beyond the **256**]" grant in "the examination of land claims, and beyond the express purview whereof this doctrine ought not to be carried,"<sup>1</sup> are each of them, in title—in preamble—in express enactment, definitively restricted, in this respect, to entries of vacant and unappropriated lands under the acts of 1777 and 1783.

By an act of Assembly of May, 1780, referred to in the 7th section of the act of 1782, a certain tract of country was reserved to be appropriated to the purpose of rewarding the bravery and zeal of the continental officers and soldiers in the service of the state of North Carolina. By the act of 1782, c. 3, entitled, "An act for the relief of the officers and soldiers of the continental line, and for other purposes," it is enacted that these officers and soldiers shall severally have such a number of acres of land, varying according to rank in a certain ratio specified in the act, and preliminary measures are directed to be taken for exploring and laying off the lands out of which this military bounty, or rather military debt, shall be satisfied. By the act of 1783, c. 3, entitled, "An act to amend the last-mentioned act," it is declared that the persons entitled to military grants under the act referred to shall, on application to the Secretary of State, receive from him warrants of survey for such quantities of land as they are respectively entitled to "within the limits of the lands reserved for the officers and soldiers," directed to a surveyor appointed for that special purpose. No previous entry is required from a \*military claimant, and the warrant of survey is restricted only by the boundaries of the territory set apart for the satisfaction of military claims. In endeavoring to pay the debt of gratitude due to her brave defenders, the state recognizes no priority of merit among them. The consideration for these grants has been received from all, and from all at the same time. There is no first or second purchaser among them, nor has there been a purchase of any particular lands, but only of specified quantities of land. To prevent disputes which might arise between two or more of them wishing to have their warrants satisfied at the same place, only two provisions are made; one that the choice shall be decided by lot, and the other, that he who has assented to his brother soldier's location, shall not afterwards interfere with it. No enactment was ever made that the warrants of survey should all be delivered at prescribed times, nor that they should be surveyed in the order of their dates or numbers, nor that grants founded on younger warrants should be void. Until the act of sess. 1 of 1784, c. 15, entitled

"an act to amend the act of 1782, c. 3," no mode whatever had been provided by which a memorandum of the military locations should be preserved. That act directed that the surveyor to whom the military warrants were directed should keep a book containing a minute of the name of the military claimant, number of his location, number of his warrant, of the quantity of acres, date, and description of his location. The necessity of some such memorial, as a check upon the officers of government and preventive of fraud, is too manifest to [\***258** require any other reason to be given for this statutory provision. But to declare that because such statutory provision is made, that, therefore, the positive and special enactments which have been made in regard to entries in the general land-office, shall obtain in these locations, and that enactments thereafter to be made, restricted in terms to the former, shall be law also in regard to the latter, may pass for anything as well as for judicial exposition.

If, however, this court should consider such judicial exposition as established, the inquiry then distinctly presents itself, can Tyrrel's grant claim a preference over Sumner's grant, to which it is younger, by reason of Gee's better entry? The entry to which is allowed the extraordinary property of causing the grant subsequently issued to have legal operation from the date of the entry, is on all hands required to be a "special entry." It has been found a difficult matter to define this "specialty" with precision. The circumstances which make up this specialty are either such as are fitted to identify the entry, or to give it notoriety; and an entry is not now acknowledged as a special entry unless notoriety and identity both concur.<sup>2</sup> In regard to the identity of an entry, this must depend on facts existing at the date of the entry, and appearing on its face, or to be collected by plain inference from those which do appear on its face. The notoriety of an entry is a different affair. Occurrences happening after an \*entry has been made [\***259** may render it very notorious, although but little known before. But no subsequent occurrences can have any effect upon the identity of an entry. The entry is a matter of record accessible to every individual. It ought to be so definite that all who are acquainted with the country may be enabled, on an examination of it, to ascertain where it lies, and to avoid interference with it.<sup>3</sup> No act less authentic in its nature, such as a survey—no act which is not a matter of record, however notorious it may be—is considered as giving this legal notification.<sup>4</sup> In North Carolina and Tennessee, no record is made of surveys. The surveyor returns two plats to the secretary's office, one of which is kept there, and the other appended to the grant. As every individual has it in his power to procure knowledge of an entry, he is presumed to have such knowledge, and if he locate land which has been before entered, he is in the condition of a purchaser with notice of a prior equitable right, affected with a legal fraud, and trustee for the equitable owner. Land titles must rest on general principles, and

1.—3 Wheat. Rep. 221.

2.—See *Dallam's Lessee v. Breckenridge*, *Cooke's* Rep. 157.

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3.—*Anderson v. Cannon*, 1 *Cooke's* Rep. 30, 31.

4.—*Ib.* 32, 33; 3 *Hayw.* 186, 215, 217; *Wilson v. Mason*, 1 *Cranch*, 99.

Wheat. 7.

the entry, special on its face, and made of record, is not to be supplied by other evidence of an inferior character, but which might be thought reasonably equivalent.<sup>1</sup> It would be an unwarrantable, and a most alarming extension of a principle, already carried too far, to permit an entry originally wandering to become **260\*** \*fixed, originally vague to become specific, by matter *ex post facto*, and from the time of this change of character to give it the efficacy of retracting the grant to itself. The entry must, on its face, be fixed to some spot.<sup>2</sup> It is foreign from the present inquiry to examine under what circumstances a defect of notoriety in an entry, always sufficiently definite, may be remedied by subsequent occurrences, and what shall be the operation of such entry after it becomes notorious.<sup>3</sup>

Gee's entry is for 3,840 acres adjoining the northern boundary of "General Sumner, and running west along his line for complement." It contains no other words of description, and of course can only be identified by those. It calls for the northern boundary of General Sumner's—what? The plaintiff contends, of General Sumner's entry. Sumner's entry, and Gee's entry, are records of the same office, and in the same book. To this book every locator has a right to recur for the purpose of ascertaining where he may procure lands without interference with prior appropriations. A locator reads Sumner's entry, dated the 17th of March, 1785, and on the next page he meets with Gee's, dated the 1st of June, 1785, containing no other description than that it adjoins Sumner's northern boundary. It is impossible but that he should understand the latter entry as entirely depending on the former. There **261\*** \*is no intimation to him that a survey has been made of Sumner's entry. Calling for its northern boundary, and to run west along that line gives no such hint, for all the military entries are required "to be run out at the four cardinal points of the compass either in a square or an oblong." (Act of 1784, c. 15, sec. 3.) If there has been such a survey he has not the means of seeing it—is uninstructed where to look for it. He is not apprised of the names of those who made it, or from whom he may learn what lines of it were run. He must understand the reference in Gee's entry as made to that which is accessible to him—which is spread before his eyes—to General Sumner's entry. As the object of a special entry is to enable those who examine it to ascertain where it lies, the information which such an entry necessarily conveys to the examiner must be supposed to be the information which the enterer intended to convey. Had Sumner's entry been on its face special, and fixed to a particular spot, it is impossible to deny but that Gee's entry by these words of reference would have been equally definite and special. And if a survey had been made of Sumner's entry varying from its precise requisition, Gee's entry would still have remained fixed to the spot which the record indicated—would not have followed Sumner's survey in its wanderings, nor lost its claims to specialty and certainty.

To suppose Gee's entry to refer to the north-

ern boundary of Sumner's survey, as ascertained by Pollock's plan and certificate, is full of difficulties. It presumes that such survey had then certainly been \*made, and plat **[\*262** and certificate returned. It presumes that these, or some of these, were known to Gee. It presumes that this plat and certificate, and survey, were so notorious that every subsequent locator would understand words of reference in a book of entries, as applying not to an entry but to a survey. Yet there is nothing to show that this alleged survey ever became notorious, even to this day. There is nothing to prove that Gee had any knowledge of this survey, or that the plat had, at the date of his entry, found its way into the secretary's office. Nor is there any testimony to show that any survey had then been made except the date of Pollock's certificate, a paper of very questionable character, produced under circumstances of great suspicion, and emanating from one who seems destitute of all claims to credit. The supposition that the words in Gee's entry refer to Pollock's plat takes for granted facts not proved; accordingly we find the court instructing the jury that this plat, if Pollock marked but one line, "would show where, by calculation, the northern boundary of Sumner's tract should be according to that plat—would make Gee's entry special from the date of Pollock's survey, and would cause Tyrrel's grant to relate back to the date of Gee's entry." Thus the court undertook to pronounce that Gee's entry was subsequent to the marking of one of Sumner's lines by Pollock, and to the legal completion of Pollock's survey. It is not necessary, and, perhaps, it is not practicable, to clear up the mystery which Pollock's plat throws over this transaction. But it would seem probable **\*that** Pollock, having made out a plat, **[\*263** presented it to his immediate principal, Malloy, and that Malloy, knowing of its interference with Lieutenant Pasteur's prior right, instead of adopting this plat as his own, made a new plat and certificate, extending the second and fourth lines sufficiently far to comprehend the twelve thousand acres exclusive of Pasteur's land. Malloy's plat and certificate were duly returned to the office, for on them the grant actually issued; and it is likely that when he returned them he gave the information to Armstrong that Pollock was, in fact, to be credited for the work to which Malloy's name appeared, as it is otherwise unaccountable that any explanation to that effect should have been either given or required. Pollock had, no doubt, in conformity to the ordinary requisites of the law, prepared two plats. The one not delivered to Malloy afterwards found its way (at what time, or by what means, it is impossible to say) into the secretary's office. Is it unfair to conclude that it was not there in 1793, or otherwise Sumner's grant would have conformed to it? The grossest frauds and irregularities have taken place in the military land-office of North Carolina. These have been proclaimed by the public statutes of the state. (Acts of 1797, c. 24, and 1798, c. 14.) Pollock, whose certificate has caused all this perplexity, was examined as a witness for the defendants

1.—Wilson v. Mason, *Ib.*

2.—1 Tenn. Rep. 407, 411, 412; *Id.* 505, 507.

3.—Simm's Lessee v. Dickson, 1 Cooke's Rep. 141; Baird v. Trimble, 1 Cooke's Rep. 287, 288.



on a former occasion, to invalidate the plaintiff's claim. He swore to the running of Sumner's second line, and the marking of the third corner agreeably to this place. Munfee proved **264\***] that Pollock did not run \*the second line, nor mark the third corner. All the witnesses concurred that not a marked tree was to be found after leaving Sumner's first line; and the demonstration of nature was given to prove the falsehood of his allegation about the third corner. There was no evidence to fix the actual running of Sumner's first line more precisely than to the year 1785 or 1786. Under all these circumstances, was it not, at least, a matter of doubt whether Pollock's survey had been made—had been ratified by his superior—had been filed in the office before the 1st of June, 1785? And if the construction of Gee's entry, given by the Circuit Court, presupposed the existence of facts not ascertained, then an important inquiry was decided by the court, which belonged exclusively to the cognizance of the jury.

If Gee's entry rests its claim to certainty upon its reference to Sumner's entry, it can advance no higher pretension than Sumner's to be regarded as a special entry. No evidence having been given of the deadened trees marked I. J., Sumner's entry is thus far fixed, "on the east side of the upper south road, between the heads of Mill Creek, Little Harpeth, and Stewart's Creek, and on the waters of some of them," and Gee's is thus far fixed "to adjoin Sumner's on the north." If the first be vague, so is the second, "fixed in an orb that flies." If the first be sufficiently special, it will apply, as well to that part of the land covered by both grants, as to that covered by Sumner's, and not comprehended within Tyrrel's. Indeed, to have surveyed Sumner's a little further to the north and **265\***] west, so as to cause it to take in \*more of the land covered by Tyrrel's grant, would have more nearly conformed to the entry than does the survey on which the grant has issued.

Should it be objected on the part of the defendant, that Sumner's grant issued on a second survey after a former survey made and returned, the objection will avail them nothing. Where the state has authorized the granting of lands, and a grant is made, such grant, notwithstanding any irregularities, is good against future claims.<sup>1</sup> A survey on which a grant has not issued, is no estoppel to another survey.<sup>2</sup> If a surveyor mistake in running out land, it is reasonable that he may correct that mistake before a grant issues, so that the rights of innocent third persons be not thereby injured.<sup>3</sup> Unless Gee's entry is identified to the land excluded from the first, and comprehended within the second survey, it cannot be pretended that Gee's rights were injured by such second survey. The survey on Gee's entry was made in 1796, ten years after the survey on which Sumner's grant was founded, and three years after Sumner's grant had issued; and the surveyor of Gee's entry had with him on the survey a plat of Sumner's tract representing the courses and distances as specified in the plat annexed to Sumner's grant.

From some of the facts mentioned in the bill of exceptions, it might be supposed that the parties intended to raise the question of the statute of limitations. It is believed, however, that is a question on \*which this court [**\*266** will not give an opinion. The statute of Westminster, the 2d, 13 Edw. I., ch. 31, which gave the remedy of a bill of exceptions, emphatically confines the attention of the Court of Errors to the exception taken "and if justice cannot deny his seal, they shall proceed to judgment, according to the same exception as it ought to be allowed or disallowed." It does not appear that any opinion was given in the Circuit Court on the statute of limitations, or that it came into consideration there. The instruction to the jury was founded solely on the supposed relation of Tyrrel's grant to the date of Gee's entry, so as to overreach Sumner's prior grant. A bill of exceptions does not draw the whole matter into examination, but only the points to which it is taken, and of course must be regarded as stating such facts only as will enable the revising court to judge of the matter excepted to.<sup>4</sup> It may not be amiss, however, to state, that on this question as presented by the facts appearing on the bill of exceptions, the plaintiff claims to be entitled to recover. The Tennessee adjudications have settled that persons "beyond seas," have eight years after returning to the state, within which to make their entry, or bring their writ;<sup>5</sup> and this court has decided that the words "beyond seas" are equivalent to "without the limits of the state."<sup>6</sup> In this case it is explicitly stated that the lessor of the plaintiff never was within the limits of the state of Tennessee.

\**Mr. White*, for the defendants in [**\*267** error, stated, that before a discussion of the main question presented by this record, the attention of the court ought to be directed to the only bill of exceptions which was either tendered in, or signed by the Circuit Court. By that it would appear, that no exception whatever was taken to the instructions given to the jury, at any time before the verdict was rendered. If the plaintiff was dissatisfied with the charge, that dissatisfaction ought to have been expressed immediately; remaining silent until the rendition of the verdict was a waiver of any exception, which might have availed the party if it had been taken immediately.<sup>7</sup> The first error assigned, as to the charge, is upon a motion for a new trial, after the refusal of which, the bill of exceptions was tendered and signed. Whether the court decided correctly or not in refusing the new trial, is a point which this court will not revise, as has been so well settled that it would only be a waste of time to refer to decisions in support of this statement.

If these preliminary objections are well taken, there is no point brought here, for examination, which can admit of any doubt.

It is to be regretted, that, from the bill of exceptions, we are not at liberty to examine the question relative to the statute of limitations.

4.—Bridgman & Holt, Show. Parl. Cases, 120 Bull. N. P. 316; *Frier v. Jackson*, 8 Johns. Rep. 495.

5.—2 Tenn. Rep. 341.

6.—*Murray v. Baker*, 3 Wheat. Rep. 541.

7.—Bull. N. P. 115.

1.—1 Tenn. Rep. 322.

2.—*White v. Crocket*, 3 Hayw. 183, 181.

3.—1 Tenn. Rep. 6.

It is sufficient to say that only one opinion could be entertained upon it, if it was fairly discussed.

But as it is possible that we may be mistaken **268\***] \*supposing that the charge of the judge below is not now before this court. Should that be the case, it is submitted that the charge was strictly correct. The line E. F. represented on plat No. 3, must be considered as between these parties the northern boundary of Sumner: (1) Because the proof shows satisfactorily, that in May, 1785, Sumner caused his entry to be surveyed by Pollock; that the corner at A. was made, the lines A. B. and B. E., were then run, and these three corners marked. A plat and certificate of this survey was made, and with the warrant, returned to the secretary's office. The moment these things were done, the surveyor was, as to this transaction, *functus officio*, the boundaries of Sumner's 12,000 acres were fixed, and he who then made an entry, calling to adjoin him on the north, can never be disturbed by any after act of others, changing Sumner's boundary. The defendant's entry was made on the first day of June, 1785, and his grant is to be viewed as if issued on that day because the entry on which it is issued is special.

The plaintiff is not now at liberty to say, the fact is not as I have stated; although there is a contrariety of evidence upon the fact, whether the line B. E. was run by Pollock, yet as the plaintiff excepted to the charge, the fact is to be taken most strongly against him.<sup>1</sup> But if this be not so, still it is insisted that no man can doubt the running the line A. B., and marking those two corners by Pollock, an authorized surveyor, in May, 1785. This line is now, and **269\***] \*has at all times been, the southern boundary of Sumner's tract. It is therefore contended, (2) That on the 1st of June, 1785, when the entry of Gee was made, he had a right to include in it any land which Sumner's entry did not notify him was included within Sumner's claim. Of what, then, was Sumner's entry notice? That Sumner had appropriated 12,000 acres which was to run north from B. as many poles as would make that quantity, and nothing more. This will stop us at E. and still make E. F. the northern boundary, which Gee calls to adjoin. The officers and soldiers had equal rights; they had each paid the same kind of consideration, and each had a right to appropriate to his own use any vacant land he could find, within the military district; and all was vacant, except that which had been either granted, or so described in an entry as to afford reasonable notice, to all others, of the spot appropriated by such entry. On the 1st of June, 1785, when Gee entered, how could he know that Sumner's boundary would be changed by extending the line from B. so as to include 14,000 acres of land, when his entry called for 12,000 only? It was impossible. Yield to the pretensions on the other side, and suppose the facts to be, as we may well suppose it, that there was a succession of entries, each calling to bound upon the north of the other, and look at the consequences. By changing Sumner's northern boundary, you change the northern boundary of each succeeding entry, and by this means there is an exchange of tracts to the northern boundary of the state, and the last is

pressed into the adjoining state. \*The [**270** position is too mischievous to be well founded.

But it has been argued that the decisions in Tennessee, which authorize an entry to be noticed as evidence in a court of law, are founded in error, and ought not to be extended.

To those who have no knowledge of the peculiar situation of Tennessee, when North Carolina legislated upon this subject, there is plausibility in this argument; but when the situation of that country is understood, and the statutes relative to this point considered, it is believed, there can be found no ground of doubt upon the subject. It has been often examined, and for many years the point has not only been considered as decided, but decided so often, that it is settled, and settled upon principles which everyone will believe correct, who will take the trouble to examine them.

It has been further argued, that if the defendants are permitted to introduce their entry in this case it will be going farther than has been done in Tennessee.

The counsel who use this argument have not examined this subject with their usual correctness. The principle settled in every case is, that either party, plaintiff or defendant, may introduce his entry, and if that entry is special, and so describes the land afterwards granted to the enterer, that his title shall be considered as if this grant had issued on the day his entry was made.

It has likewise been insisted, that there is very little pretense for putting grants founded upon military warrants upon the same footing with those bottomed \*on entries made [**271** under the acts of 1777 and 1783.

But the courts have made no distinction, nor ought they to make any, that could benefit the plaintiff. If any distinction can be found, it is that there is more reason for receiving the entry in the former case than the latter. In the latter, the entry office was in North Carolina, remote from the land to be entered. In the former the office directed to be kept at Nashville, in the military district; to the end that the officers and soldiers might conveniently examine it, and become informed of previous appropriations. Upon inspecting this record, and the facts there disclosed, it must be manifest that Sumner's boundary is the line E. F. If not, how came the plaintiff by the certificate for 1808 acres of land, on account of the interference with Pasteur's? It could not have been procured, because there would have been 12,000 acres exclusive of Pasteur's claim, and no certificate could have been procured. There is, therefore, the representation to the General Assembly of North Carolina, the application to the Board of Commissioners, the testimony of many respectable witnesses, and the persuasive evidence furnished by the verdicts of three different juries, all concurring in the fact that the line E. F. is Sumner's northern boundary. Why should it be disturbed? The plaintiff now holds within that line about 11,000 acres of land, and has a land warrant, or certificate for 1808 acres in compensation for that taken by Pasteur, making in all about 13,000, and that without interfering with the defendants. They ought not to be disturbed, and the more \*especially as the record shows that [**272** many persons are now dead who formerly

1.—Bull. N. P. 117.



gave material evidence, and upon whose evidence the two first verdicts were founded.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court:

This is a writ of error to a judgment in ejectment rendered in the Circuit Court of the United States for the District of West Tennessee, which was brought by the plaintiffs in error. After a verdict in favor of the defendants, the counsel for the plaintiff moved for a new trial, which was refused. To the opinion of the judge, overruling the motion for a new trial, and also to his charge to the jury, the plaintiff excepted, and the cause comes on now to be heard on his exceptions.

It is well settled that this court will not revise the opinion of a circuit court, either granting or rejecting a motion for a new trial; but the exception to the charge of the judge, although taken after a motion for a new trial, may have been and probably was reserved at the time the charge was given, and will therefore be considered.

The exception to this charge of the court below, consists of two parts:

1st. To so much of it as admits the copies taken from the secretary's office of North Carolina, as evidence in the cause.

2d. To so much of it as admits the validity of Gee's entry, and gives it the preference to so much of Sumner's patent as comprehends land not embraced in Pollock's survey.

**273\*]** \*The first point seems not to have been relied on by the plaintiff's counsel in argument; and has, we think, been very properly abandoned. These documents were official copies of papers belonging to the title of the parties, taken from the office in which those papers were kept, and regularly authenticated. We perceive no ground on which the objections to their admission could be sustained. If the charge of the judge went beyond these official copies to the proceedings of the legislature, and the record of the former trial, we perceive no error in this. The former trial was between parties or privies, and the petition to the legislature was the act of the party by guardian, the resolution of the General Assembly on which, was a measure of the whole state, the effect of which in this or any other case, might be controverted, but to which all interested in it might have recourse.

The second part of the charge presents a question of more intricacy, which requires an attentive consideration of the land laws of North Carolina, and of the decisions of the courts of Tennessee.

In Kentucky and in Virginia the rule is, that a court of common law cannot look beyond the patent; but in Tennessee it is understood to be otherwise. The courts of law in that state allow the parties, in an ejectment, to go back to the original entry, and to connect the patent with it. This rule is founded on the land laws of North Carolina, which have been construed in Tennessee to permit and require it. But the plaintiffs contend that this construction has been limited to the comparison of the dates of **274\*]** \*the entries, and admits of no inquiry into their legal effect as they stand in relation to each other.

If the question were to depend merely on its

reason, it would be difficult to support the opinion that a court authorized to compare entries with each other, should not, in the exercise of this power, be permitted to examine their whole legal operation and relative effect. If it were to depend upon a construction now, for the first time, to be given to the acts of North Carolina, we should find great difficulty in maintaining that they allow the entries to be compared so far as respects dates, but no farther. The act of November, 1786, ch. 20, in its preamble, recites, that, "Whereas it is the intent and meaning of the said act" (the act for opening the land-office), "and of the act hereby revived and put in force, that the first enterers of the vacant and unappropriated lands, if specially located, therein described, shall have preference of all others," &c. The 1st section then enacts, "That every first enterer of any tract of land, specially located, lying in the western parts of this state," &c., shall have a further time for making his surveys, and that grants upon lands previously entered by any other person shall be void.

The same act allows a survey to be made on removed warrants, in cases where the warrants were originally located on lands which had been previously entered "as the law directs," by some other person, "provided such lands were at the time of such survey actually vacant, and that such survey on removed warrants shall not affect or injure the right of \*any [**275** lands entered, and specially located, in the office aforesaid previous to such survey."

The act of November, 1787, ch. 23, directs all surveyors to survey lands according to their priority of entry, and that every grant obtained on a subsequent entry, contrary to the provisions of that act, shall be void.

The original act had prescribed the manner of making entries, and those made in pursuance of law are considered special.

Between special entries the first is undoubtedly to be preferred; but if one entry be special and the other vague, as if one should describe the land intended to be acquired, in conformity with the act, and the other should totally omit to give a description which might designate the place, should enter 5,000 acres of land, lying in the county of A without naming any place in the county to which it might be fixed, could it be contended that, on any fair construction of the acts, this entry would prevail against one which was special, but was subsequently made? We think it could not. The acts of North Carolina appear to us to have been intended to preserve the priority of legal entries, not of those made contrary to law.

We do not think that the decisions of the courts of Tennessee establish a contrary principle. Several *dicta* are to be found in the cases stating the rule to be, that courts will go beyond the grant only to support a prior entry, but these *dicta* were applied to the exclusion of extrinsic matter, not to the exclusion of considerations belonging to the entries themselves. The title \*to lands surveyed on removed war- [**276** rants, has never been carried back to the entry; and on the same principle the title to lands surveyed off the entry, can have no date anterior to the patent, so far as the survey does not conform to the entry. (1 Tenn. Rep., 172, 351, 306, 413).

The effects of entries, then, as well as their dates, is considered by the courts of Tennessee.

It has also been contended that this principle ought not to be applied to military grants. The acts of North Carolina, which have been construed to justify a court of law in considering the entry as the commencement of title, are not, it is agreed, applicable to military warrants. But the act of 1786, c. 20, on which this construction is supposed to be founded, declares it to have been the intention of the act for opening the land-office, that the first enterers "shall have preference to all others in surveying and obtaining grants for the same."

We think the act which prescribes the mode of obtaining military grants manifests this intention as unequivocally as those which are referred to in the act of 1786, c. 20. It is true, as has been stated in argument by the plaintiff's counsel, that the 3d sec. of the act "for the relief of the officers and soldiers of the Continental line, and for other purposes," directs, that where two or more persons wish or claim to have his or their warrant located on the same piece of land, the parties contending shall cast lots for the choice. But this section obviously provides for applications made at the same time. The 5th section directs, that "where a warrant **277**]" shall be hereafter located, without "any person making objections to such location, that such location shall be good and valid, notwithstanding the claim that may be afterwards set up by any other person."

This section, we think, manifests a clear intention to give priority of right to the prior entry; and we are not surprised that, under this act, the courts of Tennessee should comprehend military titles also in that rule which authorizes courts of law to take into view the entries of the parties. At any rate, such is the settled course of the courts of the state, and those of the United States ought to conform to it.

We think, then, that the Circuit Court committed no error in inquiring into the rights of the parties to the land in controversy, under their respective entries. It is next to be considered, whether, in making this inquiry, that court has decided erroneously.

The entry, as well as the patent of the plaintiff, being the oldest, it must prevail unless some circumstance has occurred to defeat the right given by this priority.

The defendants rely upon the survey made by Pollock as confining the entry of Sumner to that survey.

Of the existence of this survey there appears to have been no doubt, and none seems to have been entertained at the trial. The plaintiff objected to receiving the copy of the plat and certificate in evidence; but, when that objection was overruled, he contested the survey no farther. His object, then, was to show that the **278**]" second line was never run. \*The judge charged the jury that the plat and certificate made by Pollock, if he marked no more of the corners and lines of Sumner's tract, but the southern boundary, and south-east and south-west corner would show, by calculation, where the northern boundary of his tract should be.

Nothing can be more apparent than the correctness of this charge. The law directs, that "every tract surveyed for officers or soldiers, Wheat. 7.

shall be run out at the four cardinal points of the compass, either in a square or in an oblong." Consequently, when one line of a survey is given, the remaining three lines are found by a calculation which cannot vary. General Sumner's entry was for 12,000 acres of land. A line from west to east, constituting the southern boundary, was run, and measured 1,292 poles. Corner trees at each extremity were marked. From the end of this first line the survey calls for a line due north 1,486 poles. Had this line been actually run and marked, the tract would have been bounded by the lines actually run, and the corner trees actually marked. But, the line not having been run, the tract was bounded by the course and distance called for. Had there been no survey, had Sumner's entry been for 12,000 acres of land, to begin where the survey began, and to run east 1,292 poles, and from the ends of that line north for quantity, it must have been bounded in the same manner, because, a rectangular oblong figure, to contain 12,000 acres, one of which is 1,272 poles, must have for its other sides, lines of 1,486 poles. Of course the judge was correct in saying, that if the southern \*boundary was given, the [**279** northern boundary was to be found by computation.

Was he equally correct in adding, that Gee's land might be located on the north of Sumner's northern line when thus found?

We think he was.

Gee's entry called to lie, "adjoining the northern boundary of Brigadier-General Sumner, running west along his line for complement."

Sumner's northern line was, consequently, Gee's southern line.

If, then, Sumner's grant had been issued according to Pollock's survey, no interference between him and Gee could have taken place. But a plat and certificate of survey was afterwards made out by Malloy, who was also a deputy-surveyor, which extended the lines constituting the eastern and western boundary of Sumner's land, to 1,737 poles; and upon this plat and certificate his patent was issued. We must, therefore, inquire whether Pollock's survey was legally made; and, if it was, whether it could be afterwards changed, so as to affect a person making an entry in the intermediate time between his first and second survey.

The laws of North Carolina make it the duty of surveyors to survey entries in the order in which they are made, and do not require the presence or direction of the owners of the land. Pollock was a deputy-surveyor authorized to make this survey. Consequently, it was regularly made, and had all the consequences of a legal survey.

Admitting the alteration made by Malloy to be \*perfectly justifiable, Gee's entry was [**280** prior to that alteration; and the question is, whether such alteration can affect an appropriation previously made?

Upon the principles of reason and common justice, we could feel no difficulty on this point. But we are relieved from considering it by the decisions which have already taken place in Tennessee. In *Blakemore v. Chambles* (1 Tenn. Rep., 3), it was expressly determined, that the validity of surveys "has no dependence on the will or direction of claimants," and that though the mistakes of surveyors may be corrected,



"they cannot be so corrected as to injure a subsequent adjoining enterer."

Gee's entry, then, made after Pollock's survey, will, if a valid entry, hold the lands against any subsequent survey made for Sumner. But as Sumner's is the eldest grant, the validity of Gee's entry must be examined.

It calls to adjoin Sumner's northern boundary, and to run west along his line for complement.

The laws of North Carolina direct, that an entry shall express "the nearest water-courses, and remarkable places, and such water-courses, lakes, and ponds as may be therein, the natural boundaries and lines of any other person or persons, if any, which divide it from other lands."

This law cannot be construed, and never has been construed, to require that water-courses, or remarkable places which are remote, should be expressed in the entry. It requires the expression of those only which are contiguous, **281\*** and which may assist in showing \*the land intended to be acquired. If there be no considerable water-courses, lakes, or ponds within it, the entry cannot express them. The reference to the adjoining land, when we take into view that the law directs entries to be surveyed according to their dates, would always be sufficient to make the entry special, if the line called for could be found. In *Smith and others v. Craig's Lessee* (2 Tenn. Rep., 296), the court said: "Previously to the year 1786, a vague entry was well understood to be one that contained no such specialty as that a majority of those acquainted in its neighborhood, at its date, could, by reasonable industry, find it; a special entry was considered the reverse. How natural is it, then, for us to suppose, that the legislature designed, in the use of this expression, in the act of 1786, to convey such ideas as had by usage and common consent been appropriated to it."

The books are full of cases containing similar expressions. It is impossible to look at all into the subject, without being satisfied that in the state of Tennessee, such an entry as that of Gee would be deemed special, if Sumner's northern boundary could be found.

There could be no difficulty in finding it, since his land had been surveyed when this entry was made.

But the great objection on which the plaintiffs most rely, is, that to constitute a special entry in the state of Tennessee, the objects called for must be notorious as well as certain. The entry must be such as to give general information of the precise lands it appropriates. Notoriety, as well as identity, are essential, **282\*** \*it is said, to specialty, and a call for Sumner's line is not good, unless Sumner's survey was notorious.

If this proposition be correct, if notoriety as well as identity be essential to the validity of an entry in Tennessee as it is in Kentucky, then Gee's entry cannot be sustained. But the law of Tennessee, is, in this respect, entirely different from that of Kentucky. The act of Virginia, which is the land law of Kentucky, requires that entries shall be so special and certain that any subsequent locator may know how to appropriate the adjacent residuum. The land law of North Carolina, which is the law

of Tennessee, contains no such provision. The lawyers of Kentucky have made some attempts to transplant into Tennessee the principles which had grown up in Kentucky; but their attempts were unsuccessful. The books are full of cases in which it is expressly decided that notoriety is not essential to the validity of an entry. In the case of *Philip's Lessee v. Robertson* (2 Tenn. Rep., 399), the whole subject is reviewed. Judge Overton takes a very comprehensive view of the doctrines growing out of the land laws of North Carolina, and shows conclusively that they do not require, and had never been understood in Tennessee to require notoriety, as essential to the validity of an entry. His opinion in this case has, we are informed, been confirmed by the other judges of their Supreme Court.

If notoriety be not necessary to Gee's entry, it is special according to the laws of Tennessee, and ought to hold the land it covers against any subsequent survey \*made of an entry [**\*283** which had been previously surveyed. The judge was correct in saying that such subsequent survey must be considered as if made on a removed warrant.

*Judgment affirmed with costs.*

Cited—1 Wall. 598; 7 Wall. 502.

[PRIZE.]

## THE SANTISSIMA TRINIDAD AND THE ST. ANDER.

The commission of a publicship of a foreign state, signed by the proper authorities, is conclusive evidence of her national character.

During the existence of the civil war between Spain and her colonies, and previous to the acknowledgement of the independence of the latter by the United States, the colonies were deemed by us belligerent nations, and entitled so far as concerns us, to all the sovereign rights of war, against their enemy.

How far and under what circumstances, the evidence of witnesses, who concur in proof of a material fact, but whose testimony is in other respects contradictory, ought to be credited in respect to that fact.

The sending of armed vessels, or of munitions of war, from a neutral country to a belligerent port, for sale as articles of commerce, is unlawful only as it subjects the property to confiscation on capture by the other belligerent.

No neutral state is bound to prohibit the exportation of contraband articles, and the United States have not prohibited it.

In the case of an illegal augmentation of the force of a belligerent cruiser in our ports by enlisting men, the *onus probandi* is thrown on him to show that the persons enlisted were subjects of the belligerent state or belonging to its service, and then transiently within the United States.

The 6th article of the Spanish treaty of 1795, applies exclusively to the protection and defense of Spanish ships within our territorial jurisdiction, \*and provides only for their restitution, [**\*284** when captured within the same.

The 4th article of the same treaty, which prohibits the citizens or subjects of the respective contracting parties from taking commissions, &c., to cruise against the other, under the penalty of being considered as pirates, is confined to private armed vessels, and does not extend to public ships.

*Quere*, Whether a citizen of the United States, independently of any legislative act on the subject, can throw off his allegiance to his native country.

However this may be, it can never be done without a *bona fide* change of domicile, nor for fraudulent

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lent purposes, nor to justify the commission of a crime against the country, or any violation of its laws.

An augmentation of force, or illegal outfit, does not affect any capture made after the original cruise, for which such augmentation or outfit was made, is terminated.

But as to captures made during the same cruise, the uniform doctrine of this court has been, that they are infected with the character of torts, and that the original owner is entitled to restitution, when the property is brought into our jurisdiction.

This doctrine extends to captures by public, as well as private armed ships.

Case of *The Cassius* (3 Dall. Rep. 121), commented on, and confirmed.

Case of *The Exchange* (7 Cranch, 116), distinguished from the present case.

The exemption of foreign public ships, coming into our waters, under an express or implied license from the local jurisdiction, does not extend to their prize ships or goods, captured in violation of our neutrality.

**A**PPEAL from the Circuit Court of Virginia. This was a libel filed by the Consul of Spain, in the District Court of Virginia, in April, 1817, against eighty-nine bales of cochineal, two bales of jalap, and one box of vanilla, originally constituting part of the cargoes of the Spanish ships *Santissima Trinidad* and *St. Ander*, and alleged, to be unlawfully, and piratically taken out of those vessels on the high seas by a squadron consisting of two armed **285\*** vessels called *the Independencia del Sud* and *the Altravida*, and manned and commanded by persons assuming themselves to be citizens of the United Provinces of the Rio de la Plata. The libel was filed, in behalf of the original Spanish owners, by Don Pablo Chacon, Consul of His Catholic Majesty for the port of Norfolk; and as amended, it insisted upon restitution principally for three reasons: 1. That the commanders of the capturing vessels, the *Independencia* and the *Altravida*, were native citizens of the United States, and were prohibited by our treaty with Spain of 1795 from taking commissions to cruise against that power. 2. That the said capturing vessels were owned in the United States, and were originally equipped, fitted out, armed and manned in the United States, contrary to law. 3. That their force and armament had been illegally augmented within the United States.

A claim and answer was given in by James Chaytor, styling himself Don Diego Chaytor, in which he asserted that he was commander of the *Independencia*, that she was a public armed vessel belonging to the government of the United Provinces of Rio de la Plata, and that he was duly commissioned as her commander; that open war existed between those provinces and Spain; that the property in question was captured by him, as prize of war, on the high seas, and taken out of the Spanish ships the *Santissima Trinidad* and the *St. Ander*, and put on board of the *Independencia*; and that he, afterwards, in March, 1817, came into the port of Norfolk with his capturing **286\*** ship, where she was received *and* acknowledged as a public ship of war, and the captured property, with the approbation and consent of the government of the United States, was there landed for safe-keeping in the custom-house store. The claimant admitted that he was a native citizen of the United States, and that his wife and family have constantly resided at Baltimore; but alleged, that in May,

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1816, at the city of Buenos Ayres, he accepted a commission under the government of the United Provinces, and then and there expatriated himself by the only means in his power, viz., a formal notification of the fact to the United States Consul at that place. He denied that the capturing vessel, the *Independencia*, was owned in the United States, or that she was fitted out, equipped, or armed, or her force augmented, in the ports of the United States, contrary to law. He denied, also, that the *Altravida* was owned in the United States, or that she was armed, equipped, or fitted out in the United States, contrary to law; or that she aided in the capture of the property in question. He further asserted, that the captured property had been libeled and duly condemned as prize in the tribunal of prizes of the United Provinces, at Buenos Ayres, on the 6th of February, 1818. He denied the illegal enlistment of his crew in the United States; but admitted that several persons there entered themselves on board as seamen in December, 1816, representing themselves to be, and being, as he supposed, citizens of the United Provinces, or in their service, and then transiently in the United States; and that he refused to receive citizens of this country, and *actually* **\*287** sent on shore some who had clandestinely introduced themselves on board.

It appeared by the evidence in the cause, that the capturing vessel, the *Independencia*, was originally built and equipped in the port of Baltimore as a privateer, during the late war between the United States and Great Britain, and was then rigged as a schooner, and called the *Mammoth*, and was fitted out to cruise against the enemy. After the peace she was converted into a brig, and sold by her original owners. In January, 1816, she was loaded with a cargo of munitions of war, by her new owners, who were also inhabitants of Baltimore, and being armed with twelve guns, constituting part of her original armament, she was sent from that port under the command of the claimant, Chaytor, ostensibly on a voyage to the north-west coast of America, but in reality to Buenos Ayres. By the written instructions given to the supercargo on this voyage, he was authorized, by the owners, to sell the vessel to the government of Buenos Ayres if he could obtain a suitable price. She arrived at Buenos Ayres, having committed no act of hostility, but sailing under the protection of the United States flag during the outward voyage. At Buenos Ayres the vessel was sold to the claimant, and two other persons; and, soon afterwards, in May, 1816, assumed the flag and character of a public ship, and was understood by the crew to have been sold to the government of Buenos Ayres, and the claimant made known these facts to the crew, asserting that he had become a citizen of Buenos Ayres, and had received *a* commission to com- **\*288** mand the vessel as a national ship; and invited the crew to enlist in the same service; and the greater part of them, accordingly, enlisted. From this period, the public agents of the government of the United States, and other foreign governments at that port considered the vessel as a public ship of war, and this was her avowed character and reputation. No bill of sale to the government of Buenos Ayres was



produced, but the claimant's commission from that government was given in evidence.

Upon the point of the illegal equipment and augmentation of force of the capturing vessels in the ports of the United States, different witnesses were examined on the part of the libellant, whose testimony was extremely contradictory; but it appeared from the evidence, and was admitted by the claimant, that after the sale at Buenos Ayres, in May, 1816, the *Independencia* departed from that port under his command, on a cruise against Spain; and after visiting the coast of Spain, put into Baltimore early in the month of October of the same year, having then on board the greater part of her original crew, among which were many citizens of the United States. On her arrival at Baltimore she was received as a public ship, and underwent considerable repairs in that port. Her bottom was new coppered, some parts of her hull were recaulked, part of her water ways replaced, a new head was put on, some new sails and rigging to a small amount, and a new mainyard were obtained; some bolts were driven into the hull, and the mainmast (which **289**\*) had been \*shivered by lightning) was taken out, reduced in length, and replaced in its former station. For the purpose of making these repairs, her guns, ammunition, and cargo, were discharged under the inspection of an officer of the customs; and when the repairs were made, the armament was replaced, and a report made by the proper officer to the collector, that there was no addition to her armament. The *Independencia* again left Baltimore in the latter part of December, 1816, having at that time on board a crew of 112 men; and on or about the 8th of February following, sailed from the capes of the Chesapeake on the cruise in which the property in question was captured. During the stay of the *Independencia* at Baltimore, several persons were enlisted on board her, and the claimant's own witnesses proved that the number was about thirty.

On her departure from Baltimore, the *Independencia* was accompanied by the *Altravida*, as a tender or despatch vessel. This last was formerly a privateer called the *Romp*, and had been condemned by the District Court of Virginia for illegal conduct, and was sold under the decree of court, together with the armament and munitions of war then on board. She was purchased ostensibly for one Thomas Taylor, but immediately transferred to the claimant, Chaytor. She soon afterwards went to Baltimore, and was attached to the *Independencia* as a tender, having no separate commission, but acting under the authority of the claimant. Some of her guns were mounted, and a crew of about twenty-five men put on board at Baltimore **290**\*) more. She dropped \*down to the Patuxent a few days before the sailing of the *Independencia*, and was there joined by the latter, and accompanied her on her cruise.

The District Court, upon the hearing of the cause, decreed restitution to the original Spanish owners. That sentence was affirmed in the Circuit Court, and from the decree of the latter the cause was brought by appeal to this court.

*Mr. Winder*, for the appellant, (1) argued upon the facts to show that there had been no such illegal outfit or augmentation of the force of the capturing vessel in our ports, as would

entitle the original Spanish owners to restitution of the captured property, on the ground of a violation of our neutrality by the captors.

2. He argued that even supposing the claimant, Chaytor, to be a native citizen of the United States, the capture was not invalidated by the circumstance of his commanding the capturing vessel. Being a public ship of a foreign state, this court could not, upon its own principles, inquire into her conduct further than to see that she had a regular commission, signed by the proper authorities of that state.<sup>1</sup> It is perfectly consistent with the law and universal practice of nations for neutral subjects to take commissions in foreign wars.<sup>2</sup> This court has determined that an alien may command a private armed vessel of the \*United States, and cruise against their [\***291** enemy, though it happens to be his own native country.<sup>3</sup> So also the prize ordinance of Buenos Ayres declares, that all officers of commissioned vessels or privateers belonging to that state, although they be foreigners, shall enjoy all the privileges of citizens, whilst thus employed.<sup>4</sup>

But it may be said that the Spanish treaty of 1795 renders such an act criminal, and all its consequences void, and therefore this court cannot listen to the claim of a citizen who has thus violated the supreme law of the land.

The answer to this is, that the treaty shows the idea of the contracting parties, that independently of its stipulations, their respective citizens and subjects might take commissions to cruise against each other without violating the pre-existing law of nations. The sole effect of the treaty is, to subject them to be treated as pirates by the opposite party, if it thinks fit. It excludes them from the protection of their own government, leaves them at the mercy of the opposite party, and excuses the government of the offenders from all responsibility to the other for their misconduct. They are not made pirates by the treaty, but only made liable to be considered as such by the party against whom they act. Would not the government in whose service they held commissions, have a right to retaliate, if they were treated as pirates, either by their own government, or by that \*against which they [\***292** acted; since by the law of nations the belligerent might grant to them as foreigners, and they might accept the commissions?

The treaty operates only between the contracting parties, and cannot interfere with the lawful powers and rights of other nations, under the law of nations; and between the parties, it only operates to give the belligerent, so far as the neutral contracting party is concerned, a right to treat the citizen as a pirate, without complaint from his government. It dispenses the offended party, so far as the other is concerned, from the obligation to observe the rules of civilized warfare, *quoad* its citizen thus implicated; but it can have no effect upon the rights of the other belligerent *quoad* the officer of that belligerent. The party whose

1.—The *Exchange*, 7 Cranch, 116.

2.—*Vattel*, *Droit des Gens*, l. 3, c. 2, s. 13, 14, 16; l. 3, c. 7, s. 228, 230; *Bynk. Q. J. Pub. l. 1, c. 22*; Du Ponceau's *Transl.*, p. 175.

3.—The *Mary and Susan*, 1 Wheat. Rep. 57.

4.—4 Wheat. Rep. Appx. Note II., 30.



citizens or subjects they are, is not bound to treat the supposed offenders as pirates, and our courts cannot so treat them in the absence of an act of Congress. The United States are not bound so to treat or consider them. They are simply bound to leave them to the discretion of Spain, and there the effect of the treaty stops. The prohibition of the treaty has its prescribed peril and effect, and cannot, at least judicially, be extended further. To make the treaty bind the United States to restore a prize made by one of its citizens under a commission from a foreign government would be to make a treaty stipulation between Spain and the United States operate to interfere with the undoubted rights of a third foreign power who is no party to the treaty. It would abridge and annul the effect of a commission, which, by the **293**\*] unquestioned law of nations, he had a right, within his own territory, to grant.

The acts of Congress to protect the neutrality of the United States have nothing to do with it, because none of them extend to, or pretend to extend to, the acceptance of a commission in a foreign country by a citizen of this. And the silence of Congress on the subject is a strong legislative exposition of the treaty; for in making provision to preserve the neutrality of the United States generally, and especially in relation to the contest between Spain and her colonies, they have not rendered criminal such acceptance of a commission, and as they have manifested a spirit of some severity on this subject, and are silent on such a case, it is strong evidence that Congress did not feel bound to add anything to the treaty; since, if they were bound, they would have done so in obedience to this treaty obligation of neutrality as they have done in other cases. Where the law stops, the courts of justice must stop; *expressum facit tacitum cessare*. The plain object of the law was, even in cases within it, to affect the offending citizen; not to affect the foreign government who employs him; or, in other words, not to authorize a judicial interference with its belligerent acts. The statute committed to the judiciary all that the legislature intended to be within their competency. The rest it reserved for national adjustment by forbearing to submit it to the judiciary. The law must be taken as it is, not expanded by inference. To put a judicial rider upon it, is to **294**\*] legislate. The inference which would vacate a capture under the commission would be a supplement to the law, would be to legislate on a distinct subject, *i. e.*, the effect of a belligerent act by a foreign state. The law is a restraining law, *in terrorem*, aimed at the citizens only. The inference deals with a third party, a sovereign state, who is not subject to our jurisdiction; and acts in a way which the law does not prescribe; for the law authorizes nothing but the punishment of the individual. If more had been intended, more would, and ought to have been done; for the whole subject was well understood from 1794 to 1819, when the last act was passed. There is no positive municipal rule giving judicial jurisdiction as to such a commission, or any commission, even within the law, with reference to the effect of restoring a prize made under it. Every belligerent state has a right to decide upon the means of annoyance, which it organ-

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izes against its enemy within its own territory. If its commission to make war can be subject to ordinary judicial question in a neutral tribunal, where it cannot be heard and cannot condescend to appear, it is not a sovereign act. But the granting such a commission is the very highest act of sovereignty, and is peculiarly above ordinary judicial control in foreign countries. The legality, the force and effect of the commission itself, must defy ordinary judicial inquiry, or the belligerent can only authorize war so far forth as neutral tribunals shall think fit to suffer it.

A judicial recognition of the legality of the capture in question by a court of prize at Buenos Ayres would undoubtedly have put the capture out of reach of our court. [**295** But the sentence of such a court is no more a sovereign act than the granting the commission. It does but ascertain the granting of the commission, and gives to it no new force or validity. The belligerent state is just as much answerable for the wrong done to the neutral state, if any there be, in granting the commissions after the sentence as before. A judicial sentence, in a case of prize, binds for no other reason than that it is the act of the state to which the court belongs. That it is a judicial sentence is of no importance. It is the sovereignty of the state, and its right of decision which gives to the sentence its conclusive character, in the view of foreign tribunals; and all this applies equally to the act of granting a commission, within the territory of the belligerent.

All the cases of this class, which have been decided in this court, turn exclusively upon the fact of an illegal equipment of the capturing vessel within our ports, except that of *The Bello Corrunes*, in which the judgment does indeed refer to the national character of the claimant, Barnes, as repelling his right to claim.<sup>1</sup> But as the facts of that case will show that it might have been determined on the ground of the illegal equipment of the capturing vessel, without giving a construction to the treaty, or ascertaining the national character of the claimant, all that is said by the learned judge who pronounced the opinion of the court in that case, on these subjects, may be considered as *obiter dictum*.

\*3. But the claimant, in the case [**296** now before the court, had ceased to be a citizen, before he accepted the commission, and made the capture in question. He had expatriated himself, and become a citizen of Buenos Ayres, by the only means in his power, an actual residence in that country, with a declaration of his intention to that effect. This act is countenanced by the general usage of nations, and was not forbidden by any law of his own country. By the British law, not only are privateers and merchant vessels allowed to enlist foreign seamen, but the mere fact of two years' service during war makes them British subjects.<sup>2</sup> A resident neutral in a belligerent country is subjected to the disabilities of the country in which he resides, so far as respects the opposite belligerent, and his trade is considered liable to capture and condemnation as

1.—6 Wheat. Rep. 125, 169.

2.—5 Wheat. Rep. Appx., Note III., 130.



enemy's property. Shall he not then be entitled to the corresponding advantages of his situation? The hostile character is fixed upon him by residence even if he goes to the belligerent country, with the desire of preserving his neutral character. Shall he not then be entitled to all the advantages of that character, when it is his avowed purpose and object to acquire it? Length of time generally decides the character of the residence of a neutral to be belligerent or not; but it is taken merely as evidence of his intention, and if that intention is unequivocally manifested in any other mode, his character is instantly fixed.<sup>1</sup>

**297\***] <sup>4</sup>4. This capture being made by a public ship, which has come into our ports, together with her prize goods, under the express permission of our government, the court cannot interfere to restore the captured property to the original owners upon the ground that the capturing vessel has committed a violation of our neutrality. The ship itself must certainly be exempt from the local jurisdiction.<sup>2</sup> And if the ship be exempt, it is difficult to perceive how any other property of the same sovereign, which he has acquired and holds *jure coronæ*, can be subjected to the local jurisdiction by being brought into the territory under the same permission. Still less can the prizes made by a ship which is herself exempt from the jurisdiction of the local tribunals be subjected to that jurisdiction. These prizes are as much the property of the sovereign, *jure coronæ*, as the ships by which they are taken and brought in.

The illegal augmentation of her force by the capturing vessel in our ports, cannot forfeit the immunity to which she is entitled by the law and usage of nations. Enlistments of men for this purpose, are not presumed to be made with the assent of the belligerent sovereign, and are not to be imputed to him.<sup>3</sup> It is, therefore, an offense which is not to be visited on the sovereign or his property. Reprisals cannot lawfully be made, until application to him for redress has been made. Courts of justice cannot interfere in such a case, because the sovereign cannot condescend to appear in them, **298\***] and they have no <sup>\*</sup>regular means of knowing how far he approves of what has been done by his officers. But, upon remonstrance and diplomatic discussion, the whole affair may be heard, and remedies applied fit for the occasion. Judicial decision, if it can interfere at all, is inflexible; and when the fact is established, must make entire restitution of the captured property, however insignificant may be the augmentation of force by neutral means. Besides, it is bringing into judgment the highest concerns of nations to be determined by the testimony of the basest of mankind. The enlistment of a single seaman on board a single ship of a large squadron, may draw after it the restitution of a whole enemy's fleet. The only safe course, then, is to leave matters of this sort to negotiation, or at least not to take cognizance of them in courts of justice, unless upon the application of the offended state, as in the analogous case of a capture within neutral territory.<sup>4</sup>

5. But, at all events, the condemnation of the prize goods, which took place at Buenos Ayres, in a court of the captor, is conclusive to preclude this court from taking jurisdiction of a question which has already been determined in a competent tribunal.

*Mr. Tazewell*, contra, stated, that three principal errors were alleged by the appellant in the decrees of the courts below: 1. That the facts assumed by those courts did not warrant the decrees. 2. That <sup>\*</sup>the condemnation [\***299**] nation in the tribunal of prizes at Buenos Ayres precluded the courts of this country from inquiring into the legality of the capture. 3. That our courts have no authority to make that inquiry because the facts of the case involve the sovereign rights of an independent state.

As to the first objection, it is not necessary to discuss it until the last is disposed of. Jurisdiction must be shown to exist before its rightful exercise can be proved. He would, therefore, invert the order of the argument, and examine the last-mentioned proposition before the others. It would be shown to be the only question of real difficulty in the cause.

The argument on this proposition concedes to the neutral sovereign, or state, the very right which it denies to the neutral judiciary. Now, to the belligerent sovereign, the effect is precisely the same, whether the interference with his rights be by the executive and legislative departments, or by the judiciary alone. In either case his rights are examined into, and he may be deprived of them. To the neutral state, also, the effect is the same in both cases, so far as foreign states are concerned; since, in both, the nation is equally responsible for the act done. It is no answer to the reclamation of a foreign sovereign to say, that he has been injured by the judiciary only. To him all the departments of the government make but one sovereignty. This is represented by the executive, of which the judiciary is regarded but as an emanation. It may be, and undoubtedly is, a matter of great moment to the <sup>\*</sup>neutral [\***300**] state itself, that its powers be legitimately exercised by those only to whom they have been confided by the municipal constitution. But this is a mere domestic inquiry, in which no foreign state has any concern, nor ought to be permitted to enter. Is it not strange, then, that it should now be presented to us in a litigation between two foreign subjects?

The question being raised, however, it must be discussed; not for the sake of the parties, but of the court itself. Let us then concede what the argument asserts, and it has no application to the cause. For justice is blind, and knows not of the existence of the sovereign, or of his rights, until made manifest by its own record. Nor will it notice even what its own record may disclose, unless the matter be therein duly and orderly set forth, *i. e.*, by proper parties, in proper time, and in proper form. How, then, is this fact of sovereign right to be duly and orderly disclosed, so as to be made manifest to the courts of justice, and to shut the judicial eyes to every other fact in the cause? This, although apparently a mere

1.—Wheat. Dig. Cas. tit. Prize, IV.

2.—The Exchange, 7 Cranch, 116.

3.—Vattel, Droit des Gens, l. 3, s. 15.

4.—The Anne, 3 Wheat. Rep. 435.

technical question, is one of great importance, especially on account of the practice which has been hitherto pursued by the courts of the United States in cases of this sort. And at the very threshold of the inquiry it is plain, that the sovereign who denies the authority of the court to decide, must not answer. If he does, he voluntarily submits to, nay, invites the exercise of the very authority which he denies can be exerted. His averments, too, may be traversed, and issue being joined on **301\***] the \*traverse, must be decided in some way; and so his sovereignty denied by judicature. Neither can he plead in abatement, or any dilatory exception; for he may be decreed to answer over. Neither may he protest; for the question cannot be raised by a naked protest; and if he couples his protest with an answer, if he does not so overrule his protest, his answer leaves him as before. If he adopts the practice pursued in the case of *The Cassius*,<sup>1</sup> and suggests his exemption upon the record, he will be met, as in that case, by a replication to his suggestion, and it becomes a mere plea in abatement; for whatsoever one party may affirm, the other may deny.

These are the only known modes of defense, and none of them can the foreign sovereign adopt, without abandoning the exemption claimed for him by the argument. What then must he do? He must not defend himself in judicature at all. He must apply to the sovereign of that tribunal where his rights are drawn in question, and refer to his accountability. This sovereign, if he sees fit, will suggest for him; if he does not, he will refuse to do so, and meet the consequences. To a suggestion coming from this quarter there can be no replication; for he who makes it is no party in interest. Nor is proof necessary to establish it; for it comes duly authenticated. Such was the course pursued in the memorable case of *The Exchange*,<sup>2</sup> where a suggestion of the sovereign rights of the Emperor \*Napoleon was made by the executive government; although proof of the commission of the commander of the vessel was unnecessarily superadded. This is the only proper mode in which the matter of sovereign right can, duly and orderly, be set before the court. It avoids all the technical difficulties of pleading and practice, and places the matter where, according to the argument, it ought to rest with the sovereign.

This course has not, however, been adopted here; and therefore the court will not take judicial cognizance of the fact of sovereign right, involved in the determination of the cause; and the argument insisted on, even if abstractly true, has no application to the cause, as presented upon the record. The matter is reduced to a mere question of practice, settled by the form of the pleadings, which it is now too late to amend.

Suppose, however, it were *res integra*. The court must contrive some proper form in which subjects of this sort may be brought before it. In adjusting this form, it is a sound and a safe rule to be followed, to attain the object by known, rather than by untried means, to adhere

to ancient forms, as far as may be done; and, if possible, to alter nothing. If this be so, whatever may be the rule adopted by the court, the case will still be found exposed to the objection before stated: for the record will not show any information derived from our sovereign, but the very reverse. It is only important then to examine the question, whether the information of the sovereign or executive government be the proper and only \*standard to which [**\*303** the court must refer, in matters wherein not our own people, but foreign states are concerned. Whatever the theory may be on this subject, all know that, in point of fact, courts of justice do and must decide upon the rights of sovereigns, and that even in governments the most absolute. For these courts must necessarily decide upon the rights of private individuals and corporations, and these are oft-times so interwoven with the rights of their sovereigns, that to decide upon the one, is to decide upon the other, not only in form, but effect also. Treaties and war create and destroy rights; and nations as well as individuals, derive their rights from these public transactions, which therefore the tribunals of justice must pass upon. Such, among many others, was the case of *The Amiable Isabella*, where the sovereign rights of Spain and the United States were involved, and were determined by this court.<sup>3</sup> The rights of sovereigns must then be settled by courts, and may be settled in different modes. This supposition constitutes a part of our complex system of government. Sovereign rights may be settled, not only in the federal courts, but in the state courts: and to guard against the effects of a conflict of opinion in such cases between the different local tribunals, appeals are brought from the state courts to this court. It would be in vain, however, to translate a cause here from the state courts, if this court might decide it differently from the other departments of the government. This must not be, however. The \*people, although sovereign, can have [**\*304** but one will; and that will must be spoken by all their agents, or our government is a many-headed monster. The question, then, at last results in this: In what department of the government does this will, in relation to foreign states, reside? For wherever it does reside, that will must be uttered here, or we shall have two conflicting wills on the same matter. Now, I care not where it resides, if it resides anywhere: and the argument and necessity both prove that it must reside somewhere. If then it resides here, in this court, the argument is radically defective: for then it follows that judicature may decide on sovereign rights. And if it resides not here, but elsewhere, it must be communicated from thence hither, and constitute the law of the court, or our government is a monstrous anarchy. Some mode of communication between the executive government and the judiciary must be contrived. The only doubt is how this communication is to be made. And whatsoever course may be a proper one, none has been adopted in the present case, and the court cannot therefore take notice that any sovereign rights of Buenos Ayres are involved in the cause. You cannot know the

1.—United States v. Peters, 3 Dall. 123.

2.—7 Cranch, 116.

Wheat. 7.

3.—6 Wheat. Rep. 1, 50.



fact, and must proceed as if it did not exist. This does not impugn judicial independence. The judiciary are not independent of the law. They utter the legislative will of the people, when declared by the legislature: they pursue its executive will when communicated by the executive department. All nations have felt the necessity of some such course; the only question is as to the form, which must depend **305** upon the municipal constitution and the practice of each particular country. Thus, in England all rights of prize are originally vested in the crown. Hence, the courts of prize take their law from the king's instructions. The captors cannot proceed to adjudication against the will of the crown. Hence, in the case of *The Swedish Convoy*, the condemnation of the captured property for resistance to the exercise of the right of search was limited to the merchant vessels, although the same penalty would have been applicable to the conveying frigates, had not the crown interposed its prerogative, and from reasons of state, caused the latter to be restored to the foreign sovereign.<sup>1</sup>

Heretofore the subject has been examined as a technical question of pleading and practice merely. Let us now examine it as one of evidence. Of whom then is this exemption from judicial investigation affirmed? A sovereign state. But is Buenos Ayres a sovereign state?

This court has repeatedly decided that it will not undertake to determine who are sovereign states: but will leave that question to be settled by the other departments of the government, who are charged with the external affairs of the country, and the relations of peace and war.<sup>2</sup> It may, however, be said that both the judiciary and the executive have concurred in affirming the sovereignty of the Spanish Colonies, now in revolt against the mother country. **306** But the obvious answer to this objection is that the court, following the executive department, have merely declared the notorious fact that a civil war exists between Spain and her American provinces; and this so far from affirming, is a denial of the sovereignty of the latter. It would be a public, and not a civil war, if they were sovereign states. The very object of the contest is, to decide whether they shall be sovereign and independent, or not. All that the court has affirmed is, that the existence of this civil war gave to both parties all the rights of war against each other. But belligerent rights are not regalian rights. Now, in the case last cited,<sup>3</sup> the court decided that the seal of this supposed sovereign state might be proved like any other matter *in pais*. If it were really a sovereign state, the seal would prove itself. The more the subject is examined, the more apparent will it be, what confusion and mischiefs must flow from the judicial department assuming the right to acknowledge the existence of her sovereignties, especially in the present mutable state of the world. Cases of depositions and restorations are continually occurring, of revolutions and counter-revolutions,

which present the most complicated questions of strict right and political expediency, the determination of which must be left to the other departments of the government.

But if it were true in fact, and well pleaded, that the *res* now in controversy is a sovereign's right; still, it would not be correct to say, that all sovereign rights are exempt from **307** judicial examination. There must be some exceptions to the universality of the rule. The exemption only applies to the regalian rights of the sovereign; those which are necessary to maintain his faith, dignity, and security, and to none else. Such are his august person, his ministers, his armies and fleets. These are protected from the interference of foreign judicatures, because they are essentially necessary for these purposes; they make up sovereignty itself. And nothing else which is not within the reason, is within the rule of exemption. Suppose a royal stag or horse escapes into a foreign state, and is there sold in market overt as an estray; or suppose the ship of a foreign sovereign is wrecked on our coasts, and a claim for salvage of the materials interposed. Would you stay your hand from a dread of the sacredness of the subject-matter? The privilege of sovereignty cannot protect these cases. No authority can be shown to prove it; on the contrary, the authorities are clearly the other way. Thus, all prizes made in war are the property of the sovereign, *jure coronæ*, and this, whether the prize be taken by a public or a private ship. But it is not to be argued (in this court at least) that such prizes may not be taken out of the hands of the captors (whose possession is that of their sovereign) and restored by the neutral tribunal, within whose jurisdiction they may happen to come, if made by privateers in violation of neutral territory or of neutral rights. And if so, why may not prizes made by public ships be restored under like circumstances? They both come *\*within* the same reason, and, therefore, should fall within the same exception to the general rule. The rule, then, if true at all, must be limited as I have stated: and if so, it will not apply to the present case. It may, indeed, protect the public ship herself, but not her prize goods. These are not the regalian rights of the sovereign; they are a mere accidental, military possession, which are not indispensably necessary to maintain his faith, dignity, or security.

Again; the argument which asserts exemption for sovereign rights does not confine itself to the rights of a belligerent, but equally applies to all sovereigns, whether in peace or war. But if a wrong-doing sovereign may elaim this exemption, what becomes of the rights of the injured sovereign? Must he submit, or hold his hand, and ask redress of the offender? Every objection which applies to the one, exists in equal effect as to the other; and if the tortfeasor may not pursue this course, he must not, by his own act, constrain the injured party to adopt it. To guard against this conflict of dignities, the public law has wisely settled the rule, that each sovereign is supreme at home; all are equal on the high seas, except in war, and then the comity of nations, and the necessity of the case, refers it to the *arbitrium* of the captors. But this rule of comity protects not violators of the neutral territory, within

1.—The Maria, 1 Rob. 340.

2.—Rose v. Himely, 4 Cranch, 241, 292; Gelston v. Hoyt, 3 Wheat. Rep. 246, 224; United States v. Palmer, 3 Wheat. Rep. 610, 634.

3.—The United States v. Palmer, 3 Wheat. Rep. 635.

which its sovereign is supreme; for the implied pledge given to a foreign state, of exemption from the local jurisdiction, is violated the moment it infringes our laws, treaties, and sovereign rights. The fiction of extraterritoriality **309\*** only applies to the peaceful observers of this implied pledge. The implication is repelled, and the pledge forfeited by abusing the rights of hospitality and asylum. This exception to the rule is recognized distinctly by the court in the case of *The Exchange*,<sup>1</sup> and it was upon this ground that the court has interfered in the whole class of captures made by means of illegal armaments in our ports.<sup>2</sup> The question in every one of these cases was not as to the character of the wrong-doer, but as to the nature of the act done, and the *locus in quo*, it was committed. No inquiry was ever made whether the capturing vessel was public or private; but only whether our neutrality had been violated. And the principle to be extracted from them all is, that the neutral tribunal may properly restore any prize brought within its territory, which has been made in violation of neutral laws, or rights, or obligations. Within this principle the present case is found: and, therefore, it is not universally true, that the rights of sovereigns are exempt from judicial examination.

The argument we are discussing concedes, that the injured sovereign himself may restore, although it denies the power of making restitution to his courts. But the effect to both parties is precisely the same, whether the restitution be made by sovereign or court, as has been already shown. Still, granting that it may be **310\*** done by the sovereign only; \*who is sovereign here, *quoad hoc*? It must be the judiciary: since wherever individual rights are involved, whether arising under war, or treaty, or municipal regulations, the judiciary in this country must decide.<sup>3</sup> Where indeed no case is made upon which the judiciary can act, then the executive may interfere, as it did in the commencement of the European war in 1793, in the case of *The Grange*. But even here the genius of our institutions, requires that the preliminary inquiry should be made through the judiciary, which is the proper tribunal to make such examinations, in which private rights are for the most part involved. Such was the course pursued in the case of *Thomas Nash alias Robbins*. The parties, one of whom was the King of Great Britain, could not appear in court; the executive acted therefore by judicial means, and the facts being judicially ascertained, it proceeded to carry into effect the treaty.<sup>4</sup> If then the sovereign must submit to his co-equal sovereign, as the argument concedes, and the judiciary is invested with this portion of sovereignty, the case is clear, and the argument has no application to it. Nor does this reasoning exclude the executive action, but yields to it in every instance where no case is made adapted for judicial determination; and even where such a case is made, the executive

may interpose by suggestion, by which the court will be bound as they would by an act of the legislature in a case fit for the exertion of legislative power.

\*But suppose the judiciary not to be **[\*311** sovereign as to this matter. Yet, whoever be the sovereign, as to it, he need not act directly; but may delegate his power of decision and action to another: still it is the sovereign who acts. If the executive be sovereign, this delegation is effected by suggestion, or the want of it, as the case may be. If he means that the judiciary should decide for him in a particular way, he suggests it. But if he is content to take the lead from the judiciary, and to adopt its construction, he declines to suggest. In the latter case, the judiciary acts according to the sovereign will, because he adopts theirs. In the former, the same thing is effected, for the judiciary adopt his. By this means that harmony is produced which can be effected by no other.

But if it be thought that the legislature is the true sovereign, *quoad hoc*, then the legislative will has been distinctly expressed in the neutrality act of 1794, c. 226. It is in vain to contend that this statute does not apply to public or national ships. For not only are its terms sufficiently copious to embrace any ship, but their context plainly shows that they were designed to apply especially to such ships. Here the learned counsel analyzed the act, in order to show that it extended to public, as well as private armed ships; and insisted that this construction was confirmed by the consideration that both the cases were equally within the mischief intended to be provided against, which was the violation of our own territory, and of neutral relations and obligations. Nor was there any weight in the argument which \*would confine the authority of the **[\*312** court under the act to captures made within our territorial jurisdiction. For although the 6th section expressly gives cognizance over that class of cases, the history of the law on the subject plainly proves that this was merely an affirmative position, and was not meant as an exclusion of judicial authority in other cases. The provision was meant to define the territorial jurisdiction of the Union, and to settle a supposed doubt with the courts, which did not exist in fact. It was therefore merely declaratory of the law in that case, and could not be intended as a restriction upon the general authority of the courts. If this were not so, what would become of the cases occurring before this statute was passed? or of the numerous cases since decided, of captures without our limits, by means acquired within them? This series of adjudications manifestly shows that the courts exercise their power independently of the statute, the sole effect of which is (of the 6th section at least) to recognize an existing authority in a particular case, and not to limit it to that case only.

But even if this be not so, what is a capture within our waters? Is it not to all legal purposes made within our territory, when the captor is within and the prize without, the potential force being exerted within? or where the actual force is exerted without, by boats sent from within? And if so, it proceeds solely on the ground that the *locus in quo* is to be fixed,

1.—7 Cranch, 116.

2.—The *Divina Pastora*, 4 Wheat. Rep. 52, and cases collected in note a, *Ib.* p. 65.

3.—See 3 Dall. 13.

4.—Speech of Mr. (now Chief Justice) Marshall, 6 Wheat. Rep. Appx.

Wheat. 7.



not by the place of seizure, which in both the supposed cases is without, but by the source from whence the exerted force proceeds. Con-  
**313\***]sequently, a capture \*made actually on the high seas, by means acquired here, is a capture within our territory.

It is clear then, upon principle, that the property even of a sovereign acquired in war, within a neutral territory, or by means therein illegally obtained, may be subjected to judicature, and restored; and this whether the prize is made by a public or a private cruiser. Nor is the dignity of sovereigns injuriously affected by such a proceeding, which being *in rem*, the sovereign is not constrained to defend himself before the courts of justice, but may properly apply to the other sovereign for redress, by whose suggestion, duly made, the judiciary must be bound.

That which is thus clear upon principle is equally established by authority. In the history of transactions of this nature, it will be found, that wherever the neutral state interferes to vindicate its own neutrality, no distinction is made whether that neutrality be infringed by a public or private ship.<sup>1</sup> Both  
**314\***] \*France and England restore the property of their subjects found on board of prize ships sent into their ports by the vessels of other powers, and that whether the capturing vessels are public or private.<sup>2</sup> During the beginning of the war of the revolution, the prizes sent into France by the Alliance frigate were restored by the tribunals of that country, if the property of her friends. In the case of *The Swedish Convoy*, in the English High Court of Admiralty, the crown declined proceeding against the Swedish frigates, as has been before mentioned; otherwise, Sir W. Scott declared,  
**315\***] that he would have condemned \*even those public ships.<sup>3</sup> But how could he, unless they were subject to judicature? It may be said, that they were regarded as *qua* belligerent, having forfeited their neutral character by attempting a resistance to the right of search. Be it so. Then we may, *vice versa*, condemn a public ship, or her prizes, for unneutral conduct, by which they lose their extra-territorial character conferred on them by a fiction which ought no longer to be regarded than it subserves the purposes of justice. There are numerous examples to show that there is nothing so sacred in the rights of sovereigns as to prevent judi-

cature from dealing with them, both directly and incidentally. In the case of *Duckworth v. Tucker*, the sovereign rights of Portugal were determined by the English Court of C. B., in a private controversy between two British admirals about prize money.<sup>4</sup> In the *Canton of Berne v. The Bank of England*, that state appeared as an actor in the High Court of Chancery, which had the control of the fund, which the government of Berne laid claim to, as a part of its public treasure.<sup>5</sup> As to the case of *The Exchange*, in this court, it must be repeated that it does not go on any extravagant notion of the exemption of sovereign rights from judicial scrutiny; but on the ground of preserving the national faith, and that the ship entered under the pledge of an implied license which she had not forfeited by any misconduct. Had she done so, she \*would have been con-  
**316**] demned as unhesitatingly as the most insignificant privateer. It is only necessary to recur to the case of *The Cassius*, a public armed ship of the French republic, and to the words used by the court respecting that case in *The Invincible*,<sup>6</sup> to show that it never has recognized any distinction in this respect between public and private armed ships.

The learned counsel then proceeded to examine the testimony in the cause, to show that it clearly established the fact of an illegal outfit and augmentation of force, by the capturing vessels in our ports; and, lastly, answered the argument attempted to be drawn from the alleged condemnation at Buenos Ayres, by stating, that the decree was not established in proof, and that if it were so, it could not avail as a bar to the present proceedings, as the property was at the time in the custody of our court, and had been actually sold by consent of the claimant who now sets up the decree in the foreign tribunal.

Mr. Webster, on the same side, (1) argued, that there was no force in the general objection set up by the captors; that the ship which made the capture being a public ship, we could not examine into her acts, because it would be to interfere with the sovereign rights of the state to which she belongs. He denied that there was any such general principle, and no book, or case, or even *dictum* could be found to \*support it. Judicature deals with sov-  
**317**] ereign rights perpetually, in our courts, in England, and in every country, and in every case

1.—Lee on Capt. 116, 121, 123, edit. of 1803. "In the year 1654, a captain of a Dutch man-of-war met with an English ship at sea, running into the port of Leghorn, and seized her even when she was coming to anchor; the Duke of Tuscany complained of this to the states-general, but without redress. He, however, showed his resentment of it by condemning the ship which had taken the Englishman." p. 121.

This book (Lee on Captures), which is called in the preface, "an enlarged translation of the principal part of Bynkershoek's *Questiones Juris Publici*," is in fact little more than a very poor translation of that treatise. In the original text of Bynkershoek, it by no means appears that it was a public ship which had taken the Englishman in a neutral port. His words are, "Ex factis, puae postea inciderunt, etiam haec videntur probasse Ordines Generales; quum enim anno 1654, Navarcha Hollandus naven Anglicani, in mari deprehensum et ad portum Libernensem fugientem, occupasset, etiam tunc, cum navis Anglica jam funem in terram projecerat, Dux quidem Tusciae ea de re questus est ad Ordines Generales, sed nequequam questum esse legimus. Vide tamen, an non ipse dux id postea vindicaverit;

publicata nempé nave, quae opportunitatem prochueraat occupandae istius Anglicae. (Q. J. Pub., l. 1. c. VIII., p. 64; Edit. Lugd. Batav. 1752), which Mr. Duponcau, in his elegant and accurate translation, thus renders: "From facts which afterwards took place, the states-general appear to have approved thus much; for when in the year 1654, a Dutch commander met an English vessel on the high seas, and pursued her flying into the port of Leghorn, where he took her at the moment she was coming to anchor, the Grand Duke of Tuscany complained of it to the states-general, but we read that he complained in vain. He, however, afterwards, took satisfaction by condemning the Dutch vessel that had made the pursuit and occasioned the capture of the English one." Duponcau's Bynk. p. 63.

2.—Ord. de la Mar. Art. 9; Des Prises, 15; 2 Sir L. Jenkins' Life, 780.

3.—1 Rob. 377.

4.—2 Taunt. 33.

5.—9 Ves. 347.

6.—1 Wheat. Rep. 253.



where the government is a party to the suit. Is it meant that judicature cannot deal with sovereign rights, neither domestic nor foreign? All history shows the contrary. If it were so, no sovereign could come into court. The great political powers of government, as those of peace and war, cannot indeed be submitted to judicial decision; but proprietary interests, in which the public are concerned, are settled everywhere by the tribunals of justice, as in the familiar instances of inquests of office, and writs of intrusion. So an ejectment may be brought for the crown lands, the most favorite fief. And nothing can be more sovereign than the right of prize, *jure belli*; it is a great branch of the prerogative; yet everybody may contest it, and the king must claim, and if he cannot make out a title he must lose it. Any jewel in any king's diadem may become the subject of judicial discussion. The extent and rights of the prerogative are discussed in every court in England; and all the powers of this government are discussed in this court, and in all the state tribunals. The government of the United States, and of the states, are sovereign, and cannot be sued; but in a contest between individuals or corporations, the sovereign rights of the Union and the several states may be decided.

Judicature may then deal collaterally with sovereign rights, and wherever the sovereign himself is actor: wherever he brings the suit. **318\***] The true proposition, \*therefore, must be, that the Prince cannot personally be sued in his own courts, or in foreign tribunals. As to the domestic forum, two reasons are given why the King cannot be summoned or arrested in any civil or criminal suit. The first is, his supereminency: and the second, that justice is administered by him, and in his name.

These reasons do not apply to a foreign country. He has no supremacy there, nor is justice administered in his name. Sovereignty is local; and when the sovereign transcends the limits of his land, he transcends the limits of his prerogative. The reason why he is not amenable to the foreign tribunal grows out of international law, and does not spring from the municipal code. It is not for want of jurisdiction ample enough to reach him; but that having come into the territory of another sovereign, under his permission, either express or implied, it would be a violation of the public faith to subject his person to any kind of restraint. The same immunity is extended to his ambassador, for the same reason; and to support this immunity, the fiction of extra territoriality has been invented, and applied to the cases of the army, or navy, or single ship of a sovereign coming into the territory of another. Being there under the license of the local sovereign, they are at liberty to remain and depart unmolested. Not that the foreign sovereignty exerts itself within the territory of another state, but that the local sovereignty is suspended from motives of comity, and a regard to the plighted faith of the nation. The exemption probably extends **319\***] even to private merchant \*vessels; which proves clearly that it does not rest on any right of sovereignty. But the permission may be withdrawn both as to these, and as to public vessels, if the indulgence be abused to the injury of the power by which it is granted.

Wheat. 7.

No neutral nation is bound to admit the belligerent ships of war within its waters, unless under treaty stipulations; and it may concede the privilege on such terms and conditions as it thinks fit. The presumption or fiction under which the license was granted ceases, the moment the license is revoked; and the license is revoked, as soon as the terms and conditions on which it was granted are violated. Still less can a mere general permission to the ships of a foreign state to come into our waters, be construed into a license to violate our laws, and treaties, and neutral obligations. Nor is it necessary here even to contend that the ship herself is subject to the local jurisdiction. We proceed against her prize goods, found within our territory. It is alleged, that they are held by the right of a foreign sovereign, or under a sovereign, and it is impossible to avoid inquiring into the foundation of this right. It is the inherent vice of the opposite argument, that it concedes this position; and in making that concession it yields the inevitable corollary that this sovereign right is not exempt from judicature.

2. If we proceed then to examine into the foundation of the right, we shall find that the Spanish consul here claims, in behalf of his fellow-subjects, their property, which has been taken from them by a cruiser sailing under the flag of the enemy of Spain, \*but [**320** equipped in our ports, and manned with our citizens, contrary to our municipal laws and the 6th and 14th articles of our treaty with Spain. The true interpretation of the 6th article raises our national duty, wherever a capture is made by our citizens of Spanish property, which is afterwards brought within our jurisdiction. We are to endeavor to protect the vessels and effects of Spanish subjects which shall be within the extent of our jurisdiction by sea or by land," as an act distinct from that of using our "efforts to recover and cause to be restored to the right owners their vessels and effects which may have been taken from them within the extent of said jurisdiction." It is a reciprocal duty of both states, and without invoking the aid of this article, we should find it difficult to maintain our claim upon Spain for the property of our citizens carried into her ports by French cruisers, and condemned by French tribunals within her territory. As to the 14th article, it is pretended that it attaches a mere personal penalty to the offending party, and operates merely to abandon our citizens, who may violate it, to be punished as pirates at the will of Spain. But the mutual prohibition to the citizens or subjects of each power from taking commissions to cruise against the other makes such conduct unlawful to every intent and purpose. The penalty of being punished as pirates is merely superadded as a consequence which would not necessarily have followed from the prohibition without a special provision to that effect. But the invalidity of the captures made under a commission thus unlawfully taken is a necessary \*and inevitable consequence of the pro- [**321** hibition itself. This article cannot therefore be considered as merely monitory; the words are promissory; they express the undertaking of the two governments and their reciprocal duty. Nor is it confined to captures made by private armed vessels. It is true that the first clause of the article speaks of "any commission or



letters of marque, for arming any ship or ships to act as privateers." But in the Spanish counterpart of the second clause, these last words *que obren como corsarios* are dropped, although they are retained in the English. The Spanish counterpart speaks generally of "*patente para armar algun buque ó buques con el fin de perseguir los subditos de S. M. catolica*," which obviously extends to public as well as private cruisers. As to our municipal laws, they are not confined to acts done within the limits of the United States. They are full of provisions making it unlawful for our citizens (without those limits) to fit out and arm, or command and enter on board of, a foreign cruiser intended to be employed against powers in amity with us.<sup>1</sup> Whether, therefore, the offense in this case was committed within or without the United States, the illegal equipment or augmentation is within the statutes, and consequently the property acquired under it must be restored to the true owners.

3. What gives additional strength to this national obligation, is the fact that the claimant in the present case, and those for whom he **322\*** claims as captors, \*are citizens of the United States, who claim a title to property acquired in violation of the laws and treaties of their own country, in a court of that country.

But it is said that the claimant, Chaytor, has ceased to be a citizen of this country by what is called an act of expatriation (but which ought rather to be called emigration), and has become a citizen of Buenos Ayres. Now it cannot, and certainly ought not to be denied, that men may remove from their own country in order to better their condition, or to avoid civil and religious persecution. But it does not follow that under all circumstances, and for all possible reasons, a person may shake off his allegiance to the land which gave him birth. The slavish principle of perpetual allegiance growing out of the feudal system, and this fanciful novelty of a man being authorized to change his country and his allegiance at his own will and pleasure, are both equally removed from the truth on this subject. Whatever doubtful cases may be supposed, this much may be affirmed with certainty, that there must be an actual change of the party's domicile, and that this must be done, not merely with the intention of remaining in his adopted country, but it must not be coupled with a design fraudulently to evade the laws of his native country. No act whatever of a foreign government can dispense with the allegiance of a citizen, and authorize him to violate our penal code or our treaties with other nations. This is a prior, paramount obligation, which must be first fulfilled, before he assumes any new and inconsistent duties. Even if there had been, in this case, an actual *bona* **323\*** *fide* change of domicile, *animus manendi*, so as to entitle the claimant to all the privileges of commercial inhabitancy under the law of prize or the revenue laws, it does not follow that he can with impunity levy war against the United States or their friends. And even if it be admitted that he might defend his adopted country, it does not follow that he may attack his native country, or those whom she is bound

to protect. Can it be sufficient to legalize such an act that he has made his election, and that the foreign government has ratified it? Is it not manifest that it was done, *cum dolo et culpa*, for no other purpose than to evade and violate our laws? In this respect, it is impossible to distinguish between the neutrality acts, and other laws, such as the statutes of treason, or any other the most intimately connected with the national safety and existence. But it is unnecessary to dwell upon this point, as it is the settled doctrine of this court, that a citizen of the United States cannot claim in their courts, the property of foreign nations in amity with them, captured by him in war, even if the capturing vessel be in other respects lawfully equipped and commissioned;<sup>2</sup> and that an act of expatriation cannot be set up to justify such a capture, where the removal from his own country was with the fraudulent intent of violating its laws.<sup>3</sup>

Even admitting that foreign armed vessels may, in the absence of any express prohibition, enter our ports for the purpose of refreshment, or of making repairs, and will not thereby be subject to the local \*law and judicature, [**324** it does not, therefore, follow that they may make extraordinary repairs so as to be transformed in the species. The implied license may extend to a mere replacement of the original force; but it cannot extend to such an augmentation of the force as would be inconsistent with the neutral character of the power granting the license. It cannot extend to acts done subsequent to the vessel entering the neutral port; in other words, to a violation of the license itself. The vessel may remain in the same condition as she came, but she may not increase her capacity for war by the addition of neutral means, either in munitions or men. Nor does it follow, in any supposable case, that because the capturing ship herself cannot be made answerable to the jurisdiction of the local tribunals for violating the laws and treaties of the neutral state, that her prizes are entitled to a similar exemption. They do not stand on the same principle or reason. The ship of war ought not to be detained from the public service of the sovereign to whom she belongs. Neither his dignity nor safety will permit it. But neither the prize vessels or goods captured by her are necessarily connected with his military power.

5. As to the facts of the illegal equipment and augmentation of the force of the capturing vessels in our ports, they are sufficiently established by the testimony. Although there may be some discrepancies in their evidence as to certain immaterial circumstances; yet, as they all concur in proof of the material facts, and their testimony is uncontradicted even by the claimant's witnesses as to some of the most \*important, they are entitled in this re- [**325** spect, to credit. Their testimony, taken in connection with the *res gesta*, which are admitted on all hands, satisfies the rule which the court has laid down in this class of causes, that the fact of illegal equipment in violation of our neutral duties, must be proved beyond all reasonable doubt.

1.—Act of 1797, c. 1; act of 1817, c. 58, s. 2; act of 1818, c. 83, s. 4, s. 10.

2.—The *Bello Corrunes*, 6 Wheat. Rep. 152, 169.

3.—*Talbot v. Janson*, 3 Dall. 133, 153, 164.

6. Lastly: As to the pretended condemnation at Buenos Ayres. Independent of the objection which has already been stated to it, the question which has been here raised as to the capture having been made by military means obtained within our neutral territory, could not possibly have occurred in the course of the prize proceedings in the court of the belligerent state. The goods being confessedly the property of its enemy, and liable to capture and condemnation as prize of war, the plea that the capture was made in violation of our neutrality could not be set up by the Spanish owner. Being an enemy, he had *no persona standi in judicio* for that purpose. The government of the United States must have interposed a claim upon this ground, or have authorized the Spanish claimant to interpose it. Unless this were done, the goods were clearly liable to condemnation as prize of war, as they would be in the analogous case of a capture actually made within the neutral territory itself; where, unless the objection is made by authority of the neutral government, it cannot be made by the enemy owner, who in his character of enemy, is not injured by it. We need not, therefore, directly impeach the validity of the condemnation at Buenos Ayres, so far as the rights of the **326\*** two belligerents merely are concerned. We only repudiate the claim of one of our own citizens, who comes into our court, and sets up the foreign sentence, which was obtained by him in fraud of our laws, as an excuse for the violation of those laws. To the prize court of Buenos Ayres it was sufficient that, as captor, he had a right to stand upon his commission issued by that state, and to insist upon the condemnation of his prize taken *jure belli*. But in this court that very commission disables him from claiming any title acquired under it, for reasons which could not be urged in the prize court of Buenos Ayres, where the Spanish owner could not appear at all unless by authority of the government of the United States. It is not, therefore, a *res adjudicata*. Nor is the claimant a *bona fide* purchaser of the prize goods, ignorant of the fraudulent and illegal conduct of the party by whom they were captured and sold to him. The claimant, Chaytor, is himself that party, and he can no more set up the sentence of condemnation for his protection, than he can the pretended act of naturalization to cover his crime in confederating with one of the belligerents to violate the laws, and treaties, and most solemn obligations of his own country.

*Mr. D. B. Ogden*, for the appellant, in reply, stated that he should, for the purposes of the argument, take it for granted that the capturing vessel, the *Independencia*, was in point of fact a public ship belonging to the government of Buenos Ayres. The flag and commission are **327\*** conclusive evidence of that fact. \*It is contended, on the other side, that the court is bound to interfere and restore the captured property, to the original Spanish owners, because it is said that, though the rights of a sovereign are involved, yet as he cannot appear in a court of justice to claim, these rights must be determined without hearing one of the parties, who is most materially interested in asserting them. And it is said, that the foreign sovereign must state his claim to the ex-

ecutive government, and that it must be brought to the notice of the court by a suggestion from the latter. So that according to this doctrine, the courts of this country could never listen to the complaints of foreign states, who had no minister to represent them here; and their property may be condemned, and their most sacred rights violated, without their being present, or heard. But we never meant to contend, that sovereign rights could not be discussed and determined in a court of justice, and that this suit could not be maintained, because the sovereign rights of Buenos Ayres might be incidentally drawn in question: but because this was a public armed ship of that state, coming into our waters, with her prize goods, under the express or implied permission of our government; and while here she was exempt from the jurisdiction of the local tribunals.

But we are told that Buenos Ayres has not yet been acknowledged by the government of this country as an independent state; that she is a mere revolted colony of Spain, and her cruising vessels cannot be entitled to the privileges and immunities of the public ships of an old established sovereignty. The answer to this position is, that \*though the inde- **[328]** pendence of the South American provinces has not yet been acknowledged by our government, the existence of a civil war between these revolted colonies and the mother country has been acknowledged, and this court has followed the executive government in considering them entitled to all the rights of war against their enemy. Such is the consequence which the writers on the law of nations attribute to a civil war between two portions of an empire. It is assimilated to a public war. They are belligerents in respect to each other; and all other powers, who take no part in the contest, are bound to all the duties of neutrality towards both. Whether, therefore; Buenos Ayres be a sovereign state, in the strict sense of the term, is quite immaterial for the present purpose. It is sufficient that she is a belligerent entitled to use against her enemy every species of military means. Among these, are the armed and commissioned ships of war, sailing under the public authority of that country, and admitted into the ports of this, with the same privileges as are enjoyed by the national ships of Spain. Being at war, the colonies are belligerents, and as belligerents they are entitled to all the rights of war, and we are bound to all the correspondent duties of the neutrality we profess to maintain. In the case of the *United States v. Palmer*,<sup>1</sup> this court lays down the principle that "when a civil war rages in a foreign nation, one part of which separates itself from the established government, the courts of the Union must view \*such newly constituted government, **[329]** as it is viewed by the legislative and executive departments of the government of the United States. If the government of the Union remains neutral, but recognizes the existence of a civil war, the courts of the Union cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy." Why can they not consider these acts of hostility as criminal? Because war authorizes them, and they are di-

1.—3 Wheat. Rep. 636:



rected by the new government against its enemy. In other words, because they are lawful. And if they are lawful for one purpose, it is difficult to understand how they can be unlawful for any other. If these acts are authorized by the laws of war, they must produce all the consequences of legal acts. They must vest a good title, *jure belli*, in the prizes taken by authority of the new government from its enemy. And that this is the necessary consequence of the principle is apparent from the words used by the court in *The Divina Pastora*,<sup>1</sup> which was itself a case of prize, and where the proprietary interest acquired in war came directly in judgment. The court there says, that "the government of the United States having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful those acts, which war authorizes, and which the new governments in South America may direct against their enemy." Here the question [330\*] was not, whether the \*existence of a civil war would excuse from the penalties of piracy those who might act under the authority of the new government, but whether a capture made under that authority was valid by the law of nations. So, also, in the case of *The Estrella*,<sup>2</sup> the validity of the commission was explicitly recognized by the court, and of course the authority of the government by whom it was issued was admitted.

In the case now in judgment, it is insisted, on the part of the respondent, that the court is bound to restore the property to the original Spanish owner, by the true construction of the treaty of 1795. As to the 6th article, it is certainly a very forced interpretation, which makes it imply our duty to restore all Spanish ships and goods which may happen to be found within our territory, although the title may have been changed by a previous capture *jure belli*, on the high seas. The article is evidently confined to wrongful acts done within our territorial limits. We are "to endeavor to protect the vessels and effects of Spanish subjects which shall be within the extent of our jurisdiction," but we are not to restore vessels and effects which have ceased to be Spanish by a lawful capture in war, without the extent of our jurisdiction. Nor have the United States insisted upon such an interpretation of the article as against Spain. We claim indemnity from Spain for condemnation of our vessels and effects by the French consuls in her ports, because to exercise the authority of a prize tribunal, is the highest act of sovereignty, and Spain having permitted it to be done by foreigners within her territory, it is the same thing [331\*] as if her \*own national tribunals had inflicted the wrong. The provision in this article is merely declaratory of the pre-existing law of nations, which always considers every sovereign as bound to protect the property of his friends within his territorial jurisdiction, and as responsible for whatever injuries he permitted to be there inflicted upon them. As to the 14th article, it is manifestly confined to privateers, and was not intended to extend to the case of a person entering the public mili-

tary, or naval service of one of the contracting parties to commit hostilities against the other, and still less to authorize the seizure of a public ship of war or her prizes. This article was evidently intended to abridge a pre-existing right; and that it was a pre-existing right appears from the uniform practice of the whole civilized world. But it is confined in its terms to privateers and letters of marque, and by no fair rule of construction can it be extended to public ships.

Nor is the court bound to restore, because the claimant, Chaytor, is a citizen of this country, and has violated its laws. Here the learned counsel entered into a minute analysis of the neutrality acts, to show that they were merely penal against the party, or the capturing vessel. But here the penalty would begin and end with the person of the captor, for the capturing vessel being a public ship belonging to a foreign state, she could not be forfeited without its being considered an act of reprisals in the nature of war against that state. Once being admitted with her prizes into our ports, she may remain as long as the executive government thinks proper to allow it. \*In [332\*] this respect there is no distinction between the public ship herself and her prizes. Here the prize goods taken by her from the enemies of the state, under whose commission she was cruising, were landed and deposited in the custom-house stores, by the express permission of the government. It is novel doctrine that prize ships and prize goods are no part of the regalian possessions of a sovereign. They may be, and frequently are, absolutely necessary to his safety. They may be the principal means by which he is enabled to carry on the war, and a chief source of his revenue. How is it, then, that they are not equally exempt from the jurisdiction of the local tribunals, with the guns, and spars, and rigging of the ship herself, which may be landed in the same manner for the purpose of making repairs? Are they not brought within the territory under the same permission, express or implied? If an army had a right of passage through a neutral territory, can it be doubted that it would extend to its military chest, and its booty previously acquired? If the fiction of extraterritoriality will protect the ship, which is the principal, why will it not protect the prize goods which are the incidents? The permission to enter may, indeed, be qualified by any condition the neutral state thinks fit to impose; such, for example, as that contained in the law of France, that prize goods which may have been taken from the subjects of the state or its allies should be restored. But this court has expressly repudiated that principle in the case of *The Invincible*,<sup>3</sup> and it is for the executive [333\*] and legislative departments to impose such restrictions as they think fit upon the admission into our ports of armed vessels, public or private, with their prizes. In the case of *The Exchange*, which has been so often referred to, the court in summing up its opinion says: "It seems, then, to be a principle of public law, that national ships of war, entering the ports of a friendly power open to their reception, are to be considered as exempted by the consent of

1.—4 Wheat. Rep. 52.

2.—5 Wheat. Rep. 298.

3.—1 Wheat. Rep. 238.

that power from its jurisdiction." The ship herself being exempted from the local jurisdiction, she remains a part of the territory of her own country, and if she brings in with her prize ships, or prize goods, they are to be considered as in the possession of that country. That they are so, is apparent from the established doctrine of this court, that prize ships or goods, though lying in a neutral territory, may be condemned in a competent court of the belligerent state, by whose cruisers they were captured. Indeed, the writers on the law of nations expressly state the privilege of bringing in their prizes to be a part of the permission.<sup>1</sup> But how can this be if the immunity does not extend to everything on board? Here the goods were taken *jure belli*. Whether they are good prize depends upon the adjudication of the captor's court, which is the only competent tribunal to determine that question. They are in his possession for the purpose of proceeding **334\*** to adjudication, \*even while they are locally within the neutral territory. Either the condemnation at Buenos Ayres is a sufficient adjudication, or not. If it be so, then the appellant is entitled to the goods under it. If it be not, still he is entitled to the possession of the goods, in order that he may proceed against them in the most regular manner, which he has been hitherto prevented from doing by this very suit.

*Mr. Justice STORY* delivered the opinion of the court:

Upon the argument at the bar several questions have arisen, which have been deliberately considered by the court; and its judgment will now be pronounced. The first in the order, in which we think it most convenient to consider the cause, is, whether the *Independencia* is in point of fact a public ship, belonging to the government of Buenos Ayres. The history of this vessel, so far as is necessary for the disposal of this point, is briefly this: She was originally built and equipped at Baltimore as a privateer during the late war with Great Britain, and was then rigged as a schooner, and called the *Mammoth*, and cruised against the enemy. After the peace she was rigged as a brig, and sold by her original owners. In January, 1816, she was loaded with a cargo of munitions of war, by her new owners (who are inhabitants of Baltimore, and being armed with twelve guns, constituting a part of her original armament), she was dispatched from that port, under the command of the claimant, on a voyage, ostensibly to the north west coast, but in **335\*** reality to Buenos Ayres. \*By the written instructions given to the supercargo on this voyage, he was authorized to sell the vessel to the government of Buenos Ayres, if he could obtain a suitable price. She duly arrived at Buenos Ayres, having exercised no act of hostility, but sailed under the protection of the American flag, during the voyage. At Buenos Ayres the vessel was sold to Captain Chaytor and two other persons; and soon afterwards she assumed the flag and character of a public ship, and was understood by the crew to have been sold to the government of Buenos Ayres; and Captain Chaytor made known these facts to

the crew, and asserted that he had become a citizen of Buenos Ayres; and had received a commission to command the vessel as a national ship; and invited the crew to enlist in the service; and the greater part of them accordingly enlisted. From this period, which was in May, 1816, the public functionaries of our own and other foreign governments at that port, considered the vessel as a public ship of war, and such was her avowed character and reputation. No bill of sale of the vessel to the government of Buenos Ayres is produced, and a question has been made principally from this defect in the evidence, whether her character as a public ship is established. It is not understood that any doubt is expressed as to the genuineness of Captain Chaytor's commission, nor as to the competency of the other proofs in the cause introduced, to corroborate it. The only point is, whether supposing them true, they afford satisfactory evidence of her public character. We are of opinion that they do. In general the commission of a public ship, signed \*by the proper authorities of the nation [**336** to which she belongs, is complete proof of her national character. A bill of sale is not necessary to be produced. Nor will the courts of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. The commission, therefore, of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been the settled practice between nations; and it is a rule founded in public convenience and policy, and cannot be broken in upon, without endangering the peace and repose; as well of neutral as of belligerent sovereigns. The commission in the present case is not expressed in the most unequivocal terms; but its fair purport and interpretation must be deemed to apply to a public ship of the government. If we add to this the corroborative testimony of our own and the British consul at Buenos Ayres, as well as that of private citizens, to the notoriety of her claim of a public character, and her admission into our own ports as a public ship, with the immunities and privileges belonging to such a ship, with the express approbation of our own government, it does not seem too much to assert, whatever may be the private suspicion of a lurking American \*interest, that she must be [**337** judicially held to be a public ship of the country whose commission she bears.

There is another objection urged against the admission of this vessel to the privileges and immunities of a public ship, which may as well be disposed of in connection with the question already considered. It is, that Buenos Ayres has not yet been acknowledged as a sovereign independent government by the executive or legislature of the United States, and, therefore, is not entitled to have her ships of war recognized by our courts as national ships. We have, in former cases, had occasion to express

1.—Vattel, Droit des Gens. l. 3, c. 7.  
Wheat. 7.



our opinion on this point. The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum and hospitality and intercourse. Each party is, therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights. We cannot interfere to the prejudice of either belligerent without making ourselves a party to the contest, and departing from the posture of neutrality. All captures made by each must be considered as having the same validity, and all the immunities which may be claimed by public ships in our ports under the law of nations must be considered as equally the right of each; and as such must be recognized by our courts of justice, until Congress shall prescribe a different rule. This is the **338\*** doctrine heretofore asserted by this court, and we see no reason to depart from it.

The next question growing out of this record, is whether the property in controversy was captured in violation of our neutrality, so that restitution ought, by the law of nations, to be decreed to the libelants. Two grounds are relied upon to justify restitution: First, that the *Independencia* and *Altravida* were originally equipped, armed, and manned as vessels of war in our ports; second, that there was an illegal augmentation of the force of the *Independencia* within our ports. Are these grounds, or either of them, sustained by the evidence?

If the cause stood solely upon the testimony of the witnesses who have been examined on behalf of the libelants, we should have great hesitation in admitting the conclusions which have been drawn from it. The witnesses, indeed, speak directly and uniformly either to the point of illegal equipment, or illegal augmentation of force within our ports. But their testimony is much shaken by the manifest contradictions which it involves, and by declarations of facts, the falsity of which was entirely within their knowledge, and has been completely established in proof. It has been said, that if witnesses concur in proof of a material fact, they ought to be believed in respect to that fact, whatever may be the other contradictions in their testimony. That position may be true under circumstances; but it is a doctrine which can be received only under many qualifications, and with great caution. If the **339\*** circumstances \*respecting which the testimony is discordant be immaterial, and of such a nature, that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of the human mind, rather than from deliberate error. But where the party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and courts of justice, under such circumstances, are bound, upon principles of

law, and morality and justice, to apply the maxim *falsus in uno, falsus in omnibus*. What ground of judicial belief can there be left, when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood? The contradictions in the testimony of the witnesses of the libelants have been exposed at the bar with great force and accuracy; and they are so numerous that, in ordinary cases, no court of justice could venture to rely on it without danger of being betrayed into the grossest errors. But in a case of the description of that before the court, where the sovereignty and rights of a foreign belligerent nation are in question, and where the exercise of jurisdiction over captures made under its flag, can be justified only by clear proof of the violation of our neutrality, there are still stronger reasons for abstaining from interference, if the testimony is **[\*340]** clouded with doubt and suspicion. We adhere to the rule which has been already adopted by this court, that restitution ought not to be decreed upon the ground of capture in violation of our neutrality, unless the fact be established beyond all reasonable doubt.

But the present case does not stand upon this testimony alone. It derives its principal proofs altogether from independent sources, to the consideration of which the attention of the court will now be directed.

The question as to the original illegal armament and outfit of the *Independencia* may be dismissed in a few words. It is apparent, that though equipped as a vessel of war, she was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality. If captured by a Spanish ship of war during the voyage she would have been justly condemnable as good prize, for being engaged in a traffic prohibited by the law of nations. But there is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit; and which only exposes the persons engaged in it to the penalty of confiscation. Supposing, therefore, the voyage to have been for commercial purposes, and the sale at Buenos Ayres to have been a *bona fide* sale (and there is nothing in the evidence before us to contradict it), there is no pretense to say, that the original outfit on the \*voyage was illegal, or that a capture **[\*341]** made after the sale was, for that cause alone, invalid.

The more material consideration is as to the augmentation of her force in the United States, at a subsequent period. It appears from the evidence, and, indeed, is admitted by Captain Chaytor, that after the sale in May, 1816, the *Independencia* sailed for Buenos Ayres under his command, on a cruise against Spain; and after visiting the coast of Spain, she put into Baltimore early in the month of October of the same year, having then on board the greater part of her original crew, among whom were many Americans. On her arrival at Baltimore, she was received as a public ship, and there underwent considerable repairs. Her bottom was new coppered, some parts of her hull were recaulked, part of the water-ways were re-

placed, a new head was put on, some new sails and rigging to a small amount, a new mainyard was obtained, some bolts were driven into the hull, and the mainmast, which had been shivered by lightning, was taken out, reduced in length, and replaced in its former station. In order to make these repairs, her guns, ammunition and cargo were discharged under the inspection of an officer of the customs, and when the repairs were made, the armament was replaced, and a report made by the proper officer to the collector, that there was no addition to her armament. The *Independencia* left Baltimore in the latter part of December, 1816, having then on board a crew of 112 men; and about the 8th of January following, she sailed from the capes of the Chesapeake on the cruise on which **342\*** the property in question was captured, being accompanied by the *Altravida*, as a tender, or dispatch vessel. It will be necessary, hereafter, to make more particular mention of the *Altravida*; but, for the present, the observations of the court will be confined to the *Independencia*. It is admitted by the claimant, that during her stay at Baltimore, several persons were enlisted on board the *Independencia*, and his own witnesses prove that the number was about thirty.

The first observation that occurs on this part of the case is, that here is a clear augmentation of force within our jurisdiction. The excuse offered is, that the persons so enlisted, represented themselves, or were supposed to be, persons in the service of Buenos Ayres. Of this, however, there is not the slightest proof. The enlistment of men being proved, it is incumbent on the claimant to show that they were persons who might lawfully be enlisted; and as the burden of proof rests on him, the presumption necessarily arising from the absence of such proof is that they were not of that character. It is not a little remarkable that not a single officer of the *Independencia* has been examined on this occasion. They are the persons who, from their situation, must have been acquainted with the facts; and the total omission to bring their testimony into the cause can scarcely be accounted for but upon a supposition extremely unfavorable to the innocence of the transaction.

Another observation which is drawn from the predicament of this case is, that if, as the **343\*** claimant asserts, the original voyage to Buenos Ayres, was a mere commercial adventure, the crew must have been composed principally of Americans or residents in our country. They enlisted at Buenos Ayres on board the *Independencia*, as officers and seamen for the purposes of warfare, and there is no evidence in the case as to the length of time of their engagements, or of the place where the cruise was to terminate. Why are the documents on this subject, for documents must exist, in the possession of the claimant; why are they not produced? If the cruise was to terminate at Buenos Ayres, or at a specific period of time, the fact would have a material bearing on the merits of the cause. Yet though the pressure of this point must, at all times, have been forcibly felt, there has not, up to the present moment, been the slightest effort to relieve it from the darkness which thus surrounds it. Under such circumstances, the natural con-

clusion would seem to be that the crew were to be discharged, and the cruise to terminate at Baltimore. This was their native or adopted home, the place where they first embarked on board the *Mammoth*, and that to which most of them must be supposed solicitous to return. The conduct of the vessel indicated the same intent. She underwent general repairs, some of which could hardly be deemed of great necessity, and must have been induced by the consideration that Baltimore was a port peculiarly well fitted for naval equipments. During the repairs (a period of two months) the crew were necessarily on shore; and it is scarcely to be supposed that they were held together by any common bond of attachment, or that **344** they had so far lost the common character of seamen as not to be easily led into some other employment or enterprise, which should yield immediate profit. What proof, indeed, is there that the same crew which came to Baltimore sailed again in the *Independencia* on her new cruise? It is stated only as hearsay by one or two of the claimant's witnesses, who had no means, and do not pretend to any means of accurate knowledge of the fact. If true, it might have been proved by the officers of the ship, by the muster roll of the crew, and by the shipping articles; and these are wholly withdrawn from the cause, without even an apology for their absence. It would certainly be an unreasonable credulity for the court, under such circumstances, to believe that the actual augmentation of force was not far greater than what is admitted by the party, and that there was either an innocence of intention or act in the enlistments. The court is therefore driven to the conclusion, that there was an illegal augmentation of the force of the *Independencia* in our ports, by a substantial increase of her crew; and this renders it wholly unnecessary to enter into an investigation of the question, whether there was not also an illegal increase of her armament.

If any doubt could be entertained as to the *Independencia*, none can be as to the predicament of the *Altravida*. This vessel was formerly a privateer, called the *Romp*, and was condemned for illegal conduct by the District Court of Virginia; and under the decree of the court, was sold, together with the armament and munitions of war then on board. **345** She was purchased ostensibly for a Mr. Thomas Taylor, but was immediately transferred to Captain Chaytor. She soon afterwards went to Baltimore, and was attached as a tender to the *Independencia*, having no separate commission, but acting under the authority of Captain Chaytor. Part of her armament was mounted, and a crew of about twenty-five men were put on board at Baltimore. She dropped down to the Patuxent a few days before the sailing of the *Independencia*, and was there joined by the latter, and accompanied her on a cruise in the manner already mentioned. Here, then, is complete evidence from the testimony introduced by the claimant himself of an illegal outfit of the *Altravida*, and an enlistment of her crew within our waters for the purposes of war. There is no pretense that the crew was transferred to her from the *Independencia*, for the claimants own witnesses admit that a few only were of this description. The *Altravida*



must be considered as attached to, and constituting a part of the force of the Independencia, and so far as the warlike means of the latter were increased by the purchase, her military force must be deemed to be augmented. Not the slightest evidence is offered of the place or circumstances under which the enlistment of the crew took place. It consisted, according to the strong language of the testimony, of persons of all nations; and it deserves consideration, that throughout this voluminous record, not a scintilla of evidence exists to show that any person on board of either vessel was a **346\*** native of Buenos Ayres. We think, then, that the fact of illegal augmentation of force, by the equipment of the Altravida, is also completely established in proof.

What, then, are the consequences which the law attaches to such conduct, so far as they respect the property now under adjudication? It is argued on the part of the libellant, that it presents a *casus fœderis* under our treaty with Spain. The sixth and fourteenth articles are relied upon for this purpose. The former is in our judgment exclusively applicable to the protection and defense of Spanish ships within our territorial jurisdiction, and provides for the restitution of them when they have been captured within that jurisdiction. The latter article provides that no subject of Spain "shall apply for, or take any commission or letter of marque for arming any ship or ships to act as privateers," against the United States, or their citizens, or their property, from any prince or state with which the United States shall be at war; and that no citizen of the United States "shall apply for, or take any commission or letters of marque, for arming any ship or ships to act as privateers" against the King of Spain, or his subjects, or their property, from any prince or state with which the said king shall be at war. "And if any person of either nation shall take such commission or letter of marque, he shall be punished as a pirate." In the Spanish counterpart of the treaty, the word "privateers" in the first clause has the corresponding word "corsarios;" but in the second clause, no such word is to be found. But it is obvious **347\*** that both clauses were intended to receive, and ought to receive, the same construction; and the very terms of the article confine the prohibition to commissions, &c., to privateers. It is not for this court to make the construction of the treaty broader than the apparent intent and purport of the language. There may have existed, and probably did exist, reasons of public policy which forbade an extension of the prohibition to public ships of war. It might well be deemed a breach of good faith in a nation to enlist in its own service an acknowledged foreigner, and at the same time subject him by that very act, and its own stipulations, to the penalties of piracy. But it is sufficient for the court, that the language of the treaty does not include the case of a public ship, and we do not perceive that the apparent intention or spirit of any of its provisions, justifies such an interpolation. The question, then, under the Spanish treaty, may be dismissed without further commentary.

This view of the question renders it unnecessary to consider another which has been discussed at the bar respecting what is denominated

the right of expatriation. It is admitted by Captain Chaytor, in the most explicit manner, that during this whole period his wife and family have continued to reside at Baltimore; and so far as this fact goes, it contradicts the supposition of any real change of his own domicile. Assuming, for the purposes of argument, that an American citizen may, independently of any legislative act to this effect, throw off his own allegiance to his native country, as to which we give no \*opinion, it is perfectly clear, [**348** that this cannot be done without a *bona fide* change of domicile under circumstances of good faith. It can never be asserted as a cover for fraud, or as a justification for the commission of a crime against the country, or for a violation of its laws, when this appears to be the intention of the act. It is unnecessary to go into a further examination of this doctrine; and it will be sufficient to ascertain its precise nature and limits, when it shall become the leading point of a judgment of the court.

And here we are met by an argument on behalf of the claimant, that the augmentation of the force of the Independencia within our ports, is not an infraction of the law of nations, or a violation of our neutrality; and that so far as it stands prohibited by our municipal laws the penalties are personal, and do not reach the ease of restitution of captures made in the cruise, during which such augmentation has taken place. It has never been held by this court, that an augmentation of force or illegal outfit affected any captures made after the original cruise was terminated. By analogy to other cases of violations of public law the offense may well be deemed to be deposited at the termination of the voyage, and not to affect future transactions. But as to captures made during the same cruise, the doctrine of this court has long established that such illegal augmentation is a violation of the law of nations, as well as of our own municipal laws, and as a violation of our neutrality, by analogy to other cases, it infects the captures subsequently made with the character \*of torts, and justifies and re- [**349** quires a restitution to the parties who have been injured by such misconduct. It does not lie in the mouth of wrong-doers, to set up a title derived from a violation of our neutrality. The cases in which this doctrine has been recognized and applied, have been cited at the bar, and are so numerous and so uniform, that it would be a waste of time to discuss them, or to examine the reasoning by which they are supported. More especially as no inclination exists on the part of the court to question the soundness of these decisions. If, indeed, the question were entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than by a direct intervention of the government itself. In the case of a capture made within a neutral territorial jurisdiction, it is well settled, that as between the captors and the captured, the question can never be litigated. It can arise only upon a claim of the neutral sovereign asserted in his own courts or the courts of the power having cognizance of the capture itself for the purposes of prize. And by analogy to this course of proceeding, the interposition of our own government might seem fit to have

been required before cognizance of the wrong could be taken by our courts. But the practice from the beginning in this class of causes, a period of nearly 30 years, has been uniformly the other way; and it is now too late to disturb it. If any inconvenience should grow out of it, from reasons of state policy or executive discretion, it is competent for Congress to apply at its pleasure the proper remedy.

It is further contended by the claimant, that the doctrine heretofore established has been confined to cases of captures made by privateers; and that it has never been applied to captures by public ships, and in reason and policy ought not to be so applied. The case of *The Cassius*, in 3 Dall. Rep., 121, has been supposed at the bar to authorize such an interpretation of the doctrine. That was the case of a motion for a prohibition to the District Court to prohibit it from exercising jurisdiction on a libel filed against the *Cassius*, a public armed ship of France, to obtain compensation in damages *in rem*, for an asserted illegal capture of another vessel belonging to the libelants on the high seas, and sending her into a French port for adjudication, as prize. The libel alleged that the *Cassius* was originally equipped and fitted for war in a port of the United States contrary to our laws, and the law of nations. But there was no allegation that she had been originally fitted out by her present commander, or after she became the property of the French government. The principal question was, whether our courts could sustain a libel for compensation *in rem* against the capturing vessel for an asserted illegal capture as prize on the high seas, when the prize was not brought into our ports, but was carried into a port *infra presidium* of the captors. The court granted the prohibition; but as no reasons were assigned for the judgment, the only ground that can be gathered, is that which is apparent on the face of the writ of prohibition, where it is distinctly asserted, that the jurisdiction in cases of this nature exclusively belongs to the courts of the capturing power, and that neither the public ships of a nation, nor the officers of such ships are liable to be arrested to answer for such captures in any neutral court. The doctrine of that case was fully recognized by this court in the case of *The Invincible* (1 Wheat. R., 238); and it furnishes a rule for the exemption of a public ship from proceedings *in rem*, in our courts, for illegal captures on the high seas, in violation of our neutrality; but in no degree exempts her prizes in our ports from the ample exercise of our jurisdiction.

Nor is there in reason or in policy any ground for a distinction between captures in violation of our neutrality by public ships, and by privateers. In each case the injury done to our friend is the same; in each the illegality of the capture is the same; in each the duty of the neutral is equally strong to assert its own rights, and to preserve its own good faith, and to take from the wrong-doer the property he has unjustly acquired, and re-instate the other party in his title and possession which have been tortiously devoted. This very point was directly asserted by this court in its judgment in the causes of *The Invincible*. Mr. Justice Johnson there said, "as to the restitution of prizes made in violation of neutrality, there could be no reason

suggested for creating a distinction between the national and the private armed vessels of a belligerent. Whilst a neutral yields to other nations the unobstructed exercise of their sovereign or belligerent rights, her own dignity and security require of her the vindication of her own neutrality, and of her sovereign right to remain the peaceable and impartial spectator of the war. As to her it is immaterial in whom the property of the offending vessel is vested. The commission under which the captors act is the same, and that alone communicates the right of capture, even to a vessel which is national property." We are satisfied of the correctness of this doctrine, and have no disposition to shake it. In cases of violation of neutral territorial jurisdiction no distinction has ever been made between the capture of public and private armed ships, and the same reason which governs that, applies with equal force to this case.

An objection of a more important and comprehensive nature has been urged at the bar, and that is, that public ships of war are exempted from the local jurisdiction by the universal assent of nations: and that as all property captured by such ships is captured for the sovereign, it is, by parity of reasoning, entitled to the like exemption; for no sovereign is answerable for his acts to the tribunals of any foreign sovereign.

In the case of *The Exchange* (7 Cranch, 116), the grounds of the exemption of public ships were fully discussed and expounded. It was there shown that it was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire. But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction. But as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time, without just offense, and if afterwards such public ships come into our ports, they are amenable to our laws in the same manner as other vessels. To be sure, a foreign sovereign cannot be compelled to appear in our courts, or be made liable to their judgment, so long as he remains in his own dominions, for the sovereignty of each is bounded by territorial limits. If, however, he comes personally within our limits, although he generally enjoys a personal immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of the nation. But there is nothing in the law of nations which forbids a foreign sovereign, either on account of the dignity of his station, or the nature of his prerogative, from voluntarily becoming a party to a suit in the tribunals of another country, or from asserting there any personal, or proprietary, or sovereign rights, which may be properly recognized and enforced by such tribunals. It is a mere matter of his own good-will



and pleasure; and if he happens to hold a private domain within another territory, it may be that he cannot obtain full redress for any injury to it, except through the instrumentality of its **354**] courts of justice. It may therefore \*be justly laid down as a general proposition, that all persons and property within the territorial jurisdiction of a sovereign, are amenable to the jurisdiction of himself or his courts; and that the exceptions to this rule are such only as by common usage, and public policy, have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights. It would indeed be strange, if a license implied by law from the general practice of nations, for the purposes of peace, should be construed as a license to do wrong to the nation itself, and justify the breach of all those obligations which good faith and friendship, by the same implication, impose upon those who seek an asylum in our ports. We are of opinion that the objection cannot be sustained; and that whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been devested by a violation of our neutrality; and if the goods are landed from the public ship in our ports, the express permission of our own government, by that does not vary the case, since it involves no pledge that if illegally captured they shall be exempted from the ordinary operation of our laws.

The last question which has been made at the bar, on which it is necessary to pronounce an opinion, is as to the effect of the asserted **355**] condemnation of the \*property in controversy, at Buenos Ayres, during the pendency of this suit. Assuming, for the purpose of argument, that the condemnation was regularly made, and is duly authenticated, we are of opinion that it cannot oust the jurisdiction of this court, after it had once regularly attached itself to the cause. By the seizure and possession of the property, under the process of the District Court, the possession of the captors was devested, and the property was emphatically placed in the custody of the law. It has since been sold, by consent of the parties, under an interlocutory decree of the court, and the proceeds are deposited in its registry, to abide the final adjudication. Admitting, then, that property may be condemned in the courts of the captor, while lying in a neutral country (a doctrine which has been affirmed by this court), still it can be so adjudicated only while the possession of the captor remains; for if it be devested, in fact, or by operation of law, that possession is gone which can alone sustain the jurisdiction. *A fortiori*, where the property is already in the custody of a neutral tribunal, and the title is in litigation there, no other foreign court can, by its adjudication, rightfully take away its jurisdiction, or forestall and defeat its judgment. It would be an attempt to exercise a sovereign authority over the court having possession of the thing, and take from the nation the right of vindicating its own justice and neutrality.

*Upon the whole, it is the opinion of the court that the decree of the Circuit Court be affirmed, with costs.*

Aff'g—1 Brock. 478.

Cited—3 Pet. 267; 7 How. 57; 2 Black. 669; 7 Wall. 161; 11 Wall. 307; 6 Otto. 190; 11 Otto. 42; Blatchf. Pr. 10; 6 Blatchf. 139; 2 Cliff. 427; 2 Sprague, 133; 2 Ware (Da.) 16.

[\*COMMON LAW.]

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A party cannot entitle himself to a patent for more than his own invention; and if the patent be for the whole of a machine, he can maintain a title to it only by establishing that it is substantially new in its structure and mode of operation.

If the same combination existed before in machines of the same nature up to a certain point, and the party's invention consists in adding some new machinery, or some improved mode of operation, to the old, the patent should be limited to such improvement; for if it includes the whole machine, it includes more than his invention, and therefore cannot be supported.

When the patent is for an improvement, the nature and extent of the improvement must be stated in the specification, and it is not sufficient that it be made out and shown at the trial or established by comparing the machine specified in the patent with former machines in use.

The former judgment of this court in the same case (*ante*, Vol. III., p. 454), commented on, explained and confirmed.

A person having an interest only in the question, and not in the event of the suit, is a competent witness.

In general, the liability of a witness to a like action, or his standing in the same predicament with the party sued, if the verdict cannot be given in evidence for or against him, is an interest in the question, and does not exclude him.

**E**RROR to the Circuit Court of Pennsylvania.

This is the same case which was formerly before this court, and is reported *ante*, Vol. III., p. 454; and by a reference to that report, the form of the patent, the nature of the action, and the subsequent proceedings, will fully appear. The cause was now again brought before the court upon a writ of error to the judgment of the Circuit Court, rendered upon the new trial, had in pursuance of the mandate of this court.

Upon the new trial, several exceptions were taken \*by the counsel for the plaintiff, [**357** Evans. The first was to the admission of one Frederick as a witness for the defendant, upon the ground of his interest in the suit. The witness, on his examination on the *voir dire*, denied that he had any interest in the cause, or that he was bound to contribute to the expenses of it. He said that he had not a hopper-boy in his mill at present, it being then in court; that it was in his mill about three weeks ago, when he gave it to a person to bring down to Philadelphia; and that his hopper-boy spreads and turns the meal, cools it some, dries it, and gathers it to the bolting chest. Upon this evidence, the plaintiff's counsel contended that Frederick was not a competent witness; but the objection was overruled by the court.

Another exception was to the refusal of the court, to allow the deposition of one Shetter to be read in evidence of the plaintiff, which had been taken according to a prevalent practice of the state courts, instead of being taken pur-

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suant to the provisions of the act of Congress.

But the principal exceptions were to the charge by the Circuit Court, in summing up the cause to the jury, which it is deemed necessary here to insert at large.

*Mr. Justice WASHINGTON.* This is an action for an infringement of the plaintiff's patent, which the plaintiff alleges to be,

1. For the whole of the machine employed in the manufacture of flour, called the hopper-boy.

2. For an improvement on the hopper-boy.

The question is, is the plaintiff entitled to recover upon either of these claims. The question is stated thus singly, because the defendant admits that he uses the very hopper-boy for which the patent is, in part, granted, and justifies himself by insisting,

1st. That the plaintiff was not the original inventor of, but that the same was in use prior to the plaintiff's patent, the hopper-boy as patented.

2d. That his patent for an improvement is bad; because the nature and extent of the improvement is not stated in his specification; and if it had been, still the patent comprehends the whole machine, and is therefore too broad.

1st. The first is a mixed question of fact and law. In order to enable you to decide the first, it will be well to attend to the description, which the plaintiff has given of this machine, in his specification, a model of which is now before you. Its parts are, (6) An upright round shaft, to revolve on a pivot in the floor. (2) A leader or upper arm. (3) An arm set with small inelining boards, called flights and sweepers. (4) Cords from the leader to the arm to turn it. (5) A weight passing over a pulley, to keep the arm tight on the meal. (6) A log at the top of the shaft to turn it, which is operated upon by the water power of the mill.

The flights are so arranged as to track the one below the other, and to operate like ploughs, and at every revolution of the machine to give the meal two turns towards the centre. The sweepers are to receive the meal from the elevator, and to trail it round the circle for the flights to gather it to the centre, and also to sweep the meal into the bolt.

**359**\*The use of this machine is stated to be, to spread any granulated substance over a floor; to stir and expose it to the air, to dry and cool it, and to gather it to the bolt.

The next inquiry under this head is, when was this discovery made? Joseph Evans has sworn, that in 1783 the plaintiff informed him that he was engaged in contriving an improvement in the manufactory of flour, and had completed it in his mind, some time in July of that year. In 1784 he constructed a rough model of the hopper-boy, but having no cords from the extremities of the leader to those of the arm, it was necessary, in making his experiments, to turn around the arm by hand. In 1785 he set up a hopper-boy in his mill, resembling the model in court, and the machine described in his specification. The evidence of Mr. Anderson strongly supports this witness, and, indeed, the discovery as early as 1784 or 1785 is scarcely controverted by the defendant.

The defendant insists that a hopper-boy, similar to the plaintiff's, was discovered, and in Wheat, 7.

use, many years anterior, even to the year 1783, and relies upon the testimony of the following witnesses:

Daniel Stouffer, who deposes, that he first saw the Stouffer hopper-boy in his father's, Christian Stouffer's mill, in the year 1764. In the year 1775, or 1776, he erected a similar one, in the mill of his brother Henry, and another in Jacob Stouffer's mill, in 1777, 1778, or 1779.

\*Philip Frederiek swears, that in **[\*360]** 1778 he saw a Stouffer hopper boy in operation in Christian Stouffer's mill, and in the year 1783 he saw one in Jacob Stouffer's mill, and another in U. Charles' mill, and that it was always called Stouffer's machine.

George Roup stated, that in 1784, he erected one of these hopper-boys in the mill of one Braniwar: and that in 1782, Abraham Stouffer described to him a similar machine, which his father used in his mill.

Christopher Stouffer, the son of Christian, has sworn that his father, having enlarged his mill, in the year 1780, erected a new hopper-boy of the description above mentioned, which is still in use in the same mill, now owned by Peter Stouffer.

If these witnesses are believed by the jury, they establish the fact asserted by the defendant, that the Stouffer hopper-boy was in use prior to the plaintiff's discovery.

The next inquiry is into the parts, operation, and use of the Stouffer hopper-boy. This consists of an upright square shaft, which passes lightly through a square mortice in an arm, underneath which are fixed slips of wood, called flights, and the arm is turned by a log on the upper end of it, which is moved by the power which moves the mills.

The arm, with the flights, operates as it turns upon the meal placed below it, and its use is, in a degree, to cool the meal and to conduct it to the bolt. It will now be proper to compare this machine with the plaintiff's. They agree in the following particulars: They each consist of a shaft, or log to turn it by the power of the mill, and an arm with flights on **[\*361]** the under side of it. They each operate on the mill below the arm, to cool, dry, and conduct it to the bolt.

In what do they differ? The plaintiff's shaft is round, and consequently could not turn the arm, into which it is loosely inserted, if it were not for the cords which connect the extremities of the arm to those of the leader. The shaft of the Stouffer hopper-boy is square, and therefore turns the arm without the aid of a leader or of cords. It has neither a weight nor pulley, nor are the flights arranged in the manner the plaintiff's are, and consequently it does not, in the opinion of most of the witnesses, cool or prepare the flour for packing as well as the plaintiff's.

The question of law now arises, which is, are the two machines, up to the point where the difference commences, the same in principle, so as to invalidate the plaintiff's claim to the hopper-boy as the original inventor of it? I take the rule to be, and so it has been settled in this and in other courts, that if the two machines be substantially the same, and operate in the same manner, to produce the same result, though they may differ in form, proportions, and utility, they are the same in principle; and the



one last discovered has no other merit than that of being an improved imitation of the one before discovered and in use, for which no valid patent can be granted, because he cannot be considered as the original inventor of the machine. If the alleged inventor of a machine, which differs from another previously patented. **362**\*) merely in form and proportion, \*but not in principle, is not entitled to a patent for an improvement, which he cannot be by the 2d section of the law, he certainly cannot, in a like case, claim a patent for the machine itself.

The question for the jury then is, are the two hopper-boys substantially the same in principle? not whether the plaintiff's hopper-boy is preferable to the other. Because if that superiority amounts to an improvement, he is entitled to a patent only for an improvement, and not for the whole machine. In the latter case the patent would be too broad, and therefore void when the patent is single.

If you are of opinion that the plaintiff is not the original inventor of the hopper-boy, he cannot obtain a verdict on that claim, unless his is an excepted case. The 1st, 2d, 3d, and 6th sections of the general patent law conclusively support this opinion. But the judgment of the Supreme Court in this case<sup>1</sup> is relied upon by the plaintiff's counsel to prove that this is an excepted case; inasmuch that the plaintiff is entitled to a verdict, although you should be satisfied that he is not the original inventor of the hopper-boy. But we are perfectly satisfied that the interpretation put upon the last clause of the judgment by the plaintiff's counsel is incorrect; and that for the following reasons: 1. The question of priority of invention was not before the Supreme Court; and it is therefore incredible that any opinion, much less a judgment, would have been given upon that point. **363**\*) The error in the charge, which \*this part of the judgment was obviously intended to correct, is stated by the Chief Justice in the following words:

"The second error alleged in the charge, is in directing the jury to find for the defendant, if they should be of opinion that, the hopper-boy was in use prior to the improvement alleged to be made thereon by Oliver Evans."

"This part of the charge seems to be founded on the opinion, that if the patent is to be considered as a grant of the exclusive use of distinct improvements, it is a grant for the hopper-boy itself, and not for an improvement on the hopper-boy." (p. 512.)

It contradicts what is stated in p. 517, where it is said that the plaintiff's claim is to the machine "which he has invented," &c. Now, if he did not invent the hopper-boy he has no claim to it; and if so, could the court mean to say, that he was nevertheless entitled to recover under that claim? Such a decision was certainly not called for by the terms of the "act for the relief of Oliver Evans," but would seem to be in direct violation of it. The act directs a patent to issue to Oliver Evans, not for his hopper-boy, elevator, &c., but "for his invention, discovery, and improvement in the art, &c., and on the several machines which he has discovered, invented, and improved." Now if the hopper-boy was not invented, &c., by O.

Evans, this act, without which O. Evans could not have obtained a patent, did not authorize the Secretary of State to grant him one for that machine; or if granted, it is clear that it was \*improvidently done. If, indeed, the **364** Supreme Court had been of opinion, that the fact of Oliver Evans' prior invention was decided, and could constitutionally have been decided by Congress, there might have been more difficulty in the case; but the argument of counsel, which pressed that point upon the court, was distinctly repudiated. We conceive that the meaning of that part of the opinion is, that this court erred in stating to the jury that O. Evans was not entitled to recover, if the hopper-boy (that is the original hopper-boy) had been in use prior to the plaintiff's alleged discovery of it; because if the plaintiff was entitled to claim an improvement on the hopper-boy, which this court had denied, and which the Supreme Court affirmed, this court was clearly wrong in saying to the jury that the plaintiff could not recover for his improvement, which, in effect, was said. Upon the whole, then, the court is of opinion, that O. Evans is not entitled to a verdict in his favor as the inventor of the hopper-boy, if you should be of opinion that another hopper-boy, substantially the same as his in principle, as before explained, up to the point, where any alteration or improvement exists in his hopper-boy, was invented, and in use prior to the plaintiff's invention or discovery, however they may differ in mere form, proportions, and utility.

2d. The plaintiff's next claim is to an improvement on a hopper-boy, which claim, we were of opinion in another case, has received the sanction of the Supreme Court. His counsel contend that his improvement is, (1) on the original method of supplying the \*bolt, **365** by manual labor; (2) on his own hopper-boy; and (3) on some hopper-boy, invented by some other person. Let this position be analyzed.

1. It is said to be an improvement on the original method by manual labor. But it is obvious that if this be the invention, it is of an original machine, because wherever the patent law speaks of an improvement, it is on some art, machine, or manufacture, &c., and not on manual labor, which was applied to the various arts long before the invention of machinery to supply its place.

2. An improvement on his own discovery.

But where is the evidence of such invention? It is true that Joseph Evans has stated that the plaintiff constructed, in 1784, a rude model of a hopper-boy; but it was no substitute for manual labor, because without the cords or leading lines, the arm could not move, and it was therefore turned by hand. It was, in fact, in an incomplete state; in progress to its completion, but not given out, or prepared to be given out to the world as a machine, before 1785; when the cords to turn the arm were added.

3. An improvement on a former machine.

This is a fair subject for a patent; and the plaintiff has laid before you strong evidence, to prove that his hopper-boy is a more useful machine than the one which is alleged to have been previously discovered and in use. If, then, you are satisfied of this fact, the point of law which has been raised by the defendant's

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counsel, remains to be considered, which is, that the plaintiff's patent for an improvement **366\***] is void, because \*the nature and extent of his improvements are not stated in his specification.

The patent is for an improved hopper-boy, as described in the specification, which is referred to, and made part of the patent. Now, does the specification express in what his improvement consist? It states all and each of the parts of the entire machine, its use and mode of operating, and claims as his invention, the machine, the peculiar properties or principles of it, viz., the spreading, turning, and gathering the meal, and the rising and lowering of its arm, by its motion to accommodate itself to the meal under it. But does this description designate the improvement, or in what it consists? Where shall we find the original hopper-boy described either as to its construction, operation, or use; or by reference to any thing, by which a knowledge of it may be obtained? Where are the improvements on such original stated? The undoubted truth is, that the specification communicates no information whatever upon any of these parts. This being so, the law, as to ordinary cases, is clear that the plaintiff cannot recover for an improvement. The 1st section of the general patent law speaks of an improvement as an invention, and directs the patent to issue for this said invention. The 3d section requires the applicant to swear or affirm that he believes himself to be the true inventor of the art, machine, or improvement, for which he asks a patent; and further that he shall deliver a written description of his invention, in such full, clear, and exact terms, that any person acquainted with the art, may know how to construct and use **367\***] \*the same, &c. That it is necessary to the validity of a patent, that the specification should describe in what the improvement consists, is decided by Mr. Justice Story, in the cases referred to in the appendix to 3 Wheat. Rep., and in the cases of *Bombon v. Bule*, *Boville v. Poor*, *M'Farlane v. Price*, *Harmer v. Playne*; and perhaps some others. What are the reasons upon which this doctrine is founded? They are to guard the public against an unintentional infringement of the patent, during its continuance, and to enable an artist to make the improvement, by a reference to some known and certain authority, to be found among the records of the office of the Secretary of State, after the patent has run out. But it is contended by the plaintiff's counsel, that the law would be unreasonable to require, and that it does not require this to be done, unless the improvement is upon a patented machine, a description of which can be obtained by a reference to the records of the Secretary of State's office; that it might often be impossible for the patentee to discover, and consequently to describe the parts of a machine in use, perhaps only in some obscure part of the world. The answer to this is, that an improvement necessarily implies an original, and unless the patentee is acquainted with the original which he supposes he has improved, he must talk idly, when he calls his invention an improvement.

If he knows nothing of an original, then his invention is an original, or nothing: and the Wheat. 7.

subsequent appearance of an original to defeat his patent is one of the risks, which every patentee is exposed to under \*our law. As [**368** to the supposed distinction between an improvement on a machine patented, and one not so, there is nothing in it. In both cases the improvement must be described, but with this difference: That in the former case it may be sufficient to refer to the patent and specification, for a description of the original machine, and then to state, in what the improvements, or such original consists; whereas, in the latter case, it would be necessary to describe the original machine, and also the improvement. The reason for this distinction is too obvious to need explanation.

If the general law upon this subject has been correctly stated, the next question is, is this an excepted case? It is contended by the plaintiff that it is so. 1st. In virtue of the act for the relief of O. Evans; and 2d, by the decision of the Supreme Court.

1. Under the private act: That declares, that the patent is to be granted in the manner and form prescribed by the general patent law. What constitutes the manner and form in which a patent is granted by the law? The obvious answer is, the petition; the patent, with the signature of the President and the seal of the United States affixed to it; the oath or affirmation; the specification, or description of the invention, as required by the third section; the drawings and models, if required. Will it be contended that a patent would be granted in the manner and form prescribed by this law, if there were no description whatever of the invention? and if it would not, which is taken for granted, where is the difference between the total absence of a specification, and one which has no reference \*at all to the invention for [**369** which the patent is granted?

This is not the case of an imperfect or obscure description; but of one which relates exclusively to the whole machine; whereas, the invention for which the patent is granted, is for an improvement.

2. The opinion of the Supreme Court, which states, "that it will be incumbent on the plaintiff, where he claims for an improvement, to show the extent of his improvement, so that a person understanding the subject may comprehend distinctly in what it consists."<sup>1</sup> But how is it to be shown? The court has not pointed out the manner, and we therefore think the only fair implication is, that it must be shown as the statute of the United States and the general principles of law require, *i. e.*, by the patent and specification. If it may be shown by parol evidence to the jury, as the plaintiff's counsel contend it may, then it may be fairly asked *cui bono?* which sort of a showing would then be, so far as it would be productive of any useful purpose? As to the defendant, the evidence comes too late, to save him from the consequences of an error innocently committed. As to the public at large with a view to caution, during the continuance of the patent, and to information of the nature of the improvement after its termination, the evidence given in this cause must be evanescent and totally useless.

We feel perfectly convinced that the mean-



ing of the Supreme Court, as to this point, is again misunderstood by the plaintiff's counsel, not only for the reasons above mentioned, but **370\***] because the extent and \*construction of the plaintiff's patent, and not the validity of it, in relation to any one of the machines, were the questions before that court; and none others (in reference to the charge), were argued at the bar, or reasoned upon by the Chief Justice, in delivering the opinion.

Upon the whole, we are of opinion, that the plaintiff is not entitled to a verdict for the alleged infringement of his patent, for an improvement of the hopper-boy.

Whereupon a verdict and judgment thereon were rendered for the defendant in the Circuit Court, and the cause was again brought by writ of error to this court.

*Mr. C. J. Ingersoll*,<sup>1</sup> for the plaintiff, premised a review of Evan's inventions and improvements as in proof in the cause, originating in 1783, and perfected, as regards the hopper-boy, in 1785, the grants from the legislatures of Delaware, Maryland, and Pennsylvania, in 1787; the first patent of the plaintiff under the federal government, in 1790, and the second in 1808, by virtue of the special act of Congress for the relief of Oliver Evans. The great utility of those improvements was now universally acknowledged, while the patentee was deprived of all their advantages. It was a singular misfortune for him, among others, to be under the necessity of bringing his patent a second time before this court, for revision, in the same case, in which much of the matter in dispute was the construction of the opinion formerly pronounced, reversing that of the \*Circuit Court of Pennsylvania, which that court had occasion to review. It was the earnest hope of the plaintiff that a full and final decision would now take place, so as to put the subject at rest.

With respect to the matters of evidence, he contended, (1) that David Aby was incompetent as a witness, because he was sued in *pari delicto*, and of course disposed to vacate the patent he had himself infringed. Interest in such a question is equivalent to interest in the cause. Perhaps even the verdict might be given in evidence, under the sixth section of the act of 1793, c. 11, which enjoins it on the court to declare the patent void in the event of a verdict for the defendant. The plaintiff's answer to this objection is, that as the patent is for several machines and improvements, the court could not annul such a patent, but on the foundation of a verdict against all the claims. But why not? Why not declare it void *pro tanto*? Every principle applicable to common cases applies to this. Nay, it is even more necessary, in so complicated a monopoly, to guard the public against imposition or vexation, by demands founded on any part of it, tried and abrogated. (2) It was objected to David Aby, as a witness, that he and six others, including the defendants in these cases, as was ascertained on his *voir dire*, combined to defeat the suits, and for that purpose contributed a common purse to bear the expenses of defending them. If any sur-

plus remained, it was to be returned by the witness, who acted as treasurer; if any deficiencies, it was to be raised by further levies from the contributors. This was breaking down all distinction \*between bias and [**\*372** interest. It amounted, perhaps, to maintenance.<sup>2</sup> (3) David Aby was suffered to prove the existence of the Stouffer original hopper-boy, when the notice was that evidence would be given of the existence of the improved hopper-boy. The notice is in 3 Wheat. Rep., 470. By this, a complete surprise was inflicted on the plaintiff. The defendant's position was, that for this purpose, he waived the notice of special matter and gave the evidence, under the general issue, as proof of non-user. But as the notice is equivalent to a special plea, was it competent to the defendant, after putting it in, to abandon it on the trial? There no doubt are cases when the defendant might avail himself of the general issue.<sup>3</sup> But this was a case of special matter, tending to prove that the specification does not contain the whole truth, or that the thing was not originally discovered by the patentee. The decisive proof of this position is, that the defendant was allowed to use the same evidence to show that the plaintiff was not original with his hopper-boy, which he used to show that the defendant did not use the hopper-boy. It was an evasion of the wholesome provisions of the sixth section of the act of 1793,<sup>4</sup> calculated to destroy a patent by means which a patentee never could possibly controvert. It was an aggravation of these objections that the court charged the jury, that after a witness was ruled by the court to be competent, the jury could not \*disqualify him on the [**\*373** ground of discredit, but must believe him, unless otherwise contradicted. By this course of proceeding, the defendants were their own witnesses, and the plaintiff was not allowed to discredit them. (4) The court should have suffered the plaintiff to prove that the son of one of the Stouffers, and the executors of another, purchased Evans' improvements. On the former occasion, similar evidence was sanctioned as to the Stouffers themselves, the alleged originators of the hopper-boy.<sup>5</sup> And why not the acknowledgments of their descendants and legal representatives? It was treated before as evidence of opinion. If so, why not the opinion of one generation as well as another? But it was more than opinion. It was traditional history of the invention and improvements. (5) The court should have suffered the defendant's witness, Philip Frederick, to be asked whether Daniel Stouffer was subject to fits of mental derangement. Stouffer was the defendant's principal witness; and that was a most material circumstance in his faculty to bear credible testimony as to remote periods and obscure circumstances. Besides, the witness, Philip Frederick, if he had denied the fact, might have been contradicted by other testimony; in which respect it was a very important inquiry to be made of him, with a view to Frederick's credit. (6) The deposition of Michael Forner was overruled, after that of John Shet-

1.—Some part of his argument is applicable to the points of evidence in the subsequent case of Evans v. Hettich.

2.—5 Burr. 2730; Phill. Ev. Ch. 5, p. 49.

3.—3 Wheat. Rep. Appx. 27.

4.—Act of 1793, c. 11, s. 6; 3 Wheat. Rep. 504.

5.—3 Wheat. Rep. 495, 505.

ter had been received under precisely the same circumstances. Neither of them was taken according to the act of Congress, which is in-  
**374\***] convenient and \*unfair in its operation. Rules for depositions were entered by both parties. Both parties took depositions under these rules. When the defendant offered to read Shetter's deposition, no objection was made, and it was laid before the jury. But when the plaintiff offered to read Forner's, taken in the same manner, and under the same rules, it was objected to, and overruled. The clerk testified, that for twenty years the practice had been to take depositions by rule, on notice, instead of taking them under the act of Congress, which requires no notice where the witness lives more than 100 miles from the place of trial. There was, therefore, evidence of mutual consent and understanding between the parties, deducible both from the invariable practice, and from the rules entered and acted on in these cases. Yet the court rejected the plaintiff's proof, and suffered the defendant's to remain as received in force. Thus the plaintiff was most unexpectedly deprived of some of his most material testimony, while the defendants themselves were their own witnesses.

The main matter in dispute was on the court's construction of the word "improvement," which it imputed to the patent. This radical difficulty escaped notice when these cases were before discussed in the circuit and supreme courts. 1. It was a misapprehension to suppose that the word exists at all in the patent or specification, in connection with the hopper-boy. The patent is for improvements in the art of manufacturing flour, and for certain other machines, one of which is denominated an improved hopper-boy. But the distinction is obvious.  
**375\***] between \*something patented as an improvement of a hopper-boy, and something patented as an improved hopper-boy. The latter was so called, as substituting mere machinery for manual labor. It might be so called as a caveat against unknown but possibly existing originals, which, in the strong illustration of the court, would avail a defendant if he could prove their existence in the mountains of China. It might be so called, as meaning nothing more than a melioration of the inventor's own original essays. Evans' hopper-boy was a great and most beneficial improvement, which he called an improved hopper-boy. But it had no original. Even the bolt-filler, ascribed to Stouffer, alleged to be of earlier origin, was as different in principle, as it was inferior in practice, to the plaintiff's machine.

2. It was a second error of the court, to take it for granted, that the improved hopper-boy was not so described in the specification, as to distinguish it from all things before known or used, and to enable a person skilled in the art to make it. It is so described. (Here the counsel went into a specification of the peculiar structure and properties of the hopper-boy.) No one skilled in the art could misapprehend this description, or be misled by it. The error of the court was, in condescending to consider itself skilled in the art of which this is a branch. The law does not require of patentees to describe new and old, but merely to distinguish new from old. Otherwise a patent would be

more complex and voluminous than a Welsh pedigree. Take a boat, for instance; must every species, from the ark downwards, \*be described? The peculiar properties [**376** of the improved hopper-boy are perfectly explained. It is not a mere change of form and proportions, but a combination of well-known materials, on new principles, essentially set forth in the specification, so as to prevent all interfering claims during the exclusive term, and to impart the rights to the public afterwards. The authorities were misunderstood by the court in this respect. They all require, to be sure, a discrimination, when the subject-matter is an improvement: But they require only an essential improvement; not a recapitulation of the particulars of both the old rudiments, and the new combinations, in detail, distinguishing them in terms.

3. This, however, was a question of fact to have been submitted to the jury, instead of being, as it was, exclusively assumed and determined by the court. How can a court decide, whether a person skilled in the art could understand a description, and copy a machine? The cases are uniformly so.<sup>1</sup> In all these cases, the court left this inquiry as a fact to the jury. Indeed, the 6th sect. of the act of 1793, c. 11, treats it not only as matter of fact, but of fraud. It must appear that the specification is untrue, either deficient or redundant, in order to deceive the public. It is matter of concealment. Can the court infer this scienter?

4. Indeed, it may well be doubted whether any discrimination is necessary, where, as in this case \*there is but one patent in [**377** existence. The second section of the law speaks of the case of a prior patented machine. The court would have the third section to be substantive, without association with the second and sixth. But how can a patentee describe what he never saw? If not before patented, how could he see or know? If he knew, but concealed his knowledge, is it not matter of fraud? The cases, when examined, will be found to have most of them referred their reasoning to the point of conflicting patents. Such is the fact in *Harmer v. Playne*, *Bozill v. Moore*, and *Lowell v. Lewis*. Which explanation is all important to a correct understanding of those cases.

5. The special act of Congress for the relief of Oliver Evans, vouchsafes him from all technical obstacles. His improvements by that time were universally acknowledged. Congress did not mean to forestall the ascertainment of their originality, which any citizen might try, if he chose, nor their utility. But the relieving act dispenses with specification, oath, fee, and all the other prerequisites of common cases. It was not designed merely to prolong the term of monopoly, but to relieve it from vexations and frivolous embarrassments. Accordingly, it uses the term improvements, in addition to the terms applied to such subjects by the act of 1793; and confers on Oliver Evans an exclusive right in his discoveries, inventions, machines, and improvements in general, and specifically. The obvious design of this act of grace, was to

1.—8 T. R. 95; 11 East's Rep. 101; 2 Marsh. Rep. 211; Starkie's N. P. Rep. 199; 3 Meriv. 622; 1 Gallis. 438; 2 Gallis. 51; 1 Mass. 182, 432; 3 Wheat. Rep. 514; Appx. 17.



relieve the grantee from all the formalities to which patentees in common are subjected, **378\*** leaving the question of priority or originality alone open to inquiry by the country.

6. But even this inquiry was not competent to these defendants, who are citizens of Pennsylvania. The act of assembly of that commonwealth, in 1786, confers on Evans the exclusive right in his hopper-boy, and inflicts penalties on all infractors of it. To this act, the defendants directly acceded and contributed by their representatives; and it is a well-settled principle, that they are bound by their legislation.<sup>1</sup> Nor is this position at all affected by the 7th section of the act of 1793, c. 11.

*Mr. Sergeant.* contra. A patent is intended to secure to an inventor the exclusive right, for a limited time, to his invention. At the expiration of the period, the thing thus secured is to become public property, which any one is at liberty to use. In the mean time, every one is to abstain from using the thing patented, at the peril of a severe responsibility in damages. The provisions of the patent law have a view to these several objects, all of which are to be promoted as far as possible, and reconciled with each other, the public security and the benefit being protected, as well the interests of the inventor. He is to enjoy the fruits of his ingenuity, upon terms and conditions, which are compatible with the safety, the peace, and the interest of other citizens.

A patent, therefore, in the first place, can **379\*** only be for an original invention. It is of no importance, that a man really believes himself to be the inventor, or is the true inventor, having made the discovery himself, without even the knowledge, that the thing he supposes himself to have invented, was known or used before, or described in some public work. However honest he may be, he has no merit, as respects the rest of the community, in discovering what was already known and open to common use; nor will he be allowed to appropriate the thing to himself, because he has made a mistake. The truth of his invention, though not an original one, will protect him against a summary proceeding to set aside his patent under the 10th sec. of the act of 1793, c. 11; but it will not avail him to enforce his claim in an action against an individual. The want of originality, proved by showing that the thing was used or known before, or described in some public work, is, in every case, a valid and conclusive defense.

Again; an invention may be of a machine, or of an improvement on a machine; of something that was entirely unknown before, or of an addition to or alteration in what was previously known, so as to make it more useful. Each of these is a patentable object; but the patent, as to both, is to be for the invention only, and the laws that govern it, thus understood, will be found to be exactly the same. Novelty is an essential part of the merit, and it is only what is new that is to be secured by the patent. A mistake is just as fatal to the patentee in the one case as in the other; and if he **380\*** should really believe himself to have invented an improvement, when in truth it was known, used or described before, he could not

give legal effect to his patent. There is, however, one peculiarity in the case of patents for improvements. Improvement being a relative term, presupposes the existence of something to which it refers, known to the inventor at the time of making the supposed improvement. If he does not know of it, he cannot know he has improved upon it; and if he does know of it, he can readily describe the improvement he has made, that is, his own invention. A man who has never heard of a time-keeper, might suppose himself the inventor of one; but it is impossible to conceive, that a man who has never heard of such a thing, should believe himself to be the inventor of an improvement upon the time-keeper.

A patent for an entire machine covers the whole—a patent for an improvement, on the contrary, covers only the improvement, and necessarily supposes there are parts which are not patented. It is the line between these, and the parts which are patented that defines the respective pretensions of the patentee and the public; and unless that line be somehow marked, it is impossible to say where the one terminates, and the other begins. Confusion, uncertainty, extortion, fraud, and litigation would be the inevitable consequence.

It is the business and duty of the inventor, then, at the time of applying for his patent, and before he can receive a patent, to deliver a "written description of his invention, and of the manner of using, or process of compounding the same, in such full, clear, and **[381]** exact terms, as to distinguish the same from all other things before known, and to enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make, compound, and use the same," &c., sec. 3. This specification is to remain in the office of the Secretary of State, and a copy of it is everywhere made evidence. The design of this provision is manifest; it is to secure to the public the use of the invention, after the expiration of the period for which the patent is granted; and to enable individuals, in the mean time, to know what it is that is intended to be secured, so that they may avoid interference, or, if they think proper, dispute the claim of originality. For both these purposes, it was necessary that there should be authentic and recorded evidence, accessible to all, and remaining unchangeable and unaltered. Without a specification, the patent would be void. A specification which does not comply with the requirements of the act of Congress, is, to all legal intents, no specification, and the patent would be equally void, as if there were literally no specification.

In the present case, the patent is to be regarded, either, 1. As a patent for the whole machine, or, 2. As a patent for an improvement on an old and known machine. The utmost that can be contended, is, that the patentee has an election to consider it as the one, or the other; and that is a very liberal concession, inasmuch as it is founded upon the ambiguity of his own specification, from which, generally, a man ought not to be permitted to derive an advantage. But it is clear that it cannot be **[382]** a patent for both; that would be a legal absurdity, involving a plain contradiction in terms.

1. As a patent for the whole machine, in-

Wheat. 7..

1.—10 East's Rep. 536; 3 Johns. Ch. Rep. 598.

cluding the plaintiff's alleged improvement, it is void, because the plaintiff was not the original inventor of the machine. The fact, that a hopper-boy, known by the name of an S. or Stouffer hopper-boy, having all the essential parts of the plaintiff's machine, and applied to the same uses and purposes (whether more or less perfectly, is not material to inquire), existed, and was in use, before the date of the plaintiff's earliest alleged discovery, has twice been proved to the satisfaction of intelligent juries in each of these cases, and is now to be taken for granted, as conclusively established. At the former trial, the learned judge who presided (Mr. Justice Washington) instructed the jury, if they should be of opinion that Oliver Evans was not the original inventor, to find for the defendant; which they did accordingly, being fully satisfied of the fact. Upon error to this court, the judgment was reversed, on the ground that the patent was not for the machine, but for an improvement; the phrase "improved hopper-boy," being after much hesitation, deemed equivalent to "improvement" on a hopper-boy. But the opinion of the court distinctly admits, what indeed cannot be questioned, that if, as respects the hopper-boy, the patent had been for the whole machine, the direction of the learned judge would have been right.

In giving to the plaintiff the benefit of the alternative, the case was put in the most favorable view for him. He might claim as inventor of the whole machine, or he might claim as inventor of the improvement; but, under this patent he could not claim for both; and in claiming for either, he must of course abide by the settled principles of law, applicable to the construction of the patent thus adopted. Each must be taken singly. The two could not be confounded, so as to entitle him upon the one to the benefit of principles belonging to the other. If the patent be for the whole machine, it is void if he is not the original inventor; and that he is not, has been fully established.

It is intimated, however, and will probably be insisted upon hereafter, that admitting the S. or Stouffer hopper-boy to have been previously known and used, the two machines are so entirely different, that Mr. Evans might well be entitled to a patent for the whole. As a question of fact, that has been decided by the verdict of the jury, and the identity of the machine must now be taken for granted, unless the jury were led to the conclusion by an erroneous charge from the court. What constitutes identity, and what diversity, is frequently a question of great difficulty. It was the right and the duty of the judge to inform the jury what were the principles to guide their deliberations in deciding it, and this he has done with admirable clearness, and in conformity with the best authority upon this abstruse part of the law. "Where a specific machine already exists" (says Mr. Justice Story), "producing certain effects, if a mere addition is made to such machine, to produce the same effects in a better manner, a patent cannot be taken for the whole machine, but for an improvement only."<sup>1</sup> And the same learned judge

says, "the material question, therefore, is not whether the same elements of motion, or the same component parts are used, but whether the given effect is produced substantially by the same mode of operation, and the same combination of powers, in both machines."<sup>2</sup> The identity here is perfectly apparent upon the description, and still more so upon inspection of the models. The object of both is the same—to dispense with manual labor, and supply the hopper—to supply it gradually, in small, successive, regular portions, by means of the power that moves the mill; substituting mechanical contrivances for human agency. The effect is the same, to turn, stir, and cool the flour, and thus prepare it for bolting before it is delivered. The construction of the machines as to "the mode of operation," and "the combination of powers" is the same. In both, there is an upright shaft, with a cog, turned by the power that moves the mill; an arm, resting lightly on the meal, and turned by the upright shaft: something on the under part of the arm, whether flights or sweepers, to gather in the meal to the hopper. So far, they are the same. Now for the differences. The plaintiff's machine has a round shaft, instead of a square one; it has leading lines, which are necessary in consequence of the shaft being round, and a weight to balance the arm. These may all be improvements, but they are only improvements, and do not make a different machine. The name itself bespeaks identity; the old machine was called a bolt-filler, or hopper-boy; and the plaintiff's is called "an improved hopper-boy."

But if the machines be so entirely different, as to entitle the plaintiff to a patent for the whole, though the S. hopper-boy was previously known and used, then it would necessarily follow, that even if the plaintiff were the original inventor of the improved machine, and that was the first invention, yet any one might with impunity make and use such a machine as the S. hopper-boy; that is to say, by stripping off some of the parts, he might entitle himself to use the residue. This is a proposition too monstrous to be maintained. If it be sound, it decides this case without any regard to the question of original invention, for the defendant Eaton used only the S. hopper-boy.

A sure test, however, of the identity, is to consider what parts are indispensable to both machines. They are, the upright shaft with a cog in it, the arm, and the sweeps. With these, the machine will work; without them, it will not. These parts are common to both machines. What is it that the plaintiff has added? What is not indispensable, but perhaps better. That is exactly the definition of an improvement. Can he, in his improved machine, dispense with any one of the parts that belong to the old machine? The answer is clear—he cannot. Can we dispense with any of his additions? Yes, with all of them. The machine is complete, an efficient agent for its purpose, without them; the evidence even leaves it doubtful whether, apart from the elevator, it is not the better of the two. It is certainly in use, and is the very machine for the use of which Mr. Eaton is sued. There can be no serious doubt,

1.—Whittemore v. Cutter, 1 Gallis. 450.  
Wheat. 7.

2.—Odiorne v. Winkley, 2 Gallis. 54.



that if the plaintiff has any claim, it is only for an improvement.

2. As a patent for an improvement, it is void, because the specification does not show in what the improvement consists, or, in other words, what it is that the plaintiff claims as his invention; "the nature and extent of the improvement are not stated in his specification." This was the precise ground of the decision below.

The counsel for the plaintiff who opened the argument, was understood to concede, that if the patent be for an improvement, and there be nothing in the circumstances of this particular case to make it an exception from the general rule, the law was correctly laid down. And certainly there can be no doubt of this, whether we consider the spirit and terms of the act of Congress, the decisions in England, or the adjudged cases in the United States.

The current of authority, of every sort, is uniform to establish, that the invention to be patented must be described in such full and exact terms as to "distinguish the same from all things before known." The 2d section of the act has no relation to this question. That provides for the case, where one man has a patent for a machine, and another for an improvement, declaring that the one shall not be at liberty to use the invention of the other, and thus precisely limiting their respective rights. Does it follow, that if a machine has not been patented, he who improves upon it has a right to appropriate the whole to himself, and withdraw what **387** \*] \*was before public property from the public use? That no one can afterwards make use of the old and known machine, without the license of the patentee? The section was made with a different view, and leaves what is not provided for upon the same footing on which it before stood. What was common property remains so; the patentee of the improvement is at liberty to use it because it is common, and no legislation was necessary to enable him; but he is not allowed to appropriate it to himself to the exclusion of others, any more than to appropriate the invention of a prior patentee. The 6th section, which makes it a good defense, that the patentee has stated more or less than the truth in his specification, "for the purpose of deceiving the public," has no relation to the question. There is no allegation here that the machine will not produce the described effect, or that more or less has been stated for the purpose of deceiving or misleading the public. Nor is this, the court will recollect, a summary proceeding to set aside the patent under the 10th section.

But the question, and the only question, is whether in an action by a patentee against a person charged with infringing his patent, it is not necessary for the plaintiff to show in what his invention consists. In the former argument of this case, this court have laid it down expressly, that "in all cases where his claim is for an improvement, it will be incumbent on him to show the extent of his improvement, so that a person understanding the subject may comprehend distinctly in what it consists.<sup>1</sup> How is

this to be\* shown? The answer is obvious—it is to be shown from the specification. That such was the meaning of the court is evident from their adopting almost the very words of the act of Congress, which are employed to describe the office of the specification, "so that a person understanding," &c. That nothing else could be their meaning is evident, for such, it cannot be denied, is the clear design of the act of Congress, and such is the established law as collected from authoritative decisions. The patent must not be more extensive than the invention; therefore if the invention consists of an addition or improvement only, and the patent is for the whole machine, or manufacture, it is void.<sup>2</sup> In England, the specification is not annexed to the patent, but is enrolled in chancery. Yet the specification is a part of the patent for the purpose of ascertaining the nature and extent of the alleged invention.<sup>3</sup>

In this country, it is filed in the Department of State. An authenticated copy of it is always annexed to the patent, and forms a part of the patent, absolutely essential, because the patent, properly so called, in fact gives no description, referring for that to the specification. The established formula used in all patents, and to be found in the present patent, is, "the said improvement, a description whereof is given in the words of the said Oliver Evans himself, in the schedule hereto annexed, and is made a part of these presents." Now, what should the patent \*comprehend? Where the combination [**389** of a certain number of the parts has existed, up to a certain point, in former machines, the patentee merely adding other combinations, the patent should comprehend such improvements only.<sup>4</sup> And the cases that have been already referred to clearly decide, that if the invention be of an improvement only, it is indispensable that the patent should not be broader than the invention; and the specification should be drawn up in terms that do not include anything but the improvement. It is essential to point out what is new, and what is old, so as to show precisely the extent of the alleged improvement. The patentee ought, in his specification, to inform the person who consults it, what is new and what is old. He should say, "my improvement consists in this," describing it by words, if he can, or if not, by reference to figures. But here the improvement is neither described in words or figures; and it would not be in the wit of man, unless he were previously acquainted with the construction of the instrument, to say what was old and what was new. A person ought to be warned by the specification against the use of a particular invention.<sup>5</sup> It need not be denied that this description might be sufficiently given by reference; as to some other patented machine, or to some well-known machine in familiar use. For instance, to use the illustration employed by Lord Ellenborough, if \*we should say, take a common watch, [**390** and add or alter such and such parts, describing them. All that is contended, and that is fully supported by authority, and by the reason of the case is, that the specification must, in

1.—3 Wheat. Rep. 518.

2.—Bull. N. P. 76; Boulton v. Bull, H. Bl. Rep. 463

3.—Boulton v. Bull; Hornblower v. Boulton, 3 Term. Rep. 95.

4.—Bevill v. Moore, 2 Marsh. Rep. 211.

5.—Per Lord Ellenborough; M'Farlane v. Price, 1 Starkie's Rep. 199.

some way or other, distinguish the new from the old, the improvement from what was known before, so as to show what the patented invention is, or else the patent is broader than the invention, and void. The decided cases in the United States are to the same effect. If the inventor of an improvement obtain a patent for the whole machine, the patent being more extensive than the invention, is void.<sup>1</sup>

The cases are brought together, well digested, and the principles stated in the appendix to 3 Wheat. Rep., 13.

How else can the extent of the improvement be shown? Shall it be by evidence at the trial? Then the design of the act would be entirely defeated, and the specification useless. The argument of the court below upon this point is perfectly conclusive. To say that the patent may be for the whole machine, and the claim for as much as the plaintiff can prove to be original, or rather the defendant cannot disprove, is to make the right depend, not upon the patent, nor even upon the fact of originality, but upon the evidence the party may have it in his power to produce, and his intelligence and skill in applying it. The right, instead of being uniform everywhere, \*might be one thing in one state, and another in another. In different courts of the same state, it might be different. And even in the same court, at different times, as the particular evidence happened to vary, it would be more or less extensive. The patent would in effect be nothing but an outline, large enough of course, to be filled up as occasion might serve. This is an absurdity, and, what is worse, a great temptation to fraud. Besides, under this supposition, how is any man to inform himself what it is that is patented, so that he may avoid the danger of infringement? It is too late at the time of trial, to answer any good purpose to the defendant. And how are the public to be informed at the expiration of the time, or how is a person of skill to be able to make the improvement; in short, of what use is the specification, unless it be to define, with precision, the extent and nature of the improvement? The act of Congress emphatically refers to the specification, and to that alone, as furnishing everything, without extrinsic aid, and so it must do. If it be broader than the invention, the patent is void.

But it is objected here, that this was a question for the jury, and not for the court. Whether the specification is broader than the invention, may perhaps in some cases be a question of fact, or a mixed question of fact and of law, the construction of the written instrument of specification being for the court, and the other evidence in the case for the jury. But, if it be "incumbent upon the plaintiff to show the extent and nature of his improvement," and that is to be shown from the specification, then it is plainly incumbent upon him **392\*** to show from the specification, \*where he claims for an improvement, that he has described an improvement as distinguished from a known machine. And that it is submitted, being exclusively a question arising upon the face of the instrument, is a question for the

court. Let us examine the specification. Is there anything in it which even professes to describe an improvement, as distinguished from a machine known or used before? Does it not plainly, and in terms, include the whole machine? That is evidently a question of law, upon the face of the instrument, and it may be confidently pronounced, that it does include the whole, and that no man can so read the specification, as to ascertain which parts are claimed by the plaintiff, and which are not; or, that there are any parts which are not claimed by him. But, it is due to the court, further to say, that the charge in this respect, must, as in all other cases, be understood with reference to the allegations and to the evidence. If there had been an attempt to prove, or even an assertion, the most distant intimation, that men of skill in mechanics, bringing to the study of this difficult specification, the aid of peculiar knowledge, could discern in it a line between new and old, or any defined limits of improvement, that would doubtless have been fit to be heard, and whatever matter proper for the consideration of a jury might have arisen, would have been submitted to the jury. But no such evidence was offered—the record shows it. No such suggestion even was made; it was not pretended—the charge shows it; for the part excepted to was itself a reply by the court to an argument of the plaintiff's counsel, \*which admitted that the specification [**393** did not show in what the improvement consisted, by contending for the extravagant position that it was competent to show it by evidence at the trial, which is in effect to say, that the plaintiff was entitled to whatever the defendant had not disproved.

It has been said, however, and to our very great surprise, that the court below erred in dealing with this patent as a patent for an improvement; that it is not for an improvement, but for an improved hopper-boy. When this case was formerly before the Circuit Court, that court dealt with the patent as a patent for a hopper-boy, and not for an improvement. Upon error to this court, one error principally relied upon was, that the court below had thus construed it to be a patent for the machine.<sup>2</sup> And it was contended that an "improved hopper-boy," and an "improvement on a hopper-boy," were one and the same. "This," says one of the counsel, "was a patent for an improvement on the particular machine in question." And of that opinion were the court, after much deliberation.<sup>3</sup> And can it now be contended, in the same court, and by the same party, that this is not to be dealt with as a patent for an improvement? But, the truth is, it has been treated in this case as a patent for both the machine and the improvement, so as to give the plaintiff the full benefit of either construction. The real aim of the argument is to maintain, \*that a patent for the whole may [**394** be expounded as a patent for each of the parts, and legally covering as many as the patentee may be able to prove he has invented; that it may be a patent in words for one thing and in law for another; that it may have a sort of elas-

1.—Woodworth v. Parker, 1 Gallis. Rep. 439; Whittemore v. Cutter, 1 Gallis. Rep. 475; Odiorne v. Winkley, 2 Gallis. Rep. 51.

Wheat. 7. U. S., Book 5.

2.—3 Wheat. Rep. 486, 502.

3.—3 Wheat. Rep. 517.



tic ambiguity, capable of contraction, if not of expansion, so as to adapt itself to whatever it may be found convenient at any given time to embrace. This is against all settled principles; it is against good policy; and it is against the words and the spirit of the act of Congress.

Such being unquestionably the established law upon the subject of patents in general, it remains only to inquire, whether the ease of Oliver Evans is on any account an exception. And it is insisted here, that the special act for his relief makes it an exception. The history of that act is sufficient to show, that its only object was, to authorize a new patent to be issued by reason of the first having been declared void for irregularity of form attributable to the officers of the government. This gave an equitable title of relief. The appropriate relief was an extension of the time, so that the inventor might enjoy the privileges of a patent for the same time that he would have enjoyed them if the irregularity had not occurred, that is to say, the same privileges. This was sufficiently liberal, for the first patent had actually expired before the new one was granted. The new patent, too, was made retrospective, and gave to Oliver Evans an exclusive right for eight and twenty years, double the usual period; yet it was contended, formerly, that this special **395\*** act, liberal as it \*confessedly was, went the further length of dispensing altogether with the necessity of proving he was the inventor, and even precluded all right to question the invention, which was in effect to say, that the exclusive privilege was secured to him, whether he was the inventor or not. That was overruled by this court, upon the plainest grounds.<sup>1</sup> And the whole scope of the opinion then delivered distinctly establishes, that except the extension of time and the union of different inventions in the same patent, which otherwise perhaps could not be regularly joined, the patent to be issued, was to be in all respects conformable to the general law, and subject to the same regulations as other patents. Such was the interpretation of the plaintiff himself: he applied in the usual manner, by petition, with a specification and oath. Such was the interpretation of the officers of government: the patent underwent the usual examination, and is in the usual form. Such is at this moment the interpretation: for it is upon the adoption of the general law by reference, that the jurisdiction of the federal courts in cases growing out of this patent entirely rests. If that law be not applicable, this court has no power to adjudicate the cause. It is needless to pursue this further, being already decided by the former decision of this court. For the terms and conditions upon which the patent was to be granted; the jurisdiction to attach to it; the rules to govern it; the special act makes no provision, but by reference to the existing law; and **396\*** \*but for this reference we could not advance a single step in the inquiry.

All that has been said of the act of the legislature of Pennsylvania passed in the year 1787, may be disposed of in a single word. What its provisions were does not appear, and if it did, the right they conferred, whatever it may have been, was surrendered by accepting a patent

under the law of the United States. The seventh section of the act of Congress is expressed.

In conclusion, then, it is confidently submitted, that the patent of Oliver Evans must be considered as a patent either for the machine or for the improvement.

That if it be for the machine, it is void, because it is fully proved that he was not the original inventor, but the machine was known and used before.

That if it be for an improvement, it is void, because it is broader than his invention, and does not specify in what his improvement consists, so as to distinguish it from what was known and used before.

The learned counsel also urged the points of evidence in this and the next following case (*Evans v. Hettich*), but as they are so fully noticed in the opinion of the court, it is not thought necessary to report that part of his argument.

*Mr. Harper*, in reply, observed, that in the opinion of the Circuit Court, two propositions were distinctly affirmed: (1) That Evans' patent of the hopper-boy was a patent for an improvement, and not for an original invention or discovery; and (2) \*That being for [**397** an improvement, was void, because the specification did not in terms distinguish the improvements from the original machine, called the Stouffer hopper-boy. Both these propositions were indispensable for supporting the judgment below. He denied them both, and should endeavor to show that they were equally void of foundation. If he could succeed in overthrowing either, the judgment of the Circuit Court must be reversed, and the patent right of the plaintiff supported; but he believed, and should endeavor to show, that both were wholly unfounded.

And first, is the patent of Oliver Evans a patent for an improvement, or for an original invention? The decisions of the Circuit Court maintained the former. He should endeavor to demonstrate the latter.

In the outset of this investigation it would be proper to remark, that the specification makes part of the patent; and he had the authority of this court, in the former decision in this case,<sup>2</sup> for saying, that in order to ascertain what Oliver Evans obtained by his patent, one of the proper points of inquiry was, what did he ask for? what was it his wish and intention to obtain? This question may be satisfactorily answered, by referring to that part of his specification which relates to the hopper-boy. This specification is printed at length in a note to 3 Wheat. Rep. and the part of it now in question is found at p. 468. The description of the machine is very full, \*minute, and clear; and it [**398** concludes with this declaration: "I claim as my invention the peculiar properties or principles which this machine possesses, viz., the spreading, turning, and gathering the meal, at one operation, and the using and lowering its arms by its motion, to accommodate itself to any quantity of meal it has to operate on."

This was what he claimed as his invention. For this he asked a patent. Not for the machine which he had thus improved, but for the prin-

1.—3 Wheat. Rep. 513.

2.—3 Wheat. Rep. 507.

ciple on which it was made to operate. He has not very accurately expressed himself, or distinguished between the object to be obtained, and the mode of proceeding for its attainment; between the end and the means; the result and the *modus operandi* by which it is produced. But still his meaning is obvious. The object, the end to be obtained, the result, was the "spreading, turning, and gathering the meal, at one operation." The principle of the machine, the *modus operandi* by which the object was to be accomplished, in a new and better way, was the power of the machine to raise and lower its arms by its own motion, so as to accommodate itself to any greater or less quantity of flour on which it may have to operate. This, then, is his invention or discovery, which he claims as his own, and for which he demands a patent. His demand is complied with. He gets what he asked. This is what the grantors intended to give him; and I appeal again to the former decision, for the doctrine, that in order to ascertain what is given, we must look to the request of the receiver, and the intention of the giver.

**399\*]** \*It is, then, a patent for the peculiar principle of his machine, for its new mode of operating, that Oliver Evans asked for and received. That a new *modus operandi*, by a new combination of old instruments or machines, so as to produce either a new effect, or an old effect in a new way, is the proper subject-matter of a patent, appears from numerous authorities, and may be considered as a settled principle of the patent law. It was on this principle that Watts' patent for his improvements on the steam engine, which made so much noise in Westminster Hall, and produced such important effects, was finally supported and established.

The English law of patents, though different from ours in its origin, was probably the same in its principles. Indeed, our act of Congress was a mere enactment of the principles and system, which the English courts had established. That system grew out of the ancient prerogative of the crown in England, to grant monopolies. This power, long and often most oppressively exercised, was abolished in the early part of James the First's reign, by an act of Parliament, which was one of the earliest fruits of the increase of knowledge, the progress of correct ideas, and the improvement in the condition of society, which, at that time, had begun to appear. But for the encouragement of industry and ingenuity a proviso was introduced into the statute, that the king might still grant a monopoly "of any manner of new manufactures," to the first inventors, for any term not exceeding 14 years.<sup>1</sup> Upon this short **400\*]** proviso, this apparently scanty foundation, the whole structure of the English patent law, was raised by the English government and courts. The system which they thus established was adopted by our act of Congress. This system required a specification. Nothing is said of it by the statute; but the government required it, by an express clause of every patent. The principle on which it was required, was this: The statute conferred a benefit on the in-

ventor, by giving him a monopoly of his invention for a limited time. For this benefit conferred on the patentee by the community, it was thought just that he should make a return. That return consisted in the knowledge and free use of his invention, which, by his specification, he should enable the community to obtain, after the expiration of his monopoly. This principle enables us not only to understand the origin and object of the specification, but also its nature and character, as its object was to put the public in possession of the invention, after the monopoly had ceased, so as to enable all persons to use it beneficially; it was indispensable that the invention should be so fully and clearly explained, as to enable persons skilled in the same art to make and use it. This was all that was to be effected by the specification, and consequently all that it was required to contain. The very same certainty of description which would enable persons skilled in the art to make and use the invention, after the monopoly should expire, would enable them to avoid making and using it, so as to subject themselves to penalties or loss, during the continuance of the monopoly.

\*In the same manner it was established, that improvements in old machines or processes, might be combined as "new manufactures," and become the subject of patents. This principle was also incorporated into our act of Congress, in express terms. And here the same rule was adopted with respect to the specification. The "new manufacture," whether it consisted in a machine or process entirely new, or in the improvement of an old one, was to be described with such certainty, as to enable persons skilled in the art to make and use the invention, after the monopoly should expire, and to avoid it while the monopoly should exist. The principle and object were the same in both cases, and the same rule was adopted in both, by our act of Congress, as well as by the English decisions.

We shall now be able to perceive the application of the case of *Watts' patent*,<sup>2</sup> to the point under consideration; which, let it be considered, is to ascertain how far the discovery of a new *modus operandi*, so as to produce a new effect, or an old one in a new way, is the proper subject of a patent, as a useful invention, and not as an improvement.

The expansive power of steam had been many years before discovered by the Marquis of Winchester, who applied it, though very imperfectly, to various mechanical purposes. Among the rest, he employed it to put machines in motion, by communicating to them the movement which the steam was made to produce in beams and levers. Thus was laid the foundation of that wonderful invention, the steam engine. Various machines of [**402** this kind, more or less perfect, were, from time to time, brought into use; and at length Newcomen made a steam engine, which was long considered as having attained the utmost point of perfection. It consisted of a cylinder or large tube of iron, made perfectly smooth and uniform within, and completely closed at the bottom, but open at the top. Inside of this cylinder was placed, horizontally, a thick strong

1.—See the case of *Hornblower v. Boulton*, 8 T. R. 105; The opinion of Mr. Justice Lawrence.

Wheat. 7.

2.—8 T. R. 95.



plate of iron, so fitted at the edges to the inner surface of the cylinder, as to be air tight, and yet to play easily up and down. Into the centre of this plate was fitted a strong upright stem of iron, of the length required; and the stem and plate together made what is called the piston. The upper end of the piston stem was fastened by a joint to a horizontal beam, which was made fast by a joint, near the centre or at the farthest end, so as to allow its near end to play up and down with the piston to which it is attached. At the bottom of the cylinder, under the piston, was introduced a pipe or tube, leading from the boiler, where the steam was generated, into the cylinder, and furnished with a valve. When this valve was opened, it let the steam through the pipe into the lower part of the cylinder, under the piston, which was thus raised up by the explosive power of the steam, and raised with it the end of the horizontal beam to which it was attached. When the piston, and with it the beam, had been raised as high as was intended, the valve in the steam pipe was shut by the motion of the machine, and at the same moment, a valve was opened, by the same means, in a pipe, which **403\*** connected the \*cylinder with a vessel of cold water. A quantity of this water was then introduced into the cylinder, under the piston, where it condensed the steam more or less completely, and created a vacuum more or less perfect; in consequence of which the piston was pressed down by the weight of the atmospheric air resting upon it, and carried down with it the end of the horizontal beam to which it was attached. When it had subsided as low as was desired, it opened the steam valve, and let in the steam under the piston, which was raised as before, and again pressed down by the weight of the air, on the steam being again condensed by the introduction of cold water. This operation went on continually, and thus an ascending and descending motion was produced, which was communicated by the horizontal beam to the whole machinery.

The defect of this engine at length began to be observed. It consisted in the cooling of the cylinder by the cold water let in to condense the steam. The cylinder being thus rendered colder than steam, a considerable portion of the steam introduced was condensed by this coldness, while the piston was rising; and was thus destroyed before it had done its office. This rendered a greater generation of steam necessary, and of course a greater consumption of fuel. The steam, too, was not suddenly or perfectly condensed, so as to let the piston descend with sufficient rapidity or force; by which the power and effect of the machine were diminished. The water, also, into which the steam had been converted by condensation, **404\*** mained in the bottom of the \*cylinder, and further impeded the descent of the piston. These defects were seriously felt in a country where fuel was dear, and became continually more and more so. At length they threatened to render the engine entirely useless, by creating a greater expense in fuel than could be compensated by the labor saving power of the machine.

Then Watt arose, who, after long reflection and many experiments, conceived the happy idea of condensing the steam in a vessel differ-

ent from that in which it was to perform its office. This he effected by connecting with the machine another vessel called a connector, which was connected with the cylinder by a pipe with a valve in it. This valve being opened by the motion of the machine, at the same moment when the piston had ascended to its greatest height, the steam rushed through it into the conductor, where it met a stream of cold water, introduced by the same means which had been before employed for letting it into the cylinder. This cold water condensed it as fast as it came in; and a pump was also contrived, to work by the motion of the machine, and drew out of the conductor all the steam that remained uncondensed and all the water produced by the condensation. Thus a most perfect vacuum was created in the condenser, and consequently in the cylinder connected with it; the piston descended with freedom, rapidity, and force; and the cylinder, not being touched or affected by the cold water, retained a heat equal to that of steam; so that no portion of the steam introduced into it, was condensed too soon.\*

This was the great improvement; but others were \*employed to increase its effort. [**405** The cylinder was surrounded by a case the best calculated to retain heat, and the space between this case and the cylinder was kept full of steam or boiling water. Thus the cylinder was kept in the hottest possible state; the state best adapted to the preservation of the steam, while performing its office; and as steam thus preserved was found to be more effectual than atmospheric air in bringing down the piston, the top of the cylinder was closed, and steam was introduced above the piston as well as below it. This steam was conducted into the condenser, and there condensed and pumped out, in the same manner with that introduced below; and thus the piston being alternately pressed up and down, by the elastic power of steam, in its most efficacious condition, gave a most powerful, steady, and uniform motion to the engine. Oily substances were employed instead of water, in keeping the vessels air tight; especially the top of the cylinder, where the steam of the piston played through it. Thus the machine was rendered as perfect as it seemed capable of becoming.

Now, in what does this machine differ from the steam engine of Newcomen, which was in use before? Both had a boiler to produce the steam, and a cylinder to receive it. The piston was the same in both, and connected in the same manner with the horizontal beam, for the purpose of communicating the motion to the rest of the machinery. In both the piston was raised by expansive power of the steam; this steam, after its office had been performed, was condensed by cold water, so as to create a \*vacuum in the cylinder, and permit the [**406** piston to descend; and in both pipes and valves of the same construction was used, for introducing alternately the steam and the cold water. In what, then, did they differ? Merely in a new *modus operandi*, by which, with the addition of another vessel, the cold water was prevented from cooling the cylinder, while it conducted the steam; and the steam was made to operate in forcing the piston down, as well as in forcing it up. In this new *modus operandi*,

Wheat. 7.

produced by a different arrangement and construction of the old machines, with the addition of one new vessel, to receive and condense the steam, consisted the great invention of Watt; for which he obtained his patent, avowedly as for a new invention, or in the language of the British statute, a "new manufacture," and not for an improvement. His specification is inserted at length in 8 T. R., 96, note (a), where it will appear that he speaks of his discovery as "a new invention," and not as an improvement, and never once mentions or alludes to the old machine.

In what did this new discovery consist? I answer with the two judges of the Common Pleas in England who were in favor of this patent, and one of whom was Lord Chief Justice Eyre,<sup>1</sup> and with the four Judges of the King's Bench, who were unanimous on the point<sup>2</sup> that it consisted in the new principle on which the steam was condensed, and which was carried into effect by a new combination of the old machinery, with the addition of one new instrument. The 407\*] word "principle," as used in relation to this subject, is not taken in its general philosophical sense, where it means a law of motion or a property of matter; but in what may be termed its mechanical sense, in which it signifies a method of doing a thing, or of effecting a purpose; in other words, a *modus operandi*.

It is therefore established by this solemn and elaborate decision of six English judges against two, after repeated arguments and great consideration, that a new principle, or *modus operandi*, carried into practical and useful effect by the use of new instruments, or by a new combination of old ones, with or without the addition of one or more new ones, is an original invention for which a patent may be supported, without reference to any former invention or machine, for performing the same or a similar operation. This may be taken as a maxim which the cases referred to will be found fully to support.

Let us now apply this maxim to the patent of Oliver Evans. We shall soon see that according to the doctrine thus established, his discovery was not a mere "improvement," as the court below pronounced it to be, but an original invention.

The learned counsel here produced two models, one of Evans's hopper-boy, and one of Stouffer's, and explained minutely the difference between their principles, or *modus operandi*, which consisted in this: That in Stouffer's hopper-boy, the arms through a square mortice in which the square upright post was made to pass, were carried round by means of the upright post pressing upon the sides of the square 408\*] mortice, which renders it impossible for the arms to rise and fall of themselves, as the meal under them might increase or diminish; while in the hopper-boy of Evans the upright post is round, and it passes loosely through a round hole in the arms, which are carried round by two pieces of timber of the proper length, called leaders, which are inserted firmly into the upper part of the post, and attached at their ends by lines or small cords, to the corresponding ends of the arms. These lines and

leaders being put in motion by the upright post, trail round the arms, which at the same time play loosely on the post, and rise and fall of themselves, as the meal under them increases or diminishes in quantity. And to make them press more lightly on the meal, and rise and fall with more facility, as occasion may require, a weight a little lighter than themselves is attached to them by a cord which passes over a pulley in the upper part of the post. This weight nearly balances the arms, and enables them to play up and down much more easily and effectually.

The counsel also produced a drawing of Evans's machine from the patent office, to show that his model was correct, and referred to the facts of the evidence in the record where the machine of Stouffer is described, and its properties and defects explained.

He then proceeded to remark that the machine of Evans was obviously constructed upon a new principle, that the *modus operandi* was entirely new. The great object of both machines was to conduct the meal into the bolting chest, and to stir, turn, dry, and cool it on its way thither. The essential agents in this operation were the arms, which, if they remained stationary on the post, as they must of necessity do in Stouffer's machine, could not possibly perform this operation to advantage. They might sink down on the meal, as its quantity decreased, but could not possibly rise when it was increased; consequently, when new meal was placed on the floor, the machine must be stopped, and the arms lifted up. Hence, its motion was unequal, and its operation necessarily very irregular and imperfect. It also required a hand constantly, or frequently, to be present, and thus increased the expense.

Thus the condensation of the steam within the cylinder itself, in Newcomen's steam engine, cooled the cylinder improperly, wasted steam, made more fuel necessary, and rendered the operation of the machine imperfect, and too expensive. Here the similarity of imperfection is complete.

Evans removed the imperfection of the hopper-boy, not by merely adding to its parts, but by introducing a totally new principle and *modus operandi*. He detached the arms from the upright post entirely, and carried them round by means of the leaders and lines which have been described, leaving them to play freely up and down on the post, so as to accommodate themselves to the decreasing or increasing quantity of meal under them; and their movement up and down, he facilitated, regulated, and rendered perfect, by means of the weight and pulley. The *modus operandi* of the two machines consisted in the manner of carrying round the arms. This was the principle of both machines. That of Evans was new, and infinitely superior.

So Watt remedied the defects of Newcomen's steam engine, by condensing the steam in a different vessel from the cylinder, and increased the effect by introducing the steam above the piston as well as below it. This was a new principle; and here again the resemblance between the two cases is complete.

It being then clear that Evans had made a new invention as to the hopper-boy, and not merely what the law on this subject calls an

1.—Boulton v. Bull, 2 H. Bl. 463.

2.—8 T. R. 95.



improvement, and the cases showing that such an invention is the subject-matter of a patent for an original invention; it follows that he might have obtained a patent for his invention as an original invention, and not merely as an improvement. This leads to the inquiry, for what was this patent granted? Was it for an original invention of his own, or for an improvement on Stouffer's invention?

We have the authority of this court, in its former decision in this case,<sup>1</sup> for saying that when we inquire what was granted, it is proper in the first place to ascertain what the grantee wished to obtain, and next, what the grantor had the intention and the power to give. What Evans wished to obtain, is fully and most explicitly stated in the concluding sentence of his specification.<sup>2</sup> After describing, most fully and clearly, the structure, principle, and operation of his hopper-boy, he concludes thus: "I **411**"] claim as my \*invention, the peculiar properties which this machine possesses, viz., the spreading, turning, and gathering the meal at one operation; and the rising and lowering its arms by the motion, to accommodate itself to any quantity of meal it has to operate on." Here it is manifest, that he describes the effect intended to be produced, which was the same in both machines, viz., the spreading, turning, and gathering the meal at one operation; and his *modus operandi*, for producing this effect, which was entirely new, viz., the rising and lowering the arms of the machine, by its own motion, so as to accommodate itself to the increasing or diminishing quantity of meal. For this *modus operandi*, this property or principle, he claims a patent.

It is equally clear that the grantor of the patent intended to give what he thus asked for; that is, a patent for this new principle. This appears from the special act of Congress, on which the patent is founded, and to which it refers; from the terms of the patent itself; and from the specification which is expressly incorporated into it, as one of its constituent parts.

As a further illustration of this position, the most celebrated and important invention of modern times may be referred to, an invention which was destined to produce more important effects than any other single effort of the human mind. He alluded to the steamboat; that sublime conception, which had conferred so much glory on its author and his country. What was a steamboat, but a new combination of these well-known machines, a boat, a steam **412**"] engine, \*and a flutter wheel, machines most familiar to all who knew anything of such subjects. But they were so combined as to produce a new and most surprising effect, by a new *modus operandi*. This method consisted in attaching a steam engine and two flutter wheels to a boat of proper dimensions and strength, and arranging them in such a manner that the flutter wheels were set in motion by the steam engine, and struck against the water instead of being struck by it, as they are in a common saw-mill. Thus, striking against the water they act as oars, or rather as paddles, and propel the boat forward. Now, what was

there new in this machine? Not the instruments, but the manner of combining them, and their manner of operating produced by this combination: and yet no one has denied to the author of this beautiful and sublime idea the merit of an original invention, or called in question his patent, as a patent for an original invention. He, however, merely combined old machines, changing their forms and proportions so as to suit his new purpose. Evans not only combined old machines, but added new and essential parts, and by means of both produced a *modus operandi* altogether new, and highly useful. Upon what ground, then, can it be said that he is not an original inventor, when Watt was solemnly adjudged, and Fulton unanimously allowed to be so?

I therefore contend, that Evans was an original inventor, and not an improver merely; and that his patent is for an original invention, and not for an improvement. If so, the decision of the Circuit \*Court in these two [**413** cases<sup>3</sup> must be reversed, and the patent of my client is established.

But if it be not a patent for an original invention, but merely for an improvement, the decision below was erroneous, in declaring that the specification is defective. This defect consists, according to the decision below, in the omission to state particularly in what the improvement consists, and to distinguish it in terms from the pre-existent machine.

Here a very familiar maxim is applicable: *quod nemini ad vana aut ad impossibilia lex cogit*. The law requires nobody to do that which would be useless if done, or it is impossible to do. And *cui bono* make this discrimination; how can it be made; and by what provision of the law is it required? On the answer to these three questions the case must depend. If it can be shown that such a discrimination would be useless if made, or is impracticable, and that it is not expressly and positively required by the act of Congress, it will follow that the judgment below must be reversed.

And (1) *cui bono* make the discrimination? What good would it, or could it do, to anybody? In order to answer these questions, we must revert again to the object and uses of the specification.

The patent law confers a benefit on the discoverer of any artful invention, which consists in a monopoly of his invention for a limited time. The consideration which it requires him to pay for this benefit, is to put the public in possession of his invention; so as to enable all to use it, after his monopoly shall \*ex- [**414** pire; and all to avoid involving themselves in controversies and difficulties, by inadvertently infringing it while it continues. Hence the necessity of a specification; and here we find its uses, its extent, and its limitations. The British statute said nothing of a specification; but it was introduced by the executive government as a condition of every patent, and its character, objects and properties, have been accurately settled by judicial decisions in England. From those decisions it was borrowed by our act of Congress, and incorporated into its positive enactments. In both systems, its objects and uses,

1.—3 Wheat. Rep. 454.

2.—Ib. 468, note.

3.—The present case, and the subsequent case of Evans v. Hettich.

and, consequently, its nature and properties, are the same. Its object and all is to enable the public to enjoy the invention beneficially and fully, after the monopoly shall have expired, and to avoid interference with it while it shall continue. Now, what is necessary for attaining this object? Certainly nothing more than this, that the invention should be so described in the specification, by writing, and where the nature of the subject will permit, by drawings and models, as that anyone competently skilled in the art or science to which it relates, may be enabled to understand, make and use it. This is what the English decisions have established as the necessary properties of the specification; and what our statute expressly, and in terms, requires.

Now, it is obvious, that in the case of an improvement, the principle is exactly the same as in that of an original invention. The invention—that is, the thing in its improved state—must be accurately and fully described; by writing always, and by drawings and models where the [415\*] nature of the case will permit. When this is done, it is manifest that anyone who can understand the improved thing, so as to make and use it, may, in every possible case, distinguish the improvement from any and every original or antecedent thing of the same sort. Take these two hopper-boys as an example, and inspect the models which I hold in my hands. Can any man who has sufficient mechanical skill to make a hopper-boy, and understand its use, see at one glance in what these two machines differ from each other? Does not the court see it? Cannot any such mechanic, therefore, make and use the hopper-boy of Stouffer, if he should think proper, and avoid all interference with the improvement of Evans? It cannot be doubted that he may. And so may a person sufficiently skilled in the art or science to which an improvement relates, in every possible case. When he has the improvement, or the improved thing, sufficiently described, as the hopper-boy of Evans is admitted to be, and is informed of any pre-existing machine, or thing of the same general nature, which he wishes to make, sell, or use, he can look at that thing, compare it with the improved machine, or with the description, drawings and models in the patent office; see the difference, and make and use the original or old one, without the least danger of interfering with the improvement. Where, then, is the use of describing the original, or old invention, in the specification of the improvement; and of discriminating, in terms, between them? It is manifest that such a description would be perfectly useless and vain; and *neminem ad vana lex cogit*.

[416\*] \*2. But admitting that it might be of some use, would it be possible? This is the next head of inquiry; and I contend that it would not.

And here let it be remembered, that this doctrine of discrimination is not confined to such inventions as are express or avowed improvements on particular inventions. It extends necessarily to all inventions which improve anything that existed before. In the present case there happened, so far at least as is now known, to be but one hopper-boy, that of Stouffer, in use before Evans'. But suppose there had been twenty of as

Wheat. 7.

many different kinds, would they not all have been original with respect to Evans', or antecedent to it? Undoubtedly. And every man, notwithstanding Evans' patent, would have had a right to use them all, or any of them. What reason or principle could require the description of one in the specification of Evans, which would not equally apply to all? There certainly is none. Let us take the example of a patent for an improved stove for increasing the heat, or for any other object. How many millions of stoves, of what an endless variety of constructions, are used in the world. Must the patentee of this improved stove, or of this improvement on stoves, describe them all in his specification, and point out in terms the difference between each of them and his invention? It is manifest that he must, according to the doctrine of the Circuit Court; and it is equally manifest that he could not possibly do it. His specification would constitute a library of itself, which no man would or could read, and which the patent-office could hardly contain. So also improved chimneys, improved carriages, and all the multitude of other improvements, real or imaginary, on things in general use, for which patents are obtained, having pre-existent things of the same nature, and used for the same general purpose, must be described in each specification; which, if it were possible to write it, as it would very seldom be, would be far too voluminous to be understood or read.

Thus it is manifest that the discrimination contended for would be impossible, as well as useless, in relation to improvements on unpatented machines. Where, indeed, a machine is already patented, it is very easy to describe it in the specifications of the improvement, and point out all the particulars in which they differ from each other. The original specification is in the patent-office, and may be referred to; the drawings and model are there, and may be seen. Here the rule requiring a discrimination in terms between the original invention and the improvement would not be unreasonable; and it might be useful; by tending to prevent disputes between the different patentees. The mistake of which we complain, has probably arisen from not discriminating between improvements on patented and unpatented inventions. In the latter, the discrimination is manifestly impossible, as well as useless. In the former, it would be easy, and might be of some use. It might be proper to require it in one case, whether the law positively enjoins it or not. To require it in the other, would be to make the law require what is both useless and impossible. This can never be done by the construction merely in a statute, which must always be reasonable. But it may be said [418\*] that the statute positively enjoins it. If so, we must submit. When the legislature has clearly expressed its will, the court have no duty but to obey. This brings us to the question, what has the legislature enjoined on this subject?

3. All that can be supposed to relate to it is contained in the 2d and 3d sections. The second speaks of improvements; the third of specifications. It points out the object of the specification, and directs what shall be done for its attainment. The object is to put the public in complete possession of the invention, whether



an improvement or an original discovery; so that interference with it may be avoided while the patent continues, and its benefits may be fully enjoyed by the public, after the patent expires. To this end it enjoins that the applicant for a patent "shall deliver a written description of his invention, and of the manner of using, or process of compounding the same; in such full, clear, and exact terms, as to distinguish the same from all other things before known; and to enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make, compound, and use the same." This is the directory part. The thing is to be described "so as to distinguish it from all other things before known." How distinguish it? By describing all the things before known, and pointing out in terms in what it differs from them all? Certainly not; but by giving a description of it so complete and accurate, as "to enable any person skilled in the art, &c., to make, compound, 419\*" and use "the same." Is the discrimination contended for, but not mentioned in the statute, necessary for this purpose? By no means. Any person skilled in the art or science, in order to make, compound, and use the new invention, has but to look to the description of the invention itself. He need not know how nearly it resembles, or how widely it differs, from any other thing before known. With these he has no concern. And if, on the other hand, he wishes to use nothing before used and known, and to avoid interfering with the patented invention, or improvement, he has only to compare the thing which he so wishes to make or use, with the description of the patented invention, or improvement contained in the specification; and he will immediately see wherein they differ, and be enabled to avoid the latter, while he uses the former.

This section (the 3d) further directs, with a view to the same objects, that the applicant, the inventor, "in case of any machine," shall "fully explain the principle, and the several modes in which he has contemplated the application of that principle or character, by which it may be distinguished from other inventions." Here, as in the rest of the section, nothing is said about improvements, as distinguished from original discoveries. They are all treated equally as "inventions," and are placed precisely on the same ground. They are all to be so described as that they may be distinguished in their principles, and *modus operandi*, as well as in their construction and composition, from other inventions; and this is to be effected by means, not of a formal discrimination, in terms between 420\*] them, and any "other thing or things of the same general nature, but of a full and accurate verbal description, aided by drawings, models, and specimens; where the matter is of such a nature as to admit their use. In all this, nothing is said or hinted about "improvements," as contradistinguished from "original discoveries." All are treated alike as "inventions," and the same means of enabling all concerned, to distinguish them from things before used, or known, are provided in relation to both.

In fact, what is an "improvement," but a new invention? Everything that is made better is improved; and everything that makes another thing better, or does it in a better way,

is an improvement. If it be new, it is an invention so far as it goes. The greater the improvement, the greater is the invention; and any improvement differs from any other, or from an original discovery, if there be any such thing, not in nature but in degree. They may be greater inventions or less; more or less ingenious; or more or less useful; but as far as they are, so they are all inventions, and are treated precisely alike by this portion of the patent law; which, I again repeat, makes no mention, and gives no hint of a discrimination, in the specification of an improvement, between the improvement, or the thing as improved, and the original thing on which the improvement is made. Treating them all alike as "inventions," it requires, with respect to all, that they shall be so described as clearly to distinguish them; that is, as to enable all concerned to distinguish them from all other things of the same nature, \*before in use or [\*421 known. To construe the statute, so as to make it require a description not only of the new invention, but of all things of the same general nature before known, and a discrimination in terms between them, would be as unreasonable in the case of an improvement as of an original discovery, and would be perfectly unreasonable in either. It would make the statute do that which its terms do not indicate, and which the law can never be presumed to intend. It would make it require what it is not only impossible in a great variety of cases to do, but what, if done, would in every case be wholly useless and vain. This it cannot be so construed as to require: for *neminem ad vana aut ad impossibilia lex cogit*.

The counsel then adverted to the 2d section, where it was supposed, he said, that something might be found to support this doctrine of discrimination. That section spoke particularly of improvements, as to which the third was wholly silent. It said nothing whatever of the specification, its objects or motive. It made two provisions, both useful as declarations of the law, to put persons on their guard and prevent mistakes, but both undoubtedly law, without any such declaration. The first was, that the discoverer and patentee of an improvement in anything before patented, should not be entitled to make, use or vend the original; nor the inventor and patentee of the original to make, use, or vend the improvement. Here again they were both considered as inventors, and both put on the same footing. It was declared, for general information, and to prevent doubts \*and mistakes, that one should not be [\*422 entitled to the invention of the other; but nothing was said about the manner of distinguishing these inventions one from the other. That was left to the third section; where it was done without the least mention or hint of the formal discrimination, in terms, contended for in the judgment below. It was manifest that this discrimination could derive no countenance from this branch of the second section. It obviously could derive none from the other branch, which merely, for giving information to the public, and preventing mistakes, declared "that simply changing the form or proportions of any machine, or composition of matter, in any degree, shall not be deemed a discovery." This



merely amounts to saying, what would clearly have been the construction of law without any such declaration, that to constitute a patentable discovery, either original or by improvement, there must be a new principle or *modus operandi*, and not merely a change of form or proportion. If the change of form or proportion should be such as to produce a new principle or *modus operandi*, then it would be a discovery or invention, whether it amounts to an original or an improvement only; and here again improvements were treated as inventions, equally with original discoveries; the distinction between them being not in nature, but merely in degree.

But the point under consideration has been expressly settled, by the former decision in this case; the same objection, for want of this discrimination, was made in the court below, on the first trial, and the same doctrine on the subject [\*423\*] ject expressly laid down \*by the Circuit Court. This doctrine formed one of the grounds of objection, distinctly stated in the argument of the former case in this court, and was distinctly noticed by the court; and with this part of the opinion below, and the objection to it, distinctly in view, this court decided this patent on this same specification to be valid, notwithstanding its want of a discrimination in terms between the improvement and the original invention; which was an express decision on this point, in favor of the plaintiff in error. He referred to various parts of the report of the former case of *Evans v. Eaton*,<sup>1</sup> to support these positions; remarking, that although the court certainly was not bound absolutely by its own decisions, and ought to overrule them, when satisfied of their incorrectness; yet they were the great landmarks of the law, and ought not to be overturned or shaken, without the strongest and clearest reasons.

The learned counsel also cited the authorities cited in the margin, as to the objection to the charge of the court below, upon the ground that it had invaded the proper province of the jury, in respect to the sufficiency of the specification, and to the nature of the patentee's invention, as an improvement or an original discovery.<sup>2</sup>

Mr. Justice STORY delivered the opinion of the court:

This is the same case which was formerly before \*this court, and is reported in 3 Wheat. Rep., 454, and by a reference to that report, the form of the patent, the nature of the action, and the subsequent proceedings, will fully appear. The cause now comes before us upon a writ of error to the judgment of the Circuit Court, rendered upon the new trial, had in pursuance of the mandate of this court.

Upon the new trial several exceptions were taken by the counsel for the plaintiff. The first was to the admission of a Mr. Frederick, as a witness for the defendant. It is to be observed, that the sole controversy between the parties at the new trial was, whether the plaintiff was entitled to recover for an alleged breach of his patent by the defendant in using the improved

hopper-boy. Frederick, in his examination on the *voir dire*, denied that he had any interest in the cause, or that he was bound to contribute to the expenses of it. He said he had not a hopper-boy in his mill at present, it being then in court; that it was in his mill about three weeks ago, when he gave it to a person to bring down to Philadelphia; and that his hopper-boy spreads and turns the meal, cools it some, dries it, and gathers it to the bolting-chest. Upon this evidence the plaintiff's counsel contended that Frederick was not a competent witness, but the objection was overruled by the court. It does not appear from this examination whether the hopper-boy used by Frederick was that improved by the plaintiff or not; but assuming it was, we are of opinion that the witness was \*rightly admitted. It is perfectly clear, [\*425\*] that a person having an interest only in the question, and not in the event of the suit, is a competent witness; and in general the liability of a witness to a like action, or his standing in the same predicament with the party sued, if the verdict cannot be given in evidence for or against him, is an interest in the question, and does not exclude him. If nothing had been in controversy in this case, as to the validity of the patent itself, and the general issue only had been pleaded, the present objection would have fallen within the general rule. But the special notice in this case asserts matter, which if true, and found specially by the jury, might authorize the court to adjudge the patent void, and it is supposed that this constitutes such an interest in Frederick in the event of the cause, that he is thereby rendered incompetent. But in this respect, Frederick stands in the same situation as every other person in the community. If the patent is declared void, the invention may be used by the whole community, and all persons may be said to have an interest in making it public property. But this results from a general principle of law, that a party can take nothing by a void patent; and so far as such an interest goes, we think it is to the credit and not to the competency of the witness. It is clear that the verdict in this case, if given for Evans, would not be evidence in a suit against Frederick, but Frederick would be entitled to contest every step in the cause, in the same manner as if no such suit had existed. *Non constat*, that Frederick himself will ever be sued by the plaintiff, or that if \*sued, any [\*426\*] recovery can be had against him, even if the plaintiff's patent should not be avoided in this suit. It therefore rests in remote contingencies, whether Frederick will, under any circumstances, have an interest in the event of this suit, and the law adjudges the party incompetent only when he has a certain, and not a contingent interest. It has been the inclination of courts of law in modern times, generally, to lean against exceptions to testimony. This is a case which may be considered somewhat anomalous; and we think it safest to admit the testimony, leaving its credibility to the jury.

Another exception was to the refusal of the court to allow a deposition to be read by the plaintiff, which had been taken according to a prevalent practice of the state courts. It is not pretended that the deposition was admissible according to the positive rules of law, or the rules of the Circuit Court; and it is not

1.—3 Wheat. Rep. 454.

2.—12 H. Bl. 478, 484, 497; 8 T. R. 99, 101, 103; 1 Gal-  
lis. 481; 1 Mason, 189, 191.

Wheat. 7.



now produced, so that we can see what were the circumstances under which it was taken. No practice, however convenient, can give validity to depositions which are not taken according to law, or the rules of the circuit court, unless the parties expressly waive the objection, or, by previous consent, agree to have them taken and made evidence. This objection, therefore, may at once be dismissed.

The principal arguments, however, at the bar have been urged against the charge given by the Circuit Court in summing up the cause to the jury. The charge is spread *in extenso* upon the record, a practice which is unnecessary and inconvenient, and may give rise to minute criticisms and observations \*upon points incidentally introduced, for purposes of argument or illustration, and by no means essential to the merits of the cause. In causes of this nature we think the substance only of the charge is to be examined; and if it appears, upon the whole, that the law was justly expounded to the jury, general expressions, which may need and would receive qualification, if they were the direct point in judgment, are to be understood in such restricted sense.

It has been already stated, that the whole controversy at the trial turned upon the use of the plaintiff's hopper boy; and no other of the inventions, included in his patent, was asserted or supposed to be pirated by the defendant.

The plaintiff, with a view to the maintenance of his suit, contended, that his patent, so far as respected the hopper-boy, had a double aspect. 1. That it was to be as a patent for the whole of the improved hopper-boy; that is, of the whole machine as his own invention. 2. That if not susceptible of this construction, it was for an improvement upon the hopper-boy, and he was entitled to recover against the defendant for using his improvement. The defendant admitted that he used the improved hopper-boy, and put his defense upon two grounds: 1. That if the patent was for the whole machine, *i. e.*, the improved hopper-boy, the plaintiff was not the inventor of the improved hopper-boy so patented. 2. That if the patent was for an improvement only upon the hopper-boy, the specification did not describe the nature and extent **428\*** of the improvement; \*and if it did, still the patent comprehended the whole machine, and was broader than the invention. To the examination of these points, and summing up the evidence, the attention of the Circuit Court was exclusively directed; and the question is, whether the charge, in respect to the matters of law involved in these points, was erroneous to the injury of the plaintiff.

We will consider the points in the same order in which they were reviewed by the Circuit Court. Was the patent of the plaintiff, so far as respects his improved hopper-boy, a patent for the whole machine as his own invention? It is not disputed that the specification does contain a good and sufficient description of the improved hopper-boy, and of the manner of constructing it; and if there had been any dispute on this subject, it would have been matter of fact for the jury, and not of law for the decision of the court. The plaintiff, in his specification, after describing his hopper-boy, its structure, and use, sums up his invention as follows: "I claim as my invention, the

peculiar properties or principles which this machine possesses, in the spreading, turning and gathering the meal at one operation, and the raising and lowering of its arms by its motion, to accommodate itself to any quantity of meal it has to operate upon." From this manner of stating his invention, without any other qualification, it is apparent that it is just such a claim as would be made use of by the plaintiff, if the whole machine was substantially in its structure and combinations new. The plaintiff does not state \*it to be a speci- [**429**fic improvement upon an existing machine, confining his claim to that improvement, but as an invention substantially original. In short, he claims the machine as substantially new in its properties and principles, that is to say, in the *modus operandi*. If this be true, and this has been the construction strongly and earnestly pressed upon this court by the plaintiff's counsel, in the argument at the present term, what are the legal principles that flow from this doctrine? The patent act of the 21st of February, 1793, ch. 11, upon which the validity of our patents generally depends, authorizes a patent to the inventor, for his invention or improvement in any new and useful art, machine, manufacture, or composition of matter not known or used before the application. It also gives to any inventor of an improvement in the principle of any machine, or in the process of any composition of matter which has been patented, an exclusive right to a patent for his improvement; but he is not to be at liberty to use the original discovery, nor is the first inventor at liberty to use the improvement. It also declares that simply changing the form or the proportion of any machine or composition of matter, in any degree, shall not be deemed a discovery. It farther provides, that on any trial for a violation of the patent, the party may give in evidence, having given due notice thereof, any special matter tending to prove that the plaintiff's specification does not contain the whole truth relative to his discovery, or contains more than is necessary to produce the effect (where the addition or concealment shall appear to have been to \*deceive [**430**the public), or that the thing secured by the patent was not originally discovered by the patentee, but had been in use, or had been described in some public work anterior to the supposed discovery of the patentee, or that he had surreptitiously obtained a person's invention; and provides that in either of these cases judgment shall be rendered for the plaintiff, with costs, and the patent shall be declared void. It farther requires, that every inventor, before he can receive a patent, shall swear or affirm to the truth of his invention, "and shall deliver a written description of his invention, and of the manner of using, or process of compounding the same, in such full, clear, and exact terms, as to distinguish the same from all things before known, and to enable any person skilled in the art or science, of which it is a branch, or with which it is most nearly connected, to make, compound and use the same; and in the case of any machine, he shall fully explain the several modes in which he has contemplated the application of the principle, or character by which it may be distinguished from other inventions."



From this enumeration of the provisions of the act, it is clear that the party cannot entitle himself to a patent for more than his own invention; and if his patent includes things before known, or before in use, as his invention, he is not entitled to recover, for his patent is broader than his invention. If, therefore, the patent be for the whole of a machine, the party can maintain a title to it only by establishing that it is substantially new in its structure and mode of operation. If the same combinations **431\*** existed before <sup>in</sup> machines of the same nature, up to a certain point, and the party's invention consists in adding some new machinery, or some improved mode of operation, to the old, the patent should be limited to such improvement, for if it includes the whole machinery, it includes more than his invention and therefore cannot be supported. This is the view of the law on this point which was taken by the Circuit Court. That court went into a full examination of the testimony, and also of the structure of Evans' hopper-boy, and Stouffer's hopper-boy, and left it to the jury to decide, whether up to a certain point, the two machines were or were not the same in principle. If they were the same in principle, and merely differed in form and proportion, then it was declared that the plaintiff was not entitled to recover; or, to use the language of the court, if the jury were of opinion that the plaintiff was not the inventor of the hopper-boy, he was not entitled to recover, unless his was a case excepted from the general operation of the act. We perceive no reason to be dissatisfied with this part of the charge; it left the fact open for the jury, and instructed them correctly as to the law. And the verdict of the jury negatived the right of the plaintiff, as the inventor of the whole machine. The next inquiry before the Circuit Court was, whether the plaintiff's case was excepted from the general operation of the act. Upon that it is unnecessary to say more than that the point was expressly decided by this court in the negative, upon the former writ of error. And we think the opinion of this court, delivered on that occasion, is correctly understood <sup>and</sup> expounded by the Circuit Court. It could never have been intended by this court to declare, in direct opposition to the very terms of the patent act, that a party was entitled to recover, although he should be proved not to have been the inventor of the machine patented; or that he should be entitled to recover, notwithstanding the machine patented was in use prior to his alleged discovery. There is undoubtedly a slight error in drawing up the judgment of the court upon the former writ of error: but it is immediately corrected by an attentive perusal of the opinion itself. And we do not think that it can be better stated or explained than in the manner in which the Circuit Court has expounded it.

We are then led to the examination of the other point of view in which the plaintiff's counsel have attempted to maintain this patent. That is, by considering it, not as a patent for the whole of the machine or improved hopper-boy, but as an improvement of the hopper-boy. Considered under this aspect, the point presents itself which was urged by the defendant's counsel, viz., that if it be a patent for an improvement, it is void, because the nature and

extent of the improvement is not stated in the specification. The Circuit Court went into an elaborate examination of the law applicable to this point, and into a construction of the terms of the patent itself, and came to the conclusion that no distinct improvement was specified in the patent; that such specification was necessary in a patent for an improvement, and that for this defect, the plaintiff was not entitled to recover, supposing his patent to be for an improvement <sup>only</sup> of an existing machine. [**\*433** It may be justly doubted, whether this point at all arises in the cause; for the very terms of the patent, as they have been already considered, and as they have been construed at the bar by the plaintiff's counsel, at the present argument, seem almost conclusively to establish, that the patent is for the whole machine; that is, for the whole of the improved hopper-boy, and not for a mere improvement upon the old hopper-boy. But, waiving this point, can the doctrine asserted at the bar be maintained, that no specification of an improvement is necessary in the patent; and that it is sufficient if it be made out and shown at the trial, or may be established by comparing the machine specified in the patent with former machines in use? That there is no specification of any distinct improvement in the present patent, is not denied; that the patent is good without it, is the subject of inquiry. Let this be decided by reference to the patent act.

The third section of the patent act requires, as has been already stated, that the party "shall deliver a written description of his invention, in such full, clear, and exact terms, as to distinguish the same from all other things before known, and to enable any person skilled in the art or science, &c., &c., to make, compound, and use the same." The specification, then, has two objects: one is to make known the manner of constructing the machine (if the invention is of a machine), so as to enable artisans to make and use it, and thus to give the public the full benefit of the discovery after the expiration <sup>of</sup> the patent. It is not [**\*434** pretended that the plaintiff's patent is not in this respect sufficiently exact and minute in the description. But whether it be so or not, is not material to the present inquiry. The other object of the specification is, to put the public in possession of what the party claims as his own invention, so as to ascertain if he claim anything that is in common use, or is already known, and to guard against prejudice or injury from the use of an invention which the party may otherwise innocently suppose not to be patented. It is, therefore, for the purpose of warning an innocent purchaser or other person using a machine, of his infringement of the patent; and at the same time of taking from the inventor the means of practicing upon the credulity or the fears of other persons, by pretending that his invention is more than what it really is, or different from its ostensible objects, that the patentee is required to distinguish his invention in his specification. Nothing can be more direct than the very words of the act. The specification must describe the invention "in such full, clear, and distinct terms, as to distinguish the same from all other things before known." How can that be a sufficient specification of an improvement in a machine,



which does not distinguish what the improvement is, nor state in what it consists, nor how far the invention extends? Which describes the machine fully and accurately, as a whole, mixing up the new and old, but does not in the slightest degree explain what is the nature or limit of the improvement which the party claims as his own? It seems to us perfectly **435\*** clear that such a specification \*is indispensable. We do not say that the party is bound to describe the old machine; but we are of opinion that he ought to describe what his own improvement is, and to limit his patent to such improvement. For another purpose, indeed, with the view of enabling artizans to construct the machine, it may become necessary for him to state so much of the old machine as will make his specification of the structure intelligible. But the law is sufficiently complied with in relation to the other point, by distinguishing, in full, clear, and exact terms, the nature and extent of his improvement only.

We do not consider that the opinion of the Circuit Court differs, in any material respect, from this exposition of the patent act on this point; and if the plaintiff's patent is to be considered as a patent for an improvement upon an existing hopper-boy, it is defective in not specifying that improvement, and therefore the plaintiff ought not to recover.

Upon the whole, it is the opinion of the majority of the court, that the judgment of the Circuit Court ought to be affirmed with costs.

*Mr. Justice LIVINGSTON* dissented. At this late period, when the patentee is in his grave, and his patent has expired a natural death, we are called on to say, whether his patent ever had a legal existence, and it may seem not very important to the representatives of the patentee what may be the decision of this court. But understanding that many other actions are pending for a violation of this part of the patent right, and that infractions have taken place for which actions may yet be commenced, and **436\*** believing that the decision we are about to make will have a very extensive, if not a disastrous bearing on many other patents for improvements, and will in fact amount to a repeal of many of them, I have thought proper to assign my reasons for dissenting from the opinion just delivered.

In doing this, my remarks will be confined principally to the charge of the court, so far as it applies to the claim of Evans for an improvement on a hopper-boy.

I was much struck with the argument of the plaintiff's counsel in favor of the patent being for an original invention, and not for an improvement; nor would it in my opinion be a forced construction, to regard it as a patent for a combination of machines to produce certain results, and not for any of the machines, nor the different parts of which the whole is composed.

But considering it as a patent for an improvement on a hopper-boy, in which light it had been regarded, as well by the Circuit as by this court, when this cause was here before, I proceeded to examine the charge, so far as it relates to this part of the subject.

The court, after stating in what particulars the plaintiff's counsel contended that his improvement consists, which is unnecessary to repeat here, proceeds:

"The plaintiff has laid before you strong evidence to prove that his hopper-boy is a more useful machine than the one which is alleged to have been previously discovered and in use. If, then, you are satisfied of this fact, the point of law which has been \*raised by the [**437** defendant's counsel remains to be considered, which is, that the plaintiff's patent for an improvement is void because the nature and extent of his improvement is not stated in the specification.

"The patent is for an improved hopper-boy, as described in the specification, which is referred to and made part of the patent. How does the specification express in what his improvement consists? It states all and each of the parts of the entire machine, its use and mode of operating; and claims, as his invention, the peculiar properties or principles of the machine, viz., the spreading, turning, and gathering the meal, and the raising and lowering of its arms by its motion, to accommodate itself to the meal under it. But does this description designate the improvement, or in what it consists? Where shall we find the original hopper-boy described, either as to its construction, operation, or use, or by reference to anything by which a knowledge of it may be obtained? Where are the improvements on such originals stated? The undoubted truth is, that the specification communicates no information whatever upon any of these points." After some farther reasoning on the subject, and showing that the plaintiff's case is not excepted from the general rule of law, by the act which was passed for his relief, the court declares that for this imperfection or omission in the specification, the "plaintiff is not entitled to recover for an alleged infringement of his patent for the improvement on the hopper-boy." This was equivalent to saying that for this defect in the specification, the patent for the improved hopper-boy was void, and, \*of [**438** course, that no action at all, whatever might be the state of the evidence, could be maintained for the use of it. It left nothing, as it regarded the improved hopper-boy, for the jury to decide. Such is the charge, and it is delivered in terms too plain to be misunderstood.

The objections to it are now to be considered. In doing this it will be shown,

1st. That the specification is not defective, and that although it does not discriminate in what particulars the machine in question does differ from other hopper-boys in use, yet, if from the whole of the description taken together, the machine is specified so minutely, and so accurately, as to be directly and easily distinguished from all other hopper-boys antecedently known, everything has been done which the law requires, and the patent is good.

2d. That if the specification be vicious in the points mentioned, the patent ought not to be considered as absolutely void; but it is enough, and the public interest is sufficiently guarded, if care be taken that it shall not be extended to create a monopoly in any other machine, which may or may not be mentioned in the patent, which was previously known or in use. And,

Wheat. 7.



3d. That if a patent must be set aside for such defect in the specification, it should be left to the jury, on the evidence before them, to decide whether the improvement patented be not set forth with all necessary precision.

1. I have said the specification is not defective.

In determining this question, it would seem **439\***] but \*natural and just that the validity of a patent granted under a particular act of Congress should be tested by the terms there used, and by the decisions of our own courts, so far as they are of authority, and that we should be extremely cautious in adopting the rules which have been introduced into other countries, and under laws not in every respect like our own, however respectable the tribunals may be which may have prescribed those rules; and this the more especially, as most of the decisions in England, which are generally cited, and seem to have been implicitly followed in this country, are of a date long subsequent to the revolution, and many of them posterior to the passage of the patent laws in this country, and which could not therefore have been in the contemplation of Congress at the time. Besides, there is somewhat of hardship in constantly applying to a patentee in this country, adjudications made on a British act of Parliament very unlike our own, and with which decisions he has no means of becoming acquainted until long after a knowledge of them can be of any service. Already have we extended to patents for improvements on old machines, several recent decisions in England, although it was long doubted in that country, and as late as the year 1776, whether by the act of the 21 James I., c. 3, there could be a patent for an addition only. When the English courts decided in favor of such patents, they also made rules for their construction, as cases arose; there being no direct provisions in the statute on the subject. As we have provided by law, not only for the security of inventions entirely new, but also **440\***] for the \*protection of those who may discover any new and useful improvement on any art, machine, &c., not known or used before, and have prescribed the terms on which patents under it may be obtained, it would seem, if all those terms are complied with, and the invention be really new and useful, that no court can have a right to add any other terms, or to require of a patentee anything more than what the law has enjoined on him. Let us now try the patent before us by this rule: The act of the 21st February, 1793, c. 11, after stating in what cases letters patent for inventions may issue, and how they are to be obtained, requires, *inter alia*, that the inventor, before he receives his patent, shall take a certain oath, and shall deliver a written description of his invention, and of the manner of using the same, in such full, clear, and exact terms, as to distinguish the same from all other things before known, and to enable any person skilled in the art or science of which it is a branch, or with which it is most nearly connected, to make and use the same. And in the case of a machine, he shall fully explain the principle, and the several modes in which he has contemplated the application of that principle, or character by which it may be distinguished from other inventions; and he is to

accompany the whole with drawings and written references, where the nature of the case admits of it; and a model of his machine, if required by the Secretary of State, is also to be delivered.

In the present case, the patent is for an improved hopper-boy; a particular description of which, and its uses, will be found in 3 Wheat. Rep., 466. It is \*not pretended that this [**\*441**] machine, if made in conformity with the description given by Mr. Evans, could not in fact be distinguished from everything else before known, when brought into comparison with it, nor that a skillful person, from its description, would not be able to make one like it; which would seem to satisfy every requisition of the law. But the defendant's counsel say this is not enough. It should not only in its organization and aggregate be different from everything else, but every respect in which it differs in its construction or operation from other machines, should be minutely stated in the specification; or, in other words, that other machines heretofore used for similar purposes, should be either described or referred to therein, and the differences between the patented machines and those in former use, be carefully designated.

The answer to this is, that the law does not require it—that it is impracticable, and would be of no use.

We have seen already that the law prescribes no precise form of specification, which would have been impracticable, and imposes no obligation to describe, in any particular mode, the machine in question. Not a word is said as to showing in what particulars the improvement patented differs from all other machines for the same purpose then in use. If, on the whole description taken together, the machine of the plaintiff can be distinguished from other machines when compared with his, the words and the objects of the law are satisfied. The law appears to have nothing else in view, in requiring a specification, than the instruction \*of the public; that is, to guard [**\*442**] them against a violation of the patented improvement, and to enable them, when the letters patent expire, from the specification filed, to make a machine similar to the one which had been patented. The only inquiry, therefore, ought to be, whether this obvious intention of the legislature has been answered by the particular specification which may be the subject of litigation; and if enough appears, either to prevent a person from encroaching on the right of the patentee, or to enable a skillful person to make a machine which shall not only resemble the one patented, but produce the like effect; more ought not to be required. Whether these ends be attained by a particular description of every part of the improved machine, or by describing in what respect it differs from other machines, can make no difference. The information to the public is as valuable and intelligible, if not more so, in the former case, than in the latter. If it be, taken altogether, an improved machine, for the purpose of producing certain results, and so described that it may be distinguished from other machines, and that others may be made on the same model, it is a literal compliance with all that the law requires. If



the different parts of the machine, and their combination, or connection, be accurately described, or intelligibly set forth, why should it not be supported, although no reference be made to other machines dissimilar in construction, and which, although applied for the same purpose, are inferior in the beneficial results produced by them? To the objection, that it **443\***] does not precisely appear in \*what the patent hopper-boy differs from those antecedently in use, the answer is, and it ought to be conclusive, that the patentee does not mean to abridge or restrain the public from using those or any other machines, so that they differ from the one described by him; and that any mechanic, on having his specification before him, can avoid an interference with his invention. To confine our examination to the only hopper-boy which was produced on this trial, and which was called Stouffer's hopper-boy, and of which a model has been exhibited to the court, together with a model of Evans' improved hopper-boy, can a doubt be entertained for an instant that they are very dissimilar, and that any mechanic would not, in a moment, point out the distinctions between them, either from the specification or the model—or that he would not be able to make a Stouffer hopper-boy, or the improved hopper-boy of Evans, as he might be directed; and in like manner he would be able, when brought together, to discriminate between any other hopper-boy and that of Evans, provided they were different, so that those who were desirous of having a hopper-boy, on an old construction, and of not interfering with the rights of Mr. Evans, would labor under no difficulty whatever. But inasmuch as Evans himself has not discriminated or exhibited in his specification all the points of difference between his and other hopper-boys, it is supposed that his patent is for some hopper-boy already in use, as well as for his improvement thereon. The very terms of his specification precluded every supposition of that **444\***] kind. If there \*were a thousand of those machines, on different constructions, in use before the date of his patent, he leaves to the public the undisturbed enjoyment of them. He meddles not, nor does he pretend to interfere with any of them, until they make or use one constructed, in all its parts, upon his model. That form, and that form alone, he claims as his invention or improvement. It would not have been difficult, even from British authorities, to show that this specification was sufficient; but I prefer recurring to our own law as the only proper criterion of the validity or invalidity of the specification in question. My opinion is, that it has all the certainty which is required by law.

Such a specification as is required by the Circuit Court, is not only not prescribed by law, but, to me, it appears to be one extremely difficult, if not impracticable.

If the inventor of an improved hopper-boy is to discriminate, in its specification, between his improvements and any particular hopper-boy, which may be produced on the trial, and is to be non-suited for not having done so, however correct and distinguishing it may be in every other respect, he must do the like as to all other hopper-boys; and if he must describe any, he must describe all others with

which he may be acquainted; and, after all, some one may be introduced at the trial, of which he had never heard, or which he had never seen; and inasmuch as he had not stated in what respects it was improved by his machine, although this would immediately be seen on inspection, he must not \*only fail [**\*445** of recovering damages for a manifest violation of his right, but must have his patent declared void by the court, without a trial by jury, and be deprived of the fruits of a most valuable improvement, not because he was not the *bona fide* inventor—not because he had not described his improvement with sufficient certainty, according to the act of Congress—but because something more was required of him, of which he had no means of information. The only hopper-boy which made its appearance on this trial, except the plaintiff's, was that known by the name of the Stouffer hopper-boy; but *non constat*, that there may not have been a hundred different kinds in use, and some entirely unknown to the plaintiff. If he could have described them all, which would not have been an easy task, and stated in what particulars his hopper-boy differed from them all, his specification would have extended to an immoderate length, and after all have been less intelligible and satisfactory than a full description, such as is given here, of all the parts of which his consisted, and of the manner in which they are put together. There may be cases in which an improvement may be so simple as to describe it at once by reference to the thing or machine improved, as in the case of an improvement of this kind on a common watch. But even in the case of a watch, if the improvement pervades the whole machine, it would be a compliance with the terms of the law, if the patentee described every part of his improved watch, with its principle, without discriminating particularly in what respect his different wheels, &c., varied from all other watches \*then [**\*446** in use. Many patents have been obtained for improvements on stoves, locks, &c.; but has it ever been required of the patentee, in such cases, not only to describe in what manner his stove or lock is constructed, and the benefits resulting from such construction, but to point out every particular in which they differ from those already in use? This, to say the least, would be a work of great labor, and of little or no use to the public, who would be at liberty to use a stove or lock of any construction, not interfering with the one described in the specification of the patentee.

A few observations will show that such a description as the defendant's counsel contend for, would be of no greater use than the one which Mr. Evans has adopted. After all the pains to discriminate had been taken, the question would still recur, how is the improved hopper-boy to be constructed? and if, from the specification, that could not be ascertained, then, and then only, ought it to be pronounced defective. But if, from the description, the improved hopper-boy could be made by a skillful mechanic, then the public is informed, not only of what has been patented, but of what still remains common as before, and if an action be brought for a violation of the patented right, and it should appear that the hopper-boy used is not of such construction, the plaintiff



must fail in his suit. It cannot be said, with any justice, that if the discrimination be not made, the patent includes not only the improvement, but the old machine on which the improvement is engrafted. \*The old machine still remains public property; may be used by every one; nor can any person be considered as infringing on the patent right, until he adds to the machine already in use the improvements of the patentee, or, in other words, until he makes a machine resembling, in all its parts, the one which is described in the specification.

2d. But if the specification be defective in the points which have been mentioned, is the patent therefore necessarily void? This is a question of vital importance to every patentee.

I am aware that it has been said in England, that the patent must not be more extensive than the invention; therefore, if the invention consists in an improvement only, and the patent is for the whole machine, it is void. But I am not aware that it has ever been decided there that when a patent is for an "improved machine," and is taken out only for the machine thus improved, and not for the machine as before used, that such patent is void. But whatever may have been some of the late decisions in that country, I prefer, and think it the better course, to consider this question also under our own act, which, in this respect, is different from the English statute, and will therefore afford us more light, and be a safer guide than either that statute or the judgment on it. In what part, then, of our act, may it be asked, is an authority given to the federal courts to declare a patent void for a defective specification, however innocently made, and which in its consequences can injure no one? I state the question in this way, not because I think it necessary to show that if injurious consequences \*might flow from an imperfect specification, a patent must necessarily be declared void, but because I think it must be admitted that there is no evidence whatever in this cause, to induce any one to believe that Mr. Evans either intended to take, or that he did receive a patent for anything beyond his invention, which was the hopper-boy in the improved condition in which he describes it. To declare a patent for a highly useful improvement absolutely void, merely for a defective specification, if this be one, is a very high penalty, and should not be lightly inflicted, unless rendered absolutely necessary by law; the more especially, as without recurring to so harsh a measure, a court and jury will always be able to confine a remedy on the patent to violations of the improvement actually secured, and if the patentee should be so foolish, or ill-advised, as to attempt to bring within its reach the machine in its unimproved state, or any other machine before common, he would do it, not only with no prospect of success, but with the certainty of a defeat, attended with a very heavy expense. As long, therefore, as he could maintain no action, but for his improvement, it is not perceived why he should be visited with so heavy a denunciation as the forfeiture of his improvement, merely because, by some construction of his specification, which might after all be a mistaken one, he had in-

cluded in his invention, something of ever so trifling a nature, which was already known. But if such be the law, and such the frail tenure on which these rights are held, however hard it may apply in particular cases, it must have its course. But \*I cannot think [\*449 it our duty, or that we have any right to pronounce a patent void on this account; but that this important office is exclusively confided to a jury. Whether we have this right or not, will now be examined. If such summary authority were intended to have been conferred on the federal courts, the patent law ought to have been, and would have been explicit. This is so far from being the case, that in the patent law, a provision, but of a different kind, is inserted on this very subject, which is not the case in the statute of James. It was foreseen, that it must sometimes happen, either from the imperfection of language, or the ignorance of a patentee, that defective specifications would be made; it was also foreseen, that an imperfect specification might be made from design, and with a view of deceiving the public. We accordingly find it provided by law, that among other matters which the defendant may rely on in an action for infringing a patent right, is, "that the specification filed does not contain the whole truth relative to his discovery, or that it contains more than is necessary to produce the described effect, which concealment, or addition, must fully appear to have been made for the purpose of deceiving the public." If judgment is rendered for the defendant on this ground, the patent is to be declared void. This section applies as well to patents for an improvement on an existing machine, as for an invention entirely new; and was intended to protect the patent in either case against an avoidance for an imperfect and innocent specification of the invention patented. If, therefore, the defect which is alleged, \*really exist in the specification of the [\*450 patented improvement, the court is not authorized, on its mere inspection, to declare it imperfect, and the patent, on that account void. Both questions are clearly questions of fact, and are so treated by the legislature. The party has a right to insist with the jury, not only that his specification is perfect, but that if it be otherwise, no deception was intended on the public; and on either ground, they may find a verdict in his favor. So if, on the allegation, that the thing secured by patent was not originally discovered by the patentee, a verdict passes against the plaintiff, he loses his patent. In like manner, in this case, if it had appeared that the "improved hopper-boy," which was the thing secured by patent, had not been originally discovered by Mr. Evans, and a verdict had passed against him on that ground, there would have been an end of his patent. From the tenth section, also, an argument may be drawn against the right of a court to declare a patent void on mere inspection, for redundancy or deficiency in a specification. This section provides a mode of proceeding before the District Court, where there may be reason to believe a patent was obtained surreptitiously, or upon false suggestions; and if, on such proceeding, it shall appear that the patentee was not the true inventor, judgment shall be rendered by such court for a repeal of the patent.



This is the only case in which a power is conferred on a court, to vacate a patent, without the intervention of a jury. If a proceeding of this kind had been instituted before the proper tribunal against Mr. Evans, the court would **451** \*] \*have examined witnesses, and have formed its opinion on their testimony; and it is not clear that even in this case a jury might not have been called in. This section has been taken notice of, to show that it could never have been the intention of the legislature, that a patent should be avoided, on any account whatever, on the opinion of the court alone, without some examination other than that of the specification, whatever might be its excess, or poverty of description. If it had been intended to vest so important a power in the court, it would not have been left to mere implication, but would have been conferred in terms admitting of no doubt. My opinion, therefore, on this part of the charge is, that the court erred in taking upon itself to pronounce the patent void, even if the specification had been defective, or imperfect, in not particularly describing what the improvements of the patentee were; this being a power expressly delegated to a jury, who, under all the circumstances of the case, are to decide both questions of fact; that is, whether the specification be deficient, or superfluous, and the intention with which it was made so. I repeat once more, that whatever may have been the decisions in England, which are not admitted to be contrary to the view which has here been taken of the subject, they are not of authority, and are upon an act so very different in its structure from our own, as to afford little or no useful information on the subject. One great and important difference in the two laws is, that the statute of James I. has not prescribed a mode in which a patent for a vicious specification is to be set **452** \*] aside. \*The patent is granted on a condition that a specification be enrolled.

I give no opinion on the questions which arise from the admission of certain witnesses, who were supposed to be disqualified, on the score of being interested; for if the patent for the hopper-boy be void, for a defect in its specification, and that question is not to be referred to the jury, and such I understand to be the opinion of four of the judges, it is very unimportant, whether any error was committed in this respect by the court before which the cause was tried; as a verdict must ever be rendered against the representatives of the patentee, on this ground, whatever may be the state of the evidence.

*Mr. Justice JOHNSON, and Mr. Justice DUVALL, also dissented.*

*Judgment affirmed with costs.*

Aff'g—3 Wash. C. C. 443.

Confirming—S. C. 3 Wheat. 454, Rev'g 1 Pet. C. C. 322.

Cited—4 Pet. 81; 6 Pet. 297; 4 How. 127; 6 How. 437; 7 How. 198; 15 How. 215; 2 McLean, 420; 3 McLean, 254; 3 Wood. & M. 23; Bald. 314, 315, 321; 1 Story, 236; 3 Sumn. 541; 15 Blatch, 455.

## EVANS v. HETTICH.

It is no objection to the competency of a witness in a patent cause that he is sued in another action for an infringement of the same patent.

The 6th section of the patent act of 1793, c. 156, which requires a notice of the special matter to be given in evidence by the defendant under the general issue, does not include all the matters of defense which the defendant may be legally entitled to make. And where the witness was asked, whether the machine used by the defendant was like the model exhibited in court of the plaintiff's patented machine, held, that no notice was necessary to authorize the inquiry.

Where a deposition has once been read in evidence without opposition, it cannot be afterwards objected to as being irregularly taken.

It is no objection to the competency or credibility of a witness, that he is subject to fits of derangement, if he is sane at the time of giving his testimony.

**E**RROR to the Circuit Court of Pennsylvania.

This was an action for the infringement of the same patent as in the preceding case of *Evans v. Eaton*, and was argued by the same counsel. The points involved will be found to be fully discussed in the argument of that case, to which the learned reader is referred. The following is the charge delivered to the jury in the court below, which it is thought necessary here to insert.

After stating the evidence on both sides, *Mr. Justice WASHINGTON* proceeded as follows:

The facts intended to be proved by the evidence given in this cause, may be arranged under the following heads:

\*(1) Such as respect the value of the [\*454 plaintiff's hopper-boy. (2) The time of its discovery. (3) The kind of machine used by the defendant. (4) The time of its discovery and use.

1st. As to the first, the court has no observations to make, except that if you should find a verdict for the plaintiff, you will give the actual damages which the plaintiff has sustained, by reason of the defendant's use of his invention, which the court will treble.

2d. The evidence applicable to this head, if believed by the jury, proves, that in 1783, Oliver Evans commenced his investigation of the subject of an improvement in the manufactory of flour; and in the summer of the same year, he declared that he had accomplished it. In 1784, he made a model of his hopper-boy, which had no cords, weight, or pulley; and consequently the lower arm was, for the sake of the experiment, turned by the hand. In 1785 it was in operation in a mill, in as perfect a state as it now is.

3d. If the witness who was called to prove the kind of machine used by the defendant is believed by the jury, it consists of an upright square shaft, with a cog that turns it, and which is moved by the water-power of the mill. This shaft is inserted into a square mortice, in an arm or board somewhat resembling an S, with strips of wood fixed on its under side, and so arranged as to turn the meal below it, cool, dry, and conduct it to the bolting chest. This arm slips, with ease, up and down the shaft, and must be raised by hand, and kept suspended until \*the meal is put under [\*455

it. It has no upper arm, pulley, weight, or leading lines, and the strips below the arm are like the rake, as it is called, in the plaintiff's hopper-boy. This machine has acquired the name of the S, or the Stouffer hopper-boy.

4th. The witnesses examined to prove the originality, and use of the defendant's hopper-boy, if believed by the jury, date it as early as about the year 1765; and its erection and actual use in mills, in 1775 and 1778; and progressively to later periods. Objections have been made, on both sides, to the credit of some of the witnesses who have been examined, not on the ground of want of veracity, or of character, but of interest, short of that which can affect their competency. These objections have been pressed so far beyond their just limits, as to require from the court an explanation of their real value. Where the evidence of witnesses opposed by other witnesses is relied upon, by either side, to prove a particular fact, the jury must necessarily weigh their credit, in order to satisfy their own minds on which side the truth is most likely to be; and in making this inquiry, every circumstance which can affect the veracity of the witnesses, whether it concern their moral character, or whether it arise from some interest which they may have in the question, or from feelings favorable to one or the other of the parties, should be taken into the calculation. But if the fact in controversy may exist, without a violation of probability, and the proof is by witnesses exclusively on that side, there is nothing to put into the opposite scale, against which to weigh the credit of **456** those witnesses; \*and if the objection to their credit be worth anything, it must be to the full extent of rejecting their testimony altogether, or else it is worth nothing. The jury cannot compromise the matter, or halt between two opinions; they must decide that the fact is so, or is not so; and if the latter be cause of objection to the credit of the witnesses, it would amount to the confounding of the questions of competency, and credibility; for the effect would be the same, whether the court refused to permit the witnesses to testify on the ground of incompetency, or the jury should reject their testimony, when given, on that of want of credibility. I have thought it proper to submit these general observations to the consideration of the jury.

We come now to the question of law, which arises out of these facts, which is,

What are the things in which the plaintiff alleges, and has proved, he has an exclusive property, which he asserts the defendant has used, and which the defendant denies?

The first claim is for an improved hopper-boy, which the plaintiff insists is granted by his patent, which has received the sanction of the Supreme Court, and which the defendant acknowledges. This being, then, conceded ground, the court will proceed to examine it; and the inquiry will be, whether the plaintiff is entitled to a verdict for an infringement of his patent for his improved hopper-boy. The objection relied upon by the defendant is, that the plaintiff has not set forth in his specification what are the improvements **457** of which he claims to be \*the inventor, so that a person skilled in the art might comprehend distinctly in what they consist. This

objection in point of fact is fully supported. Neither the specification, nor any other document connected with the patent, states, or even alludes to any specific improvement in the hopper-boy. Taking this as true, how stands the law? The 3d section of the patent law declares, that "before an inventor can receive a patent, he shall deliver a written description of his invention, in such full, clear, and exact terms, as to distinguish the same from all other things before known, and to enable a person skilled in the art, &c., of which it is a branch, &c., to make and use the same."

What, then, is the plaintiff's invention, as asserted by his counsel, conceded by the defendant, and sanctioned by the Supreme Court in the case of *Evans v. Eaton*? The answer is, an improvement of the hopper-boy, or an improved hopper-boy, which that court has declared to be substantially the same. If this be so, then the above section of the law has declared, that he must specify this improvement in full, clear, and exact terms. If he has not done so, he has no valid patent on which he can recover.

The English decisions correspond with the injunctions of our law. (*Boulter v. Bull, Boville v. Moor, M'Farlane v. Price, Harmen v. Playne*.) The American decisions, so far as we have any reports of them, maintain the same doctrine. Mr. Justice Story, in the case of *Lovel v. Lewis*, lays it down, \*that if [**458** the patent be for an improvement in an existing machine, the patentee must, in his specification, distinguish the new from the old, and confine his patent to such parts only as are new, for if both are mixed together, and a patent taken for the whole, it is void." What is the reason for all this?

In the first place, it is to enable the public to enjoy the full benefit of the discovery, when the patentee's monopoly is expired; by having it so described on record, that any person skilled in the art, of which the invention is a branch, may be able to construct it. The next reason is, to put every citizen upon his guard, that he may not, through ignorance, violate the law, by infringing the rights of the patentee, and subjecting himself to the consequences of litigation. The inventor of the original machine, if he has obtained a patent for it, and all persons claiming under him, may lawfully enjoy all the benefits of that discovery, notwithstanding the improvement made upon it by a subsequent discoverer. If he has not chosen to ask for a monopoly, but abandoned it to the public, then it becomes public property, and any person has a right to use it. The inventor of an improvement may also obtain a patent for his discovery, which cannot legally be invaded by the inventor of the original machine, or by any other person. These rights of each are secured by law, and there is no incompatibility between them. But if a man wishing to use the original discovery, and honestly disposed to avoid an infringement of the improver's right, is unable to discover, from any certain and known standard, when the original invention ends, and \*the [**459** improvement commences, how is it possible for him to exercise his own acknowledged right, freed from the danger of invading that of



another? and to what acts of oppression might not this lead? Might not the patentee of this mysterious improvement obtain from the ignorant, the timid, and even the prudent members of society, who wish to use only the original discovery, the price he chooseth to ask for a license to use his improvement, and in this way compel them to purchase it, rather than incur expenses and inconveniences far greater than the sum demanded? If this may happen, then the improver enjoys, in a degree, the benefit of a discoverer, both of the original machine, and also of the improvement. In short, the patentee of the improvement may, to a certain extent, keep men at arm's length as to the use of the original invention, or make them pay him for it, in derogation of the rights of the inventor of the original machine. If the law, as applicable to cases in general, be rightly laid down, the next inquiry is, is the present an excepted case? The plaintiff's counsel have not directly asserted it to be so; but they have referred, with some emphasis, to what is said by the Supreme Court, in the case of *Evans v. Eaton*.<sup>1</sup> The expressions are: "In all cases where the plaintiff's claim is for an improvement on a machine, it will be incumbent on him to show the extent of his improvement, so that a person understanding the subject, may comprehend distinctly in what it consists."

This decision does not state in what way the **460\*** extent of the plaintiff's improvement is to be proved; nor did the case require that the Supreme Court should be more explicit. The obvious conclusion is, that the court left that matter undecided, and meant that the extent of the plaintiff's improvement should be shown according to rules of law. A contrary construction would be most unfair and unwarranted.

Is it possible to believe, that if the Supreme Court intended to decide contrary to the provisions of the 3d section of the patent law, and of the English and American decisions, that this was a case without the influence of that law, and those decisions, that such intention would have been expressed in such general terms? This cannot be admitted; neither can the private act for the relief of Oliver Evans warrant the argument, that this case is freed from the restrictions contained in the 3d section of the patent law; because, except as to the extent of the grant it refers to, and the Supreme Court in the before-mentioned case, considers it as within the provisions of that law.

Is it likely that the Supreme Court could have meant, that the plaintiff might cure the defects of his specification, by proving to the jury in what his improvement consisted? If so, then, as to the present defendant, such an explanation would be unavailing to save him from the consequences of an error, against which the sagacity of man, could not have guarded him. He has sinned already, if he has invaded the plaintiff's right, and it is too late to convince him of his error, if he must be a victim of it, for the want of that light, which is now shed upon the act long after his supposed transgression. **461\*** But of what avail would that explanation be, after the expiration of the plaintiff's monopoly? The parol evidence giv-

en in a court of justice being seldom recollected with accuracy, it affords the most unsafe notice of facts, particularly when they respect matters of art, that can well be supposed. What man, who wishes not to invade the plaintiff's patent, would venture to erect a hopper-boy, merely upon the information which he could gather from this trial? He could obtain none upon which he could safely rely; nor could any artist, after the expiration of the plaintiff's right, be enabled from such a source, to know how to construct the improved hopper-boy. But even if the extent of the improvement could be proved in this way, the plaintiff has not attempted to prove it, and what is more, his counsel, though repeatedly called upon to point it out, have not been able to do it.

Can the jury, without evidence, and without the aid of the plaintiff, or his counsel, say in what those improvements consist? If they had never seen another hopper-boy, supposed to be the original, this would be impossible. If, having seen the Stouffer hopper-boy, they can do so by comparing with it the plaintiff's improved hopper-boy, then the consequence seems almost to be inevitable, that the Stouffer hopper-boy is the original one; the point which under the next head is denied by the plaintiff. But if the specification had stated in what the plaintiff's improvement consisted, still he is not entitled to a verdict for a violation of his patent, unless he has proved, to your satisfaction, that the defendant has infringed it.

\*Upon the whole, then, this patent, [**462** so far as it is for an improvement, cannot be supported; and as to any claim founded on this right, the plaintiff is not entitled to your verdict.

2. The plaintiff contends that he is the original inventor, not only of the improved hopper-boy, but of the whole machine; that his patent grants him the exclusive right for both; and that this claim has received the sanction of the Supreme Court. Whether, in point of fact, he is the original inventor of the hopper-boy, will be attended to hereafter. Neither shall I stop to inquire whether the plaintiff's patent grants him the right, because, if the Supreme Court has sanctioned the claim, that is law to this court. The part of the decision of that court, relied upon by the plaintiff's counsel, is found in 3 Wheat. Rep., 517, where the Chief Justice says: "The opinion of the court, then, is, that Oliver Evans may claim under his patent the exclusive use of his inventions and improvements in the art of manufacturing flour and meal, and in the several machines which he has invented, and in his improvements on machines previously discovered."

It would seem almost impossible to misunderstand this positive declaration of the court. It appears to be the result of the previous reasoning. It states that the plaintiff may claim, (1) The exclusive use of his improvements, and inventions, in the art of manufacturing flour. (2) In the several machines which he has invented. (3) In his improvements on machines previously discovered. As to the 1st, there is no dispute in the cause. The 3d has been [**463** already disposed of, and the 2d will now be examined. It is contended by the defendant's counsel, that this is not the correct construction of the above sentence of the court, because it is

1.—3 Wheat. Rep. 518.

inconsistent with the pretensions of the plaintiff's counsel, and with the argument of the Chief Justice, throughout the opinion, which led to the above conclusion. This supposed inconsistency may, in the opinion of this court, be explained by the following observations:

The exceptions taken to the charge of this court, in the case of *Evans v. Eaton*, were, 1st. that Oliver Evans' patent was only for the combined effect of all the machines mentioned in his patent, and, 2d, in directing the jury to find for the defendant, if they should be of opinion that the hopper-boy was in use prior to the improvement alleged to be made by Oliver Evans. These were the only questions presented to the view of the Supreme Court, upon which it was deemed proper by that court to give an opinion. The reasoning of the Chief Justice, therefore, is intended to prove, and correct these errors in the charge, by showing that Oliver Evans was entitled, by his patent, and the accompanying documents, not only to the general combination of the different machines, but to an improvement on the hopper-boy, one of the machines used in combination. If he had a right to an improvement on the hopper-boy, then this court was clearly wrong in directing the jury to find a verdict for the defendant, if they should be of opinion that the hopper-boy was in use prior to the plaintiff's improvement; because it was unimportant who was **464\*** the original discoverer of the hopper-boy, provided the plaintiff had a patent for an improved hopper-boy, and the defendant used that improvement, and the charge precluded that inquiry. But whilst the Chief Justice aims to prove that Oliver Evans was entitled to this double claim, he does not exclude any other claim. There is an expression relied upon by the defendant's counsel, as having this appearance; but it is more likely that the word relied on is a typographical error, than that the court should both deny and affirm the plaintiff's right, as an original inventor of the hopper-boy. When the court came to state, definitively, what were the plaintiff's claims under this patent, the whole are distinctly stated. The act for the relief of Oliver Evans authorizes a grant to him of his improvement, in the art of manufacturing flour, and in the several machines which he has invented, and in his improvements, &c. The court says, that "the application is for a patent co-extensive with the act," &c.<sup>1</sup>

If, then, in this enumeration of the plaintiff's rights under the patent, those to the machines had been omitted, it might have been supposed that it was not recognized by that court, and it is consequently introduced, in order to prevent a conclusion against its validity, although it had not been brought into view in the previous argument; because a matter not in dispute. This course of reasoning, is, we think, strongly fortified by what the court says (p. 518): "In all cases where his claim is for an improvement," &c. Now, if his claim was confined to **465\*** an improvement, \*produced by the combined operation of all the machines, and if an improvement in the separate machines, why should the court have stated, hypothetically, that which was to be proved in case the plaintiff

claims for an improvement? The sentence following immediately that which has been relied on by the defendant's counsel seems to explain it, and to fortify the construction which we have given to it. Upon the whole, we are of opinion, that the question, who is the original inventor of the hopper-boy? is left open by the Supreme Court, and is now to be decided by the jury. If, then, the jury should be of opinion upon the evidence, that the hopper-boy which the defendant uses was invented, and was in use, prior to the discovery of Oliver Evans, then your verdict ought to be for the defendant. But to this construction there are objections made, which it is proper to notice.

1. It is contended, that the judgment of the Supreme Court in *Evans v. Eaton*,<sup>2</sup> where it is said that there is error in the proceedings below, in this, that in the charge the opinion is expressed, "that Oliver Evans was not entitled to recover if the hopper-boy in his declaration mentioned had been in use previous to his alleged discovery," entitles the plaintiff to a verdict, although the jury should be of opinion that he is not the original inventor of the hopper-boy. That the court did not mean this is most obvious, from what is said in page 517, that Oliver Evans may claim the exclusive use in the several machines which he has invented. Could the Supreme Court intend to **[\*466]** say, immediately after, that he is entitled to a verdict for a machine which he has not invented? Can it be supposed that the court meant to ride over the third section of the patent law, and set up a different rule, to govern this case, without having stated the reasons for so extraordinary a distinction? This is altogether inadmissible. It is also worthy of remark, that the words "in his declaration mentioned" in the judgment of the Supreme Court, are not in the charge of the Circuit Court as stated by the Chief Justice; and it is the insertion of those words in the judgment which produces all the difficulty. Leave them out, and then the judgment is consistent with the whole reasoning of the Chief Justice, which condemned the charge of the Circuit Court, because it precluded Oliver Evans from obtaining a verdict for his improvement, if he was not the original inventor of the elementary parts of the machine. Retain them, and it follows, that if Oliver Evans was proved not to be the inventor of the hopper-boy in his declaration mentioned, still the defendant was not entitled to a verdict. This would be in such direct opposition to the sixth section of the patent law, that we cannot suppose this was the meaning of the Supreme Court.

2. The next objection to the construction is, that the act of the legislature of Pennsylvania, of 1787, conveyed to Oliver Evans the original hopper-boy, and consequently the existence and use of the Stouffer hopper-boy, at a period prior to the plaintiff's discovery, cannot now be urged to invalidate his patent. It is by no means to be admitted that the act operates to make such a \*transfer. But if it did, **[\*467]** still the plaintiff cannot recover, if he appears not to be the first or original discoverer of the hopper-boy. His claim is not derivative either from the state or from an individual. His suit is founded on his patent, and unless he was him-

1.—3 Wheat. Rep. 508.  
Wheat. 7.

2.—3 Wheat. Rep. 519.



self the original inventor of the hopper-boy, he cannot recover.

3. Another objection stated by the plaintiff's counsel is, that the Stouffer hopper-boy, although the jury should believe it was in use in many mills before the plaintiff's discovery had fallen into disuse, and therefore cannot be urged to invalidate the plaintiff's right of recovery. The answer to this is, that whether it fell into disuse or not, if it was used before the plaintiff's discovery, the plaintiff could not obtain a patent for it, so as to exclude the defendant from using it, if he chose to do so.

4. The last objection is, that the use of the Stouffer machine cannot affect the plaintiff's patent, unless it was public. Whether that hopper-boy was in public use or not, the jury will judge from the evidence. It was erected and used in four or five mills, if the defendant's witnesses are believed. But this argument has no foundation in the act of Congress, which does not speak of public use. It is immaterial whether the patentee had notice of the prior invention or not. If it was in actual use in any part of the world, however unlikely or impossible that the fact could come to the knowledge of the patentee, his patent for the same machine cannot be supported.

**468\*]** \*A verdict was rendered for the defendant, and exceptions being taken to the above charge, the cause was brought by writ of error before this court.

*Mr. Justice STORY* delivered the opinion of the court:

This case is an action for an infringement of the same patent as in *Evans v. Eaton*;<sup>1</sup> and many of the remarks in that case are applicable to this; and therefore the opinion now delivered will refer to such points only as are not completely disposed of by the opinion already delivered. The evidence in this case does not establish that the defendant used the plaintiff's improved hopper-boy, but the hopper-boy used by the defendant, is asserted to be Stouffer's hopper-boy. At the new trial, a Mr. Aby was offered as a witness by the defendant, to prove the nature and character of the hopper-boy used by the defendant; the plaintiff objected to his testimony, as incompetent, because he was sued by the plaintiff for an infringement of his patent right, under circumstances similar to those alleged in proof against the defendant. The court overruled the objection; and the witness was then sworn on the *voir dire*, as to his interest in the suit; but upon a full examination, it did not appear that he was really interested; and the court therefore permitted him to be sworn in chief. The plaintiff took an exception to this decision of the court. The objection to the competency of Aby, so far as he has an interest from being sued, cannot **469\*]** \*be distinguished, in principle, from that already overruled in the case of *Evans v. Eaton*. There is this additional circumstance in this case, that Aby was not called as a general witness, but to establish a single fact, viz., the nature and character of the hopper-boy used by the defendant. The other objection

upon his answers on the *voir dire*, is disposed of by the single remark that he purged himself of any real interest in the event of the suit. A question was asked of this witness, on his examination in chief, whether the hopper-boy in the defendant's mill was like the model exhibited in court of the plaintiff's patented hopper-boy; the plaintiff objected to the question, because such testimony could not be given in this case, for want of notice thereof. But the objection was overruled by the court; and, in our judgment, with perfect correctness. No notice was necessary to authorize the inquiry; and if the plaintiff meant to rely on the notice required by the sixth section of the patent act, in certain cases, it is only necessary to say, that this was not within the provision of that class of cases. The question was perfectly proper under the general issue. Similar objections were taken to other witnesses; but it is unnecessary to remark on them.

An inquiry was proposed by the plaintiff, to one of the witnesses, whether one Peter Stouffer had paid the plaintiff for a license for his mill; but the court refused to allow the question to be asked; and we see no reason why it should have been allowed, for it merely referred to an act among strangers, which ought not to prejudice the defendant. A \*sim-**470** ilar question was proposed to be asked of the same witness, whether the executors of Jacob Stouffer had paid the plaintiff for a license for the mill of Jacob; the court overruled the question; and for the same reason, it was rightly overruled.

The deposition of one John Shetter was read in evidence by the defendant, without opposition, and afterwards the plaintiff moved to have the same rejected, because not taken according to the rules of the court; but the court refused to reject it; and in our judgment rightly, because it having been once introduced with the acquiescence and consent of the plaintiff, he could not afterwards avail himself of the objection.

The plaintiff then proposed to ask a question of a witness, whether Daniel Stouffer was subject to fits of derangement, and whether the witness had said so; but the court overruled the question. It does not appear distinctly in the record, that Daniel Stouffer was a witness in the cause; but if he was so, the question was properly overruled, because a person being subject to fits of derangement, is no objection either to his competency or credibility, if he is sane at the time of giving his testimony.

The next objection of the plaintiff's counsel, is to the charge of the court, in summing up the cause to the jury; but the points on which that charge materially depends, have been so fully discussed in the opinion just delivered in *Evans v. Eaton*, that it is unnecessary to examine them at large.

*Upon the whole, it is the opinion of the majority of the court, that the judgment ought to be affirmed with costs.*

Aff'g—3 Wash. C. C. 408.

Cited—Bald. 315; 3 Sumn. 541; 2 Story, 171.

Wheat. 7.

3.—*Ante*, p. 356.

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[\*PRIZE.]

## THE GRAN PARA.

THE CONSUL-GENERAL OF PORTUGAL,  
*Libelant.*

Prizes made by armed vessels which have violated the statutes for preserving the neutrality of the United States, will be restored if brought into our ports.

This court has never decided that the offense adheres to the vessel under whatever change of circumstances that may take place, nor that it cannot be deposited at the termination of the cruise, in preparing for which it was committed; but if this termination be merely colorable, and the vessel was originally equipped with the intention of being employed on the cruise, during which the capture was made, the *delictum* is not purged.

## APPEAL from the Circuit Court of Maryland.

This was a libel filed in the District Court of Maryland, by the Consul-General of Portugal alleging that a large sum of money in silver and gold coins had been, in the year 1818, taken out of the Portuguese ship *Gran Para*, then bound on a voyage from Rio Janeiro to Lisbon, by a private armed vessel called the *Irresistible*, which had been fitted out in the United States, in violation of the neutrality acts; that the said sum of money had been brought within our territorial jurisdiction, and deposited in the Marine Bank of Baltimore; and praying that the same might be restored to the original Portuguese owners. A claim was filed by one Stansbury, as agent for John D. Daniels, master and owner of the *Irresistible*, stating him to be a citizen of the Oriental Republic, which was at war with Portugal, and that he was **472\*** cruising under the flag \*and commission of that republic at the time the capture was made, as set forth in the libel, and insisting on his title to the money as lawful prize of war. By the proofs taken in the cause it appeared that the capturing vessel was built in the port of Baltimore, in the year 1817, and was, in all respects, constructed for the purposes of war. On the 16th of February, 1818, after being launched, she was purchased by the claimant, Daniels, then a citizen of the United States. A crew of about fifty men were enlisted in Baltimore, and she cleared out for Teneriffe, having in her hold 12 eighteen-pound gunnades with their carriages, and a number of small arms, and a quantity of ammunition, entered outwards as cargo. The vessel proceeded directly for Buenos Ayres, where she remained a few weeks, during which time the crew was discharged.

Having obtained a commission from the government at that place to cruise against Spain, a crew was enlisted, consisting chiefly of the same persons who had come in the vessel from Baltimore, and she sailed, in June, 1818, on a cruise under the command of the claimant. The next day after she left the port, a commission from General Artigas, as Chief of the Oriental Republic, was produced, under which the claimant declared that he intended to cruise, and that granted by the government of Buenos Ayres was sent back to that place. During this cruise, several Portuguese vessels were captured, and the money, the restitution of which was prayed for by the libelant, was taken out of

them. In September, 1818, the *Irresistible* returned to Baltimore, \*and a large sum [**\*473** of money, captured during the cruise, was deposited in the bank.

Decrees were entered in the district and circuit courts, restoring the property to the original owners, and the cause was brought by appeal to this court.

*Mr. Winder*, for the appellant and claimant, made the following points:

1. That the manner in which the *Irresistible* left the United States, on her voyage to Buenos Ayres, was not in violation of the statutes of Congress, or the neutral obligations of the United States by the law of nations.

2. It was not contrary to the law of nations for the Oriental Republic, finding the *Irresistible* in the river La Plata, under the circumstances in which she was, to take her into their service as a cruiser against their enemies.

3. That the conduct of Daniels, and any others who went out in her, in entering into the service of the Oriental Republic, was not contrary to the law of nations, nor in violation of the duties of neutrality imposed on the United States by the law of nations.

4. But even if the appellant's counsel should be mistaken in this respect, yet there is no evidence in this cause to show that the money attached was taken from the ship *Gran Para*, nor that any such ship was captured by the *Irresistible*.

*Mr. D. Hoffman*, contra, after commenting on the testimony to establish the American ownership, and the illegal outfit at Baltimore, of the privateer, argued, **(1)** That the [**\*474** neutrality and laws of this country having been violated by the captors, this court will decree restitution on that ground, though the commission under which they acted were wholly unimpeachable; a fact which is not admitted in this case, as the commissions of Artigas stand upon grounds essentially different from those which justify the commissions of Buenos Ayres, the Republic of Columbia, &c.

The law on this subject has become to well settled, and familiar, to justify much reference to, or comment on authorities. It was at one time supposed that neutral nations were, in all cases, obliged by their amity and neutrality, to rescue the captured and his property from the power of his enemy, who had brought them *infra presidia* of the neutral country, and to award restitution a species of *jus postliminii*. This was certainly, at one time, the doctrine of the English courts and jurists, and obtains in some countries on the continent of Europe.<sup>1</sup>

The rule, however, of the courts of this country, has been established to be exactly the reverse. As a general rule, a neutral court has no such power. The inquiry as to the validity and efficiency of a belligerent capture, is referred to the courts of the captors; and the restoring power, exercised on various occasions by the courts of this country, springs from \*certain exceptions, which have been [**\*475** engrafted on the general rule. This court will inquire into every seizure on the high seas, for the purpose of ascertaining whether the taking

1.—2 Azuni, 222, 223, 250, 261; Marten's Priv. 44; 1 Molloy, 58, 60, 66, 76, 87, 100; 6 Vin. Abr. 515, 517, 519, 534; 16 Vin. Abr. 347, 350; Beaves, Lex. Mer. 241, 243, 244; 2 Brown's Civ. and Adm. Law, 214, 215.



were lawful or piratical; for if there be no commission, the seizure is piracy *de facto* and *de jure*, and renders the captors responsible *civilliter et criminaliter*. If there be a commission which at the time of taking was *amortised*, or abused *animo deprædandi*, they would be responsible certainly *civilliter*, perhaps *criminaliter*. If the commission were granted by an incompetent power, every presumption would be in their favor in a criminal proceeding against them; but they would be civilly responsible before any tribunal administering the *jus gentium*. Every such tribunal, therefore, will inquire, first, into the fact of the existence of a commission; secondly, the competency of the power granting it; both of which are essential in order to distinguish capture from piracy, and the commission issued by a state or nation from that which is granted by a few associated persons, or an isolated individual, who have assumed the exercise of sovereign power.<sup>1</sup>

With regard to the exceptions to the general rule which refers the question of prize or no prize to the courts of the captors, and repudiates the right in a neutral to restore the *res capta* to those from whom it has been taken, it is said that there are now only two: first, where the **476\*** capture was made within the neutral territory;<sup>2</sup> and secondly, where the capturing vessel was in the whole, or in any part, owned or equipped, or her force in any degree augmented within the dominions of such neutral state, and this by the general principles of international law, independently of all statutory inhibitions of such ownership, equipment, &c.<sup>3</sup> The uniform series of decisions of the American courts awards restitution to the original owners of property thus taken, and the facts of the present case will be found, it is presumed, much stronger than in most others which have occurred.<sup>4</sup>

2. This court is competent to restore property to the respondent, by the general principles of maritime and international law, without any reference to the proof that the neutrality and laws of this country have been violated by the captors, but on the sole ground that the taking was not *jure belli*, but wholly without commission; as Artigas does not represent a state or nation competent to grant a commission to war against Portugal. The principles established **477\*** by the cases recently decided by this court, do not impugn the doctrine contended for, as they occurred in the case of commissions granted by such of the South American provinces, as our government, in the opinion of the court, had recognized to be in a civil war with Spain, the mother country, and which commissions only operated against such parent state. Our government and this court having, in no instance whatever, recognized Artigas as engaged in a war, even with Spain,

the mother country, and certainly not with Portugal, he is wholly incompetent to issue commissions of prize, as much so as any other individual in the Spanish provinces. This court, therefore, is competent as an instance court to decree restitution and damages, as in ordinary cases of maritime tort, and to decide (negatively) that the Banda Oriental is not a state or nation invested with the attributes of sovereignty, the former or ancient state of things being presumed to remain *de facto*, as well as *de jure*.

The government of the United States has, in no instance, recognized Artigas as engaged in a civil war with Spain, or in a war of any kind with Portugal. If we refer to the documents recognizing the South American provinces, as engaged in a civil war with Spain, we shall find no mention made of such a war by Artigas, or the Banda Oriental.<sup>5</sup> The general expression, "South American Provinces," is *\*quali-* **478** fied by the express mention of Buenos Ayres and Venezuela. But if the Banda Oriental, as modified by Artigas, might be embraced under such a general recognition of the South American provinces being engaged in a civil war with Spain, still it would be incumbent on the claimant to prove that this country ever was a province of Spain; it may have been a part of a province; we have no historical or geographical account of the country that is by any means satisfactory; and if Artigas, and his wretched and savage followers be recognized as qualified to wage war, then may every township, district, city, village, hamlet, or individual, claim the same high prerogative. If Artigas, and a few adherents, can segregate themselves from the common cause, and constitute themselves a state or nation competent to wage either a civil or public war, may not every individual in the Spanish provinces claim the same right? Where is the boundary or clear line of demarkation? By what principle can such a right be regulated, except by requiring that the power claiming the right should be possessed of the elements or constituents of a nation, such as a fixed domain, a national treasury, a national force, a code of laws,<sup>6</sup> and perhaps, in order to wage a maritime war, sea-ports? Nor will Grotius, nor his enlightened commentator, allow a company or horde of men to be a state or nation, although they may observe some kind of government and equity among themselves. *\*All that we know of Artigas* **479** and his adherents, proclaims him a mere adventurer, and them a lawless band to whom he is the sole tie of union. Artigas is mentioned by these documents to be engaged in a contest with Buenos Ayres; but it is nowhere stated that he is the chief magistrate of a province engaged in a civil war with Spain. The only executive notice of the Banda Oriental, is in

1.—Talbot v. Janson, 3 Dall. 133; The Invincible, 1 Wheat. Rep. 258; Rose v. Himely, 4 Cranch, 241.

2.—Grotius, de J. B. ac. P., l. 3, c. 4; Bynk, Q. J. Pub., l. 1, c. 8; Vattel, Droit Des Gens, l. 3, c. 7, s. 132; 5 Rob. 15, 373; Bee's Rep. 204.

3.—Pres. Messages, Vol. I., 21, 24, 27, 36, 42, 47, 48, 56, 61, 62, 72, 73, 78, 82, 87, 95; 9 Cranch, 365; 4 Wheat. Rep. 310, 311.

4.—Bee's Rep. 9, 11, 28, 60, 73, 114, 292, 299; 3 Dall. 285, 307, 319; 2 Peters, 345; The Alerta, 9 Cranch,

359; Divina Pastora, 4 Wheat. Rep. 53; The Estrella, 4 Wheat. Rep. 298; The Neustra Senora, Ib. 695; Amistad de Rues, 5 Wheat. Rep. 335; The Bello Corrunes, 6 Wheat. Rep. 152; Nueva Anna, Ib. 193; Conception, Ib. 335.

5.—9 Niles' Regist. 393, 396; Let. Sec. State, 19th Jan., 1816; Mess. 17th Nov. 1818; 4 Wheat. Rep. Appx. 23; Mess. 17th Dec. 1819; Mess. 8th March, 1822.

6.—Sir L. Jenk. 424, 791; Bynk. Q. J. Pub., l. 1, c. 17; Grot., l. 1, c. 3, s. 34; l. 3, c. 3, s. 1, 2; Cic. Phil. 4, cap. 4.



the President's message of the 17th November, 1818. On submitting to Congress the documents furnished him by our commissioners, he states, that "it appears from these communications, that the government of Buenos Ayres declared itself independent, in July, 1816; that the Banda Oriental, Entre Rios, and Paraguay, with the city of Santa Fe, all of which are also independent, are," &c.

This, surely is not a recognition of their independence; for the executive, I presume, has no power to make such recognition; nor is it a recognition of the existence of a civil war between the Banda Oriental and Spain. It will also be observed, that in the late message of the President, 8th March, 1822, no mention whatever is made of the Banda Oriental.

But if it be admitted, *argumenti gratia*, that the Banda Oriental was a South American province, engaged in a civil war with Spain, the mother country, would such a partial recognition cloth its chieftain with the power of waging war against a nation in no way connected with Spain? The sound doctrine, perhaps, is, that a colony, though competent to disenthral itself from the despotism of an unnatural **480\*** parent, and therefore, to wage a civil war, does not thereby become a nation or state, invested with all the high privileges of sovereignty. What would be the consequences of a contrary doctrine? Every minute division of an empire might *per saltum* become a nation, claiming, and asserting, all the prerogatives of free and independent states. These new-fledged, self-constituted, unorganized hordes of people, perhaps only half civilized, might then well assert their claim to sit in the councils of the great family of nations. They would claim the rights of embassy, of establishing consulates, and of inflicting all the rigors of public wars, as blockades, visitation and search, impressments, seizure, and confiscation of contraband. Such an individual as Artigas, whom no one knows, might, under this doctrine, claim to exercise every belligerent right, and, in waging his triple war, might capture, under the right of blockade, the vessels of every nation presuming to enter Buenos Ayres, Maldonado, Lisbon, or the mouth of the Tagus, though he possessed not a single sea-port, or a single vessel of his own. It is, therefore, presumed that every colony recognized as engaged in a civil war for the assertion of its independence, must rigidly restrict itself to the contest with the parent country and its allies; and cannot wage a distinct and independent war with other nations. If, therefore, the Banda Oriental be regarded as on the same footing with Buenos Ayres, or Venezuela, it cannot war against Portugal; for no alliance is pretended between **481\*** Spain and Portugal, and if it were asserted, it must be proved.<sup>1</sup> The contest between Artigas and Portugal originated in a special cause, and was prosecuted for a special purpose, viz., the recovery of Monte Video, which had been taken possession of by the Portuguese, because Spanish supremacy having ceased to operate there, the Spaniards had carried on a series of the most vexatious depredations on the adjoining Portuguese provinces, which it became the imperious duty of Portu-

gal to check and terminate. Spain, on the other hand, was engaged in a war with some of its provinces, for general, and very different objects; the conflict, therefore, between Portugal and Artigas, could not by implication make the former an ally of Spain. If the government recognition be a limited and partial one (as it certainly is), so should the effects of such recognition be partial. The fact recognized by this government, is, that a civil war rages between Spain and her South American provinces. In regard to Buenos Ayres, and Venezuela, this was certainly the fact; but government did not mean, thereby, to acknowledge the independence of these provinces. The effect of this recognition is defined by the court, in *Palmer's* case, and that of *The Divina Pastora*, to be, that the courts of this country will not regard as criminal, those acts of hostility which the province may direct against its enemy; nor will they undertake to judge of the validity of captures made under their commission, unless the maintenance of our laws and neutrality should require it. \*The ac- **[482]** knowledge of competency, therefore, of these provinces, to wage a civil war, does not clothe them with any powers beyond the sphere of the necessary operation of this right; they have no right to war with other nations, nor to claim the attributes and powers of sovereign states. If this be sound in regard to the known provinces, it must be emphatically so in relation to the Banda Oriental, and its chieftain; who claims not only to war with Spain and her provinces, but with Portugal likewise, which is no way connected with either.

Again; there having been no express recognition of the existence of a civil war between Jose Artigas and Spain; can this court imply such recognition from any circumstances? It would seem not. The power to regard a people emerging from barbarism to civilization and government; or from a colonial, to an independent state, is a prerogative exclusively of the government.<sup>2</sup> Courts are bound to regard the ancient state of things as remaining, until there be a recognition by the proper authority, and, therefore, though it be competent for courts to declare that a people do not constitute a state, they cannot affirmatively declare that they are a state. Nor is it competent for this court to recognize the existence of a civil war; this, also, is a government power, and if there be no such express recognition of the fact of a civil war between the Banda Oriental and Spain, this court will not infer it from the use of a general expression, such as, **[483]** "South American provinces." The doctrine laid down by this court in *Palmer's* case,<sup>3</sup> (in which a distinction was taken between an unqualified recognition of the independence of a people, and a partial recognition resulting from the admission of the existence of a civil war between a colony and the parent state), is in no degree at variance with the principle established in the previous cases of *Rose v. Himely*, and *Gelston v. Hoyt*, "that courts do not possess the power of first recognizing the national character of a people." Whether the recognition

2.—9 Ves. 347; 10 Ves. 353; *Rose v. Himely*, 4 Cranch; 272; *Gelston v. Hoyt*, 3 Wheat. Rep. 289, 295, 324.

3.—3 Wheat. Rep. 610.

1.—1 Ves. 283, 292.

Wheat. 7.



be unqualified or partial, the government must speak distinctly; otherwise, the courts will regard the ancient state of things; and all acts done on the high seas, under the authority of such separated people, will be looked on as wholly unauthorized and null.

3. The claimant, Daniels, is a citizen of the United States, and appears before this court as a claimant for property procured through means forbidden by the laws of the country, and the duties and obligations of a good citizen. He is an unworthy claimant, and as such will not be permitted to claim the result of his own wrongs, and illegal acts. "A claim," says Sir William Scott, "founded on piracy, or any other act, which in the general estimation of mankind is held to be illegal or immoral, might, I presume, be rejected in any court on that ground alone;"<sup>1</sup> and Mr. Justice John-  
484\*] son, in the case of \**The Bello Corrunes*, expresses himself emphatically to the same effect.<sup>2</sup>

4. With respect to there being no proof as to the seizure of the *Gran Para*, from which the money libeled is alleged to have been taken, it is presumed that this is altogether immaterial. The libel states the fact of the seizure of the *Gran Para*, and other Portuguese vessels; the answer expressly admits the taking of the money in controversy, and other money, from Portuguese vessels, and the inquiry is, whether it be the Portuguese property, and if so, whether it were rightfully taken.

Mr. *Winder*, in reply, insisted that the court would confine its interference to such cases of illegal capture, as would make the United States responsible to the injured foreign country, by the law of nations, or to such acts as are in violation of our statutes of neutrality; restraining their operation to such provisions as are required and justified by the public law. He compared this case to the analogous one of carrying contraband. The neutral nation was not responsible. The building of ships for sale was a lawful branch of commerce, and even if they were armed and equipped for war, they could only be considered as contraband; and though they might be subject to the penalty of confiscation, if taken in their transit to a belligerent, yet, if once incorporated into the mass of his military marine, they could be considered by neutrals in no other light than the rest of his naval force. But even supposing  
485\*] the original \*outfit in the ports of the United States to have been illegal, the vessel was not commissioned as a privateer, nor did she attempt to act as one, until her arrival in the river *La Plata*, when a lawful commission was obtained, and the crew re-enlisted. Even if she had made captures on her outward voyage, the *delictum* would be purged by the termination of that voyage, according to the analogies of the maritime law in other cases. This court has never yet determined that the original offense is indelible, and that it adheres to the vessel, whatever changes may have taken place, and that it cannot be deposited at the termination of the cruise, in preparing for which, the offense was committed; and as the *Irresistible* made no captures on her passage

from Baltimore to the river *La Plata*, and even if she had, the offense was deposited at the latter port, the court cannot connect her subsequent cruise with the transactions at Baltimore, or those which might have happened on her outward voyage. The learned counsel also argued, that the *Banda Oriental* was a sovereign state *de facto*, which had been acknowledged by the executive government of this country, as one of the parties to the war between Spain and her colonies, and which was engaged in an incidental contest with Portugal, which gave it the rights of war in respect to that power. He also insisted on such of the points in his argument on a former day, in the case of *The Santissima Trinidad*, as were applicable to the present. But as they will be found reported \*at large in that case,<sup>3</sup> [\*486 it is not deemed necessary to repeat them in this place.

Mr. Chief Justice MARSHALL delivered the opinion of the court, and after stating the facts, proceeded as follows:

The principle is now firmly settled, that prizes, made by vessels which have violated the acts of Congress, that have been enacted for the preservation of the neutrality of the United States, if brought within their territory, shall be restored. The only question therefore is, does this case come within the principle.

That the *Irresistible* was purchased, and that she sailed out of the port of Baltimore, armed and manned as a vessel of war, for the purpose of being employed as a cruiser against a nation with whom the United States were at peace, is too clear for controversy. That the arms and ammunition were cleared out as cargo cannot vary the case. Nor is it thought to be material that the men were enlisted in form as for a common mercantile voyage. There is nothing resembling a commercial adventure in any part of the transaction. The vessel was constructed for war, and not for commerce. There was no cargo on board but what was adapted to the purposes of war. The crew was too numerous for a merchantman, and was sufficient for a privateer. These circumstances demonstrate the intent with which the *Irresistible* sailed out of the port of Baltimore.

\*But she was not commissioned as a [\*487 privateer, nor did she attempt to act as one, until she reached the river *La Plata*, when a commission was obtained, and the crew re-enlisted. This court has never decided, that the offense adheres to the vessel whatever changes may have taken place, and cannot be deposited at the termination of the cruise in preparing for which it was committed; and as the *Irresistible* made no prize on her passage from Baltimore to the river *La Plata*, it is contended that her offense was deposited there, and that the court cannot connect her subsequent cruise with the transactions of Baltimore.

If this were to be admitted in such a case as this, the laws for the preservation of our neutrality would be completely eluded, so far as this enforcement depends on the restitution of prizes made in violation of them. Vessels completely fitted in our ports for military opera-

1.—*The Diana*, 1 Dodson, 95, 100.

2.—6 Wheat. Rep. 172.

3.—*Ante*, pp. 290, 296.



tions, need only sail to a belligerent port, and there, after obtaining a commission, go through the ceremony of discharging and re-enlisting their crew, to become perfectly legitimate cruisers, purified from every taint contracted at the place where all their real force and capacity for annoyance was acquired. This would, indeed, be a fraudulent neutrality, disgraceful to our own government, and of which no nation would be the dupe. It is impossible for a moment to disguise the facts that the arms and ammunition taken on board the *Irresistible* at Baltimore, were taken for the purpose of being used on a cruise, and that the men there enlisted, though engaged, in form, as for **488\***] a \*commercial voyage, were not so engaged in fact. There was no commercial voyage, and no individual of the crew could believe that there was one. Although there might be no express stipulation to serve on board the *Irresistible*, after her reaching the *La Plata*, and obtaining a commission, it must have been completely understood that such was to be the fact. For what other purpose could they have undertaken this voyage. Everything they saw, everything that was done, spoke a language too plain to be misunderstood.

The act of June, 1794, ch. 296, declares, that "if any person shall, within the territory or jurisdiction of the United States," "hire or retain another person to go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered in the service of any foreign prince or state as a soldier, or as a mariner, or seaman, on board of any vessel of war, letter of marque, or privateer, every person so offending shall be guilty of a high misdemeanor," &c.

Now, if the crew of the *Irresistible* were not enlisted in the port of Baltimore, to cruise under the commission afterwards obtained, it cannot, we think, be doubted, but that they were "hired or retained to go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered" into that service. For what other purpose were they hired in the port of Baltimore for the voyage to *La Plata*?

The third section makes it penal for any person, within any of the waters of the United **489\***] States, to be \*"knowingly concerned in the furnishing, fitting out, or arming of any ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, to cruise," &c.

It is too clear for controversy, that the *Irresistible* comes within this section of the law also.

The act of 1817, ch. 58, adapts the previous laws to the actual situation of the world, by adding to the words, "of any foreign prince or state," the words, "or of any colony, district, or people," &c. The act of April, 1818, ch. 83, re-enacts the acts of 1794, 1797, and 1817, with some additional provisions.

It is, therefore, very clear, that the *Irresistible* was armed and manned in Baltimore, in violation of the laws and of the neutral obligations of the United States. We do not think that any circumstances took place in the river *La Plata*, by force of which this taint was removed. To the objection that there is no proof that any part of the money was taken out of a vessel called the "*Gran Para*," it need only be

answered, that the allegation of the libel is, that she was called the "*Gran Para*, or by some other name."

*Decree affirmed with costs.*

Cited—S. C. 10 Wheat. 497.

[\*PRIZE.]

[\*490

## THE SANTA MARIA.

THE SPANISH CONSUL, *Libelant*.

A question of fact respecting the proprietary interest in prize goods captured by an armed vessel fitted out in violation of the statutes of neutrality of the United States. Restitution to the original Spanish owners decreed.

**A** PPEAL from the Circuit Court of Maryland.

This was a libel filed in the District Court of Maryland, by the consul of His Catholic Majesty for the port of Baltimore, in behalf of the Spanish owners of certain goods alleged to have been captured on the high seas, and taken out of the Spanish ship *Santa Maria*, by the privateer *Patriota*, illegally armed and equipped in the United States. The evidence in the cause established the fact that the capturing vessel was owned by citizens of this country, and that she was armed, equipped, and fitted out, in violation of the laws and treaties of the United States. But there was some contrariety in the testimony as to the identity of the property, which the claimant, Burke, insisted upon his title to hold as a *bona fide* purchaser under a condemnation and sale in some prize tribunal at Galvestown. There was also some evidence tending to show that Burke was a part owner of the capturing vessel. The District Court dismissed the libel, and ordered the property to be restored to the claimant, but this decree was reversed by the Circuit Court, and the cause was brought by appeal to this court.

\**Mr. Winder*, for the appellant, argued [\*491 upon the facts, in order to show that there was a defect of evidence of proprietary interest in the Spanish subjects, for whom the claim was given, and that there was no proof that the goods in question were taken out of the *Santa Maria*, or any other Spanish ship. He therefore insisted that even if there was no proof on the part of the claimant and appellant of a lawful condemnation of the goods as prize, he had a right to stand upon his title as an innocent purchaser, until some better title was shown in others.

*Mr. D. Hoffman*, for the respondent, argued, (1) That the evidence in the cause sufficiently established that the privateer *Patriota*, which plundered the *Santa Maria*, was owned and equipped in Baltimore. All captures made under the taint of an illegal outfit, or American ownership, have invariably been declared by this court to be illegal, and the property taken has been restored to the original owners.<sup>1</sup>

1.—The *Alerta*, 9 Craneh, 359; The *Divina Pastora*, 4 Wheat. Rep. 52; *Estrella*, 4 Wheat. Rep. 298; *Bello Corrunes*, 6 Wheat. Rep. 152; *La Concepcion*, 6 Wheat. Rep. 235.



2. All the cases cited were captures *jure belli*, under the sanction of commissions granted by South American provinces acknowledged by our government to be engaged in a civil war with Spain. In these cases, the court would have left the captors, and the courts of their country, in full possession of the *res capta*, had there been no American ownership, or equipment of the vessel effecting the seizure.<sup>1</sup> But this will not be the case where there is no commission \*to legalize the capture. In the absence of a commission, every court administering the *jus gentium*, will regard the taking as tortious at least, and, according to circumstances, piratical. Every violent dispossession on the high seas is *prima facie* tortious; and a taking as prize does not necessarily render it a capture *jure belli*.<sup>2</sup> It lies upon the claimant in this case to show the commission under which the taking is justified. If this be not shown, the court, in the exercise of its general powers, will restore the property, unless the claimant can establish his right on some other ground. In this case, no commission is produced; but,

Burke claims to hold this property rightfully as a *bona fide* purchaser, wholly ignorant of the circumstances stated in the libel. If there were any truth in this defense, in point of fact, it might be well to inquire how far even a *bona fide* purchaser, in this case, could protect himself by such a purchase. It might be urged that the doctrine of *market overt* is unknown to the *jus gentium*; that it is of peculiar and local origin, known only in England, and never recognized in the courts in this country; that the doctrine *a piratis et latronibus capta dominium non mutant*, is the received opinion of the most enlightened civilians and publicists; that as no right to the spoil vests in them, no right can be derived from them; that even if the doctrine of *market overt* were otherwise applicable, it could not obtain, inasmuch as a condemnation is essential, and this could not be [493\*] of *\*bona piratorum*;<sup>3</sup> that if the purchase was *bona fide*, the claimant only succeeded to the right of the vendors; a sale, *ex vi termini*, importing nothing more than a succession of the vendee, in consideration of money, to the rights of the vendor; and, finally, that the title of the claimant cannot be broader or more extensive than that of the pirates themselves, or those to whom they may have sold the property. But all this inquiry is unnecessary, if the proofs in this cause establish that the claimant was the active and principal owner of the *Patriota*, which seized and plundered the *Santa Maria*. On this point the circumstantial evidence comes strongly in support of the positive testimony. But there is, in the answer itself, a singular inconsistency, which throws a dark shade of suspicion over the character of this claim. The claimant first denies all knowledge of the capture of the *Santa Maria*, and of every fact stated by the libellant in relation to the *Patriota*, but subsequently relies on a purchase of this property, by his agent Novion, in regular course of trade, after it had been duly condemned. It was no doubt his intention, at

the time of filing his claim, to produce an authenticated record of condemnation, which was subsequently abandoned, no doubt from a knowledge that Aury's commission (the only one he could venture to produce) was a nullity, and that the tribunals of prize at Galveztown were wholly incompetent to adjudicate,<sup>4</sup> even \*if a condemnation of a competent court [494 could avail in such case.

After this conclusive testimony, establishing the falsity of the claim and answer filed by Burke, need it be asked whether he is a worthy claimant? He is a citizen of the United States, calling on this court to confirm to him the possession of goods, taken by a vessel fitted out by him in contravention of our laws, neutrality, and solemn treaties; and this, too, not even under the color of a commission from any power, acknowledged or unacknowledged.

Mr. Harper also argued, upon the same side, on the facts respecting the proprietary interest, and upon the question of law arising from the supposed condemnation at Galveztown. The substance of his argument upon the latter point will be found in the case of *The Nereyda*, where the same question arose more distinctly, but which was ordered to farther proof, and will be reported in the next volume.

Mr. Justice LIVINGSTON delivered the opinion of the court, and after stating the case, proceeded as follows:

In a case of so palpable a fitting out and arming in an American port, and proceeding thence directly on a cruise (whether with or without a commission, is in this case immaterial), the counsel for the claimant and libellant was right in not attempting to justify the capture. He has therefore confined his endeavors to show the insufficiency of the evidence to establish \*any title in the libellant, or in those [495 whom he represents, to the merchandise in question.

The allegation of the libel is, that the property was part of the cargo of the Spanish ship *Santa Maria*, which was captured by the *Patriota* in the year 1817. The appellant says, there is no adequate proof of this fact. Without laying any stress on the register of this ship, which has been sent from the Havana, and to which the appellant has objected, there are four witnesses, and they are the only witnesses in the cause, whose relation is so uniform and particular as to leave no room to entertain doubt on any part of this transaction.

Three of them were on board of the *Patriota*, at the time of her sailing on her illegal cruise. They establish, not only the unlawful armament of this vessel in the port of Baltimore, but the capture of the *Santa Maria*, and that the sugars libeled are the identical sugars which were taken out of her, and put on board of the schooner *Harriet*, in which they were brought to Baltimore. The other witness, Causter, although not present at the capture, testifies, in the most positive terms, and of his own knowledge, that the sugars libeled were part of the cargo of the *Santa Maria*. He speaks so much in detail on the subject, and his means of information were

1.—Nuestra Senora, 4 Wheat. Rep. 495.

2.—The Two Friends, 1 Rob. 283; Hallet v. Novion, 14 Johns. Rep. 90.

3.—2 Bro. Civ. and Adm. Law. 55, 461, 462; 2 Woodes. 429; 3 Binn. Rep. 228; 1 Johns. Cas. 471; 1 Tyl. Rep. 538.

4.—The Nueva Anna, 6 Wheat. Rep. 193.

so ample, that it is impossible he should be mistaken. Under these circumstances, and when not a single witness has been examined to throw any doubt on the subject, the court perceives no reason for disturbing the sentence of the Circuit Court, which is affirmed with costs.

S. C. 10 Wheat. 431.  
Cited—5 Mason, 471.

#### 496\*] [\*PRIZE.]

### THE ARROGANTE BARCELONES.

THE CONSUL-GENERAL OF SPAIN, *Claimant*.

This court will restore to the former owners property captured in violation of the neutrality of the United States, where it is claimed by the original wrong-doer, though it may have come back to his possession after a regular condemnation as prize.

*Quære*, How far a condemnation would protect the title of a third person, being a *bona fide* purchaser, without notice, in such a case.

**A**PPEAL from the Circuit Court of Maryland.

This was a libel filed by the Consul-General of His Catholic Majesty, in the District Court of Maryland, against the Spanish ship *Arrogante Barcelones*, and cargo, praying restitution to the original Spanish owners, upon the ground of the same having been captured on the high seas, in violation of the laws, treaties, and neutral obligations of the United States, and brought within their territorial jurisdiction. A claim was filed by Joseph Almeida, who insisted upon his title as a *bona fide* purchaser, under a capture made by the Buenos Ayres privateer, *Louisa*, and a regular sentence of condemnation in the prize court at Juan Griego, in the island of Margaritta, within the territory of a co-belligerent. It appeared, by the proofs taken in the cause, that the capturing vessel was a prize to the Buenos Ayres privateer *El Congrasso*, and was purchased by the claimant, Almeida, armed and equipped by him at Ensenada, and in April, 1818, came to 497\*] Baltimore to be refitted. She was there refitted, and sailed from that port in August, 1818, under the command of the claimant, ostensibly bound on a sealing voyage to the north-west coast of America, with a crew of ninety-six men, principally citizens of the United States; and armed with ten guns and some small arms. The ship anchored off Patuxent, and there received a considerable addition to the armament. Before the crew left Baltimore they had signed the usual ship's articles for the voyage; but after they had been at sea some days, the claimant produced privateering articles, which he required them to sign. Some of them refused, and were put in irons, and two were put on board another vessel. The crew finally signed the articles, and proceeded to cruise off Lisbon, where, on the 9th of Sep-

tember, 1818, they captured the Spanish ship *Arrogante Barcelones* and cargo, and proceeded with them to the port of Juan Griego, in the island of Margaritta, where proceedings were instituted, under which the ship and cargo were condemned in the Court of Admiralty as Spanish property and good prize of war, and purchased by the claimant at public auction. The copy of the sentence produced in evidence was certified by the Notary or Secretary of Marine, and his signature was verified by the certificate of Lino Clemente, deputy of the republic of Colombia, to the United States, but who had not then been received in that capacity by our government.<sup>1</sup> Decrees of restitution to the original Spanish owners were entered, *pro* 498 *forma*, in the district and circuit courts, and the cause was brought by appeal to this court.

*Mr. Winder*, for the appellant and claimant, argued, (1) That it was the settled rule of this court not to interfere in a doubtful case of this description,<sup>2</sup> and that the evidence in the present case was too dubious to justify the court in depriving the captors of the possession which they had acquired in war. (2) That even supposing he was mistaken on this point, this was a capture by a lawfully-commissioned cruiser of Buenos Ayres, the title under which had been confirmed by a regular condemnation in the Prize Court of Venezuela, an ally of Buenos Ayres in the war against Spain. It may be stated as an universal proposition, which has never yet been doubted or denied, that a sentence of condemnation by a competent court is conclusive, as to the proprietary interest in the *res capta*, and upon the mere question of prize or no prize; whatever doubts may have been suggested as to the collateral effect of such sentences. And a condemnation in the court of an ally or co-belligerent is equally competent for this purpose with that of the captor's country itself.<sup>3</sup> This court, as a neutral tribunal, is therefore precluded from all inquiry into the 499 previous circumstances under which the capture was made, and whether the capturing vessel had been armed and equipped in violation of our neutrality. There must be some limit to such inquiries, and there is none so fit as a regular sentence of condemnation, which, by the universal law and usage of nations, quiets the title acquired in war. And even if a decree of restitution in the present case would not directly impugn the sentence, it would so far affect the general doctrine of conclusiveness as to disturb the safety of neutral purchasers.

*Mr. D. Hoffman*, contra, insisted, (1) That there was no sufficient legal evidence of the existence of the condemnation set up in this case. We have a mere dry sentence of the court of Juan Griego, contained in a few lines, stating that the property is Spanish, and condemned as legal prize. The character of the capturing vessel, by whom commanded, commissioned, or owned and equipped, the authority of the court to adjudicate on the subject, the nature of the connection (if any) between Venezuela

1.—*Vide ante*, Vol. IV.; App'x., p. 49.

2.—*The Amistad de Rues*, 5 Wheat. Rep. 385.

3.—Wheat. on Capt. 261; 2 East's Rep. 473; 2 Bro. Civ. and Adm. Law, 257, 281. "What has been said does not extend to ships carried into the ports of an ally in the war, and there condemned, or while the ship is there, condemned in the captor's country; Wheat. 7.

and, therefore, in the present war a sentence of condemnation at Bayonne, of a ship taken by the French and carried into St. Sebastian, (a) and lying there at the time of the sentence, has been held valid; and this decision agrees with Bynkershoek's opinion, Qu. Jur. Pub., cap. 4.

a.—2 Robinson, p. 209, case of *The Christopher*.



and Bucnos Ayres, or any power by whom the commission may have been granted, do not appear; every ground is withheld which could enlighten this court, now virtually called upon **500\***] \*to enforce this decree. In a case like the present, the court will require the most satisfactory information that can be furnished. Where a case is free from suspicion and difficulty of any kind, and when the sentence itself, however concise, necessarily involves the point in discussion before another tribunal, it might be sufficient to produce the sentence as evidence of the condemnation relied on; but the court is pressed, on this occasion, with many necessary inquiries which do not usually occur. If the condemnation is to operate as a conclusive bar against the exercise of the restoring power of this court, so essential to the maintenance of the laws, treaties, neutrality, and morals of the country, it has a right to be informed whether their violation was ever the subject of inquiry before the court which pronounced the condemnation; it has a right to ascertain whether there was a commission, and by whom the commission was granted; for if granted by an individual, or a people neither recognized as a sovereign state, nor as engaged in a civil war, the condemnation would, on these grounds alone, be wholly inoperative. In such a case the court will require the entire prize proceedings to be exhibited; but if not, then at least the libel, in addition to the sentence. Here is neither the libel nor an abstract of proof, and the sentence itself is uncommonly bald. The rule on this subject formerly was, that the entire proceedings should be set forth; now, however, if the libel and sentence are satisfactory, the court dispenses with anything **501\***] further.<sup>1</sup> The libel, it would \*appear, is essential. In *Fernandis v. Da Costa*,<sup>2</sup> Lord Mansfield dispensed with the libel, only because the plaintiff had, by an unequivocal act of his own, made it unnecessary to be exhibited. So, also, in the case of *Beake v. Tyrrel*,<sup>3</sup> the necessity of furnishing the court with the material grounds of the prize proceedings, is strongly urged by the Lord Chief Justice Holt. If we advert to the general principles of the common law on this subject, we shall find it an established principle, that wherever a record is relied on, all that concerns the matter in question must be produced. The authorities cited are pointed to this effect.<sup>4</sup> No case can well be imagined in which the necessity of showing the grounds and extent of the proceeding more strongly applies than in the present; for it does not appear that Almeida had any commission; and if this be the fact, no condemnation would avail, were it ever so well authenticated.<sup>5</sup>

2. But were the condemnation satisfactorily proved, it is contended that it was pronounced by a court wholly incompetent to adjudicate on the case; that the whole proceeding was *coram non iudice*; and that it appertains to all courts to inquire into the jurisdiction of another court, whose judgments or decrees are relied on. It is presumed that under the *jus*

*gentium* an operative sentence of condemnation must be pronounced; either, first, by a court of the \*captor, sitting in the country of [**502** the captor; or, secondly, by a court of the captor, held in the country of an ally or co-belligerent of the captor; but that the courts of the ally or co-belligerent are wholly incompetent to hold plea of captures made by any one but themselves. The question is entirely new; and it is believed to be so only because it was never before attempted by the courts of an ally to pass sentence on captures made by their associates in war. That allies and co-belligerents can co-operate judicially as well as in a belligerent manner, is a position not to be found in the works of opinions of any writer. Condemnations in the port of an ally or co-belligerent are frequent; but no case can be produced of a condemnation in the court of an ally. No elementary writer mentions this exercise of judicial power of an ally. Dr. Brown<sup>6</sup> has been evidently misapprehended by the appellant's counsel. That sensible, though hasty, and sometimes inaccurate writer, has not expressed himself, in the passages cited, as clearly as he might have done; but still he does not speak of the courts of an ally condemning property taken by a companion in arms. He speaks of ships carried into the ports of an ally, and there condemned; but he does not state by whom condemned. It is, therefore, but justice to him to infer that he meant a court of the captors established in the territory of the ally in the war; and that this, and nothing else, is his meaning, is obvious from the authorities which he cites. All the cases in support of the condemnation now in judgment, will be found, on examination, to be decrees \*pronounced by [**503** courts of the captors, sitting in the country of the ally or co-belligerent, and therefore confirmatory of our position. The very silence of the writers on the law of the admiralty as to this subject, and the absence of all judicial authority, argues the soundness of the doctrine contended for. The case of *The Harmony*<sup>7</sup> was a condemnation of a British vessel, by the French commissary of marine, sitting in the country of an ally in the war; and the cases of *The Adelaide*, and *The Betsey Kruger*, were under similar circumstances. *The Cosmopolite*<sup>8</sup> presents a condemnation by the French consul, in a Spanish port, Spain then being a co-belligerent with France; and though the *res capta* was American property, the principle is the same. So likewise in the case of *Oddy v. Bo-ville*,<sup>9</sup> mainly relied on by the appellant's counsel, we find the condemnation to have been pronounced by a French court, sitting in Spain, then an ally of France, in a war against Great Britain. In fine, all the cases of condemnation in the country of a co-belligerent, are by courts of the captor sitting within the dominions of the ally. But it is not alone on the absence of authority, sanctioning prize proceedings in the courts of the ally, that the doctrine now contended for reposes. Every principle and analogy of the law on the subject are at vari-

1.—Mar. Ins. Co. v. Hodgson, 6 Cranch, 207, 220.

2.—Park on Ins. 177, 178.

3.—Comber, 120.

4.—3 Inst. 173; Trial per Pais, 166; 2 Bac. Abr. Evid. F., p. 611, 613.

5.—2 Bro. Civ. Law, 55.

6.—2 Bro. Civ. Law, 215, 257, 281.

7.—2 Rob. Adm. Rep. 174, note.

8.—3 Rob. 268.

9.—2 East's Rep. 474.



ance with the exercise of such a power. The principles which introduced condemnation as an evidence of transmutation of property under the laws of war, in lieu of the doctrine of *de-504\** *ductio infra \*presidia*, pernoctation, &c., evince the impropriety of transferring the investigation *ad aliud examen*. A judicial inquiry into the regularity of prize proceedings is important to the world at large. The capturing nation has an interest in knowing that its prize ordinances are strictly adhered to, and the courts of that nation are the most competent to inquire into this, and to enforce their observance. The nation of the captured belligerent has also some rights in respect to the things taken. As war is a contest by force to compel the party in the wrong to make retribution for some injury, the principals in the war have an account to settle, and they are reciprocally responsible for the justice and regularity of all hostile acts. No tribunals, therefore, but those of the capturing belligerent, ought to inquire into the validity of captures. Neutrals, likewise, are interested that the regularity and validity of seizures made from them should be passed on by the tribunals of that belligerent by whom the taking was effected. A contrary doctrine might deprive them of the benefit of that responsibility to which captors should ever be liable. If the ally passes sentence, it is probable the neutral would be referred to the capturing nation for any satisfaction the case of an illegal capture might demand; and if application were then made to that nation, the neutral might be referred back to the ally who pronounced the sentence. In theory, therefore, and practice, there appears to be a moral fitness in the rule which would restrict the power of condemnation to the tribunals of that belligerent by whom the property had been actually taken. The country, *505\** then, of an ally, may be subservient to this purpose, but not the courts, unless where the captures are made by the allies or co-belligerents themselves.

In addition to the objections to the mode of authenticating the condemnation, and the competency of the tribunal pronouncing it, may we not ask for some proof of an alliance or association in arms between Venezuela, the alleged ally, and the power, whatever that be, under which the claimant pretends to have acted? Even the sentence itself affords no light on this subject, and if it did, the proof should be by matter *aliundi*. As the condemnation is silent as to the power granting the commission, and no commission has been produced, this court has no evidence that the condemnation was pronounced even by the court of an ally; for the court may justly infer that there was no commission, and if the inference be not made, but it should turn out that Almeida acted under an Artigas commission, the court might then be of opinion that no alliance could be formed with the Banda Oriental, or its chieftain, Artigas, as none are capable of maintaining the relation of an ally who cannot be a sole belligerent. Hence, then, the necessity of proving the alliance, and thus furnishing an additional reason for requiring the production of something more than a naked sentence of condemnation.

4. But should all these objections prove unfounded, we then resort to the ground that a

condemnation by a court of competent jurisdiction does not deprive this court of the power it otherwise would possess of restoring this property, the exercise of this \*power being [*\*506* essential to the maintenance of our laws and neutrality.

That this sentence is wholly inoperative, as respects the restoring power of this court, appears to be manifest from a variety of considerations.

As the avowed object of this condemnation, was to close the judicial eye, and paralyze the judicial arm, of this tribunal, it will be proper to inquire into the object and extent of the prize proceeding in the vice-admiralty of Juan Griego, and the jurisdiction and power now required to be exercised by this court. We contend, first, that this court, in vindication of the violated laws of the land, will, if necessary, wholly disregard this condemnation; but, secondly, that restitution may be decreed without impugning, in any degree, the operation of this sentence, or the general doctrine of the conclusiveness of admiralty decrees. This is not a petitory but a possessory suit. The title to the property is no way involved in this proceeding. There is but one inquiry: Has the claimant acquired the possession of this property by means unlawful, as regards this country? if so, that possession will be restored to those from whom it has been wrested by the instrumentality of our citizens. The possession will be placed *in statu quo*, without any reference to the title which may otherwise have been acquired by the capture and condemnation. If this can hereafter avail the claimant anything, it is well; this court only claims the power of undoing that which has been done in breach of the laws, and only so far as to place both parties, \*in regard to the possession, in [*\*507* their former condition.

Were the court deprived of this wholesome power, our citizens and foreigners might violate our laws and most solemn treaties with complete effect. The fruits of their illegal captures, though brought here, and in the control of our tribunals, might be at once snatched from it by the production of a condemnation decreed by the very power, and in favor of the very persons, by whom our laws have been infringed. If, during this investigation, the captors, by the pretended necessity of sending a commission abroad, should procrastinate the adjudication, sufficient time would be gained for the production of a well-concocted condemnation, which would never fail to make its appearance in due time; and thus the violators of our laws would uniformly be confirmed in the possession of the fruits of their own wrong.

In the case of *The Anne*<sup>1</sup> it was decided by this court, that a capture made within neutral territory, is nevertheless valid, as between the belligerents, though it be a nullity as respects the neutral whose territory has been violated. If England, then, and France be at war, and an English privateer captures a French vessel, in the port of Philadelphia, and forthwith proceeds with the prize to sea, carries her *infra presidia capientium*, where she is condemned, and is then brought back to the port of Philadelphia; what would probably be the language



**508\***] \*of this court, when about to restore the prize, if a condemnation were presented with a view of closing all inquiry as to the violation of our territory? We apprehend it would be to this effect: In regard to France, your enemy, the capture is rightful; your condemnation pronounces it such; but in the present inquiry a third party is interested. Your possession of this vessel was gained by an abuse of our asylum, and an infraction of our territorial jurisdiction; as we have now the possession of the *corpus*, we restore it to those from whom you have, as to this country, illegally taken it. If such would be the language of this court, in the case of a gross violation of our territory, I apprehend the same reply will be given to Almeida, who has not only violated all the laws enacted for the preservation of our neutrality, but has, also, grossly abused the asylum accorded to the privateers of the South American provinces. If these vessels, in the use of that asylum, completely equip themselves with our arms, ammunition, and men, and all is to be rendered valid, or at least inscrutable, by a formal condemnation, all legislation on the subject of neutrality is but public and solemn mockery.

If this condemnation be a conclusive bar against all inquiry as to the violation of our laws, the competency of the power granting the commission, the competency of the person receiving the commission, &c., it is manifest that Venezuela, Buenos Ayres, or any of these new **509\***] formed sovereignties, may compel \*us, through the instrumentality of a condemnation, to accord to them the rights of sovereignty to every extent. In such case, captures made under the commission of Aury, or Artigas, would be equally operative with those granted by powers acknowledged to be independent, or engaged in a civil war, and the doctrine of *Rose v. Himely*, and the distinction taken in *Palmer's* case, and that of *The Estrella*, would be of no avail. Nay, even in the case of seizures clearly piratical, the 6th and 14th articles of our treaty with Spain would be effectually annulled.

Again, all inquiry into the fact of the violation of our laws, and its civil as well as penal consequences, belongs exclusively to the tribunals of this country. The courts of other nations have no right to pronounce a binding judgment as to the validity or invalidity of any act against our civil, political or criminal laws; the right to vindicate our own laws is essential and inherent; it is a sovereign right, which we have not parted with to the tribunals of other nations. If the decrees or judgments of those tribunals come in collision with our laws, the courts of this country must pursue their even way, and enforce those laws, without any reference either to the laws or judgments of a foreign state. Passive obedience to the decisions of foreign tribunals has been sufficiently inculcated; but no attempt has ever been made of so exceptionable a character as this: to require this court not only to yield to the demands of foreign violators of our laws and sovereignty, but also to the insolent requisitions of our own **510\***] criminal citizens.<sup>1</sup> \*To give force to this condemnation, is, in fact, to call on this court to enforce the decree of a foreign court.

A court, thus called on, always claims the privilege of examining into the jurisdiction of the court pronouncing the decree, the regularity of its judicial proceedings, and the intended extent of its operation.

It cannot be denied, that if a privateer, or even a public vessel of war, of a foreign power, be fitted out in our ports, her commission can protect neither her nor her prizes from the sanctions of our law. Why, then, should a condemnation, which is but the exercise of another species of sovereign power, place the property in a state of absolute immunity? The position taken on the other side, that decrees of a court of competent jurisdiction are always binding, and exclude all inquiry, is far from sound. The general doctrine is well known, but its extent and its exceptions are equally well known.

Secondly. But this court may decree restitution, without in any degree impugning the doctrine of the conclusiveness of admiralty sentences.

If the postulate be allowed, that the restoring power of this court rests exclusively on the ground of violated neutrality, then the prize court had no right to, and never did, in fact, institute any inquiry relative to the illegality of the equipment, in reference to our laws; that is an inquiry competent for this court solely. There is another inquiry, competent solely for the courts of the captors, viz., the fact of the capture, and its conformity to prize regulations and the *jus belli*. These are distinct rights, in the exercise of \*which neither tribunal [**511**] is called on to pronounce on any matter not essential to be proved in order to justify a decision. The taking was rightful in regard to the belligerents, though our laws were violated, and its restitution by this tribunal will be equally so, though the seizure be valid *qua* prize. In this point of view, there is no collision between the two tribunals; the decree of each stands, *valeat quantum valere potest*. No judgment or decree establishes anything beyond what was necessarily proved in order to arrive at the decision. The sentence, at most, proves nothing but its own correctness in regard to the mere question of prize.<sup>2</sup> All the cases, where condemnations are relied on, have a qualification to this extent. The sentence in this case pronounces that the property was Spanish, and is condemned as good prize. It does not state, either affirmatively or negatively, one word about the equipment of the privateer; and it cannot, therefore, be even *prima facie* evidence that the privateer had proceeded legally in regard to the whole world. Where a vessel is captured by a belligerent, for unneutral conduct, a condemnation would be conclusive; she was condemned on this sole ground, and she could not be restored by the courts of the neutral nation, without falsifying the very fact on which the capture and condemnation proceeded. But here the possession will be restored to the Spanish owners, not *qua* prize, but simply on the ground that the use of our neutral means in making the \*capture was a matter [**512**] in which the prize court of Juan Griego had no concern.

As a capture in violation of neutral territory

2.—*Maley v. Shattuck*, 3 Cranch, 458, 488; *The Mary*, 9 Cranch, 126, 142; 1 Gamb. N. P. Cas. 419; 12 Mass. Rep. 291; 2 Bro. Civ. and Adm. Law, 121.

1.—2 Azuni, 252; 1 H. Bl. 123; 2 H. Bl. 410.

is still valid, in regard to the contending parties, the capture, in a belligerent court, would be *omni exceptione major*. Spain, in the present case, would in vain have set up the violation of our laws as a defense, and the United States had no *persona standi in judicio*. A suggestion of violated neutrality, on behalf of this country, would not have been regarded.

Adverting, for a moment, to the grounds on which the doctrine of conclusiveness is said to rest, we shall find that none of them would be impeached by the restoration of this property. They are said to be three: comity, notice to all the world, and the co-equality of nations. As to the doctrine of comity, it is founded on the supposition of the utmost good faith, and there must be a perfect reciprocity in order to support it. Is it not too much to require of any nation, on the ground of comity, to permit foreign powers to confederate with the worst class of our people, in insulting and trampling on our solemn treaties, neutral obligations, and explicit laws of public policy?

But it is supposed to be a second ground of this doctrine of conclusiveness, that the whole world have notice, and are parties to the proceedings in a prize court, they being *in rem*. This, if true in fact, only applies to those who have a title or interest in the *res ipsa*, and not to those who have such a collateral, incidental, or potential right as that of the United States. **513\*** But the notice is itself a mere fiction.<sup>1</sup> The United States had no *persona standi* in that court; and if they had, it would have been impossible to assert it, as the libel, condemnation, sale, and arrival of the prize in this country, were nearly cotemporaneous. It is the nature of fictions to work justice, not palpable injustice; this court, therefore, will not suffer itself to be ousted of its rights by a forced application of such a fiction.

The last ground on which condemnations have acquired their power, is the admitted co-equality of all nations. This, perhaps, is the true principle. Admitting that the recognized competency to wage a civil war would clothe these provinces with every attribute of sovereignty, the reply is, that the courts of no nation are competent to render this condemnation binding to the extent contended for: this would be at war with the very principle; we should become inferior. The *deductio infra præsidia* does not clothe this court with any power; its jurisdiction originates in its right to maintain our neutral duties, and extends only so far as is required for that maintenance; no power on earth can deprive us of this right. If the sentence of any court be extended thus far, we may say, with Lord Kenyon, "it may be throwing a veil over decisions founded on Algerine, or worse than Algerine principles; and if such sentences are to protect their own injustice, redress would be sought in vain;" and it may be added, that the rights of this country, **514\*** and those of the "most vital nature, would be prostrated without remedy. If, then, the prize court of Venezuela have powers co-ordinate with this, we should not, however, by asking restoration, impute to this condemnation a legal infirmity, but to the capture a vice

antecedent and paramount to the decree, and not cognizable by that tribunal.

Were the doctrine of conclusiveness permitted to rest on its original principles, we should not be inclined to quarrel with it; but where it is extended beyond its known and salutary operation, we cannot regard it but with a jealous eye. If it be invoked by a purchaser under the decree, or to falsify a warranty of neutrality, there are then special reasons of policy, convenience, and comity, which sustain it. These special grounds are satisfactorily explained in the case of *Croudson v. Leonard*;<sup>2</sup> but it will be seen that none of the three grounds there set forth would be impugned by a restitution of this property; for, first, the question of prize is not before this court; second, the present inquiry is not in a common law court, but before a tribunal of the law of nations, and every way competent to make the necessary investigation; and, third, the decision of a court of co-ordinate jurisdiction is not re-examined.

But it has been urged, that a restitution of this property to the Spanish owner, though it might not directly impugn the condemnation, would be so far opening admiralty decrees as to disturb the safety of neutral purchasers generally, and that this would be contrary to the policy of nations. The answer to this <sup>\*515</sup> is, that the purchaser under the decree of any court does not necessarily obtain an unimpeachable title. He must take the property *cum onere*; the paramount vices in the title remain; he does not purchase under a general, but under a special warranty. The title gained by the capture, remains; it was illegal in its origin, and, as to the offended power, can never be rehabilitated.<sup>3</sup>

5. Lastly, the proof in the present case is positive that this vessel and cargo were captured by the claimant, for himself and his associates. The condemnation enures to his benefit; the alleged purchase by him was nominal; and, if it were otherwise, he gained his title or possession by a wrong, and no act of his can purge the wrong. Here we may apply the rule of the civilians: That no one can change the cause of his own possession. On this principle is it, in part, that executors, guardians and all who stand in the relation of trustees, are (as a general rule) incompetent to purchase the trust estate. Almeida's possession was gained by a wrong; he cannot change the character of that possession; he cannot, by his own act, give himself a better title. A defective title may indeed be rendered good by the purchase of outstanding good titles; but here is no outstanding interest in the subject-matter, but in the United States. The condemnation, then, could only corroborate the title which he had gained, and could not clothe him with a better one.

Mr. Harper also argued on the same side; but <sup>\*516</sup> as the whole of his argument up- on the conclusiveness of the foreign sentence will be found reported at large, in the next volume, in the case of *The Nereyda*, in order to avoid a repetition, it is thought expedient to refer the reader to that case, which involved the same question.

2.—4 Cranch, 434.

3.—Moodie v. The Betty Cathcart, Boe's Rep. 299.

1.—3 Dall. 91; 9 Cranch, 144.  
Wheat. 7.



*Mr. Winder*, in reply, denied the authority of the supposed rule that a decree or sentence of a court of admiralty cannot be given in evidence, without producing the libel, or other proceedings. There can be no necessity for producing the libel, if the sentence itself shows what the libel would show; and in this case the decree sets forth every fact which would appear on the face of the libel, or which is material to establish the conclusiveness of the proceedings. The decree accompanies the possession of the vessel, the essential muniment of her title.

This court has never asserted a right to look beyond the sentence of condemnation. It has always admitted its conclusiveness, even as to collateral effects. But even if the sentence be conclusive as to the question of prize only, the right of the original owner is completely devested. And even admitting this to be a possessory action, yet the right of possession depends on the right of property, otherwise any stranger might claim. As to the competency of the tribunal, the fact of the connection between the different Spanish provinces in the present war is notorious, and courts of justice will always take notice of such facts. Indeed, the President, in his different official communications to Congress, has alluded to **517**\*] their being engaged \*in a common contest against the mother country. Why, then, should they not lend each other the aid of their tribunals to pronounce condemnations, as well as of their ports to fit out the armaments with which the captures of Spanish property are made? If, according to the original practice of nations, a carrying *infra presidia* were to consummate the title, would it not be sufficient to carry the prize within the territory of an ally, or co-belligerent? If one co-belligerent can consent to a foreign tribunal sitting within its territory, and condemning prizes made by the cruisers of its ally, why may not the ally permit its captures to be adjudged in the courts of its co-belligerent? But at all events, Venezuela was herself engaged in war against Spain, and this was the property of her enemy brought into her territory. She had a right to condemn it in her courts, and did condemn it so as to make it a part of the mass of national property. There is no positive authority which denies the authority of the courts of a belligerent, to condemn prizes captured by its co-belligerent; and in the absence of any case to the contrary, it is sufficient that no reason of principle or public policy exists to prevent it. The learned counsel also referred to the resolution of Congress during the revolutionary war, authorizing their courts to condemn prizes captured by French cruisers, to show that the opinion and practice of nations had authorized similar proceedings.<sup>1</sup>

\**Mr. Justice JOHNSON* delivered the [\***518** opinion of the court:

The offense proved upon Almeida in this case is one of a very aggravated nature. He not only violated the neutrality of this government, but effected his purpose, by practicing a flagrant fraud, either upon his crew, or upon the revenue officers of the port of Baltimore; or perhaps partially upon both. Everything in the case proves that the sealing voyage round Cape Horn was a mere pretext; and if it be true that the crew were kidnapped under that pretext, and forced into belligerent service after getting to sea, it is a remarkable instance of bold and successful imposition. But who can believe it? The truth unquestionably is, that the crew, with perhaps the exception of the few who were put in irons, understood perfectly the nature of the enterprise they were embarking in, and were deceived into the belief that their affected ignorance, or the impudence of the fraud, would screen them from the penalties of the laws which forbade their entering into belligerent service.

It cannot, then, be questioned that Almeida now appears before us in the character of a flagrant offender against the laws and neutral obligations of this country. And there is no shadow of a ground for hesitating to apply to this case the established rule of this court, in cases of illegal outfit, unless it be the condemnation of this vessel and cargo in the court of Margarita.

This court will for the present waive all expression of its opinion on the questions raised upon the validity of that condemnation, or the sufficiency of the \*document produced [\***519** to prove it. We will put our decision upon a single, and independent ground, that the view of this court, with regard to all such cases, may henceforth be distinctly understood.

We find the captured property in the hands of the offender, and hold it to be immaterial through what circuitry of changes it has come back to him. It is not for him to claim a right springing out of his own wrong. In the hands of a third person, a valid sentence of condemnation, properly authenticated, would present a very different view of the subject. The offender's touch here restores the taint from which the condemnation may have purified the prize. Although a purchaser without notice may, in many cases, hold his purchase free from an interest with which it was chargeable in the hands of the vendor, yet it cannot return into the hands of that vendor, without reviving the original lien. Nor will courts of justice ever yield the *locus standi in judicio* to the suitor, who is compelled to trace his title through his own criminal acts.<sup>2</sup>

*Decree affirmed.*

1.—5 Wheat. Rep. Appx. 123.

2.—In the case of *The Nereyda*, which was argued at the present term, the court was of opinion that in cases where a condemnation is relied on, the libel as well as the sentence ought to be produced, in order that the court might judicially see that the foreign tribunal had jurisdiction, and what was the ground of application for condemnation,

and the parties by whom it was sought. The court also thought that the claimant ought to show by competent evidence that he was a *bona fide* purchaser of the property for a valuable consideration; and from the defects of the proofs on both points, the cause was ordered to further proof. It has therefore been thought fit to omit a report of the case, until its final decision.

520\*]

[\*PRIZE.]

# THE MONTE ALLEGRE AND THE RAINHA DE LOS ANJOS.

THE PORTUGUESE CONSUL-GENERAL,  
*Libellant.*

A question of fact upon the *bona fides* of an alleged sale of Portuguese ships, and their cargoes, which had been captured in violation of our neutrality. Restitution to the original owners decreed.

## APPEAL from the Circuit Court of Maryland.

These causes were argued by *Mr. Winder* for the appellant and claimant, and by *Mr. D. Hoffman* for the respondent and libellant; but as the same points were insisted on as in the preceding cases of *The Gran Para* and *The Arrogante Barcelones*, *ante*, pp. 471, 496, it is not thought necessary to report the argument of counsel in the present case. The facts are stated in the opinion of the court.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court:

The Monte Allegre was captured by the private armed vessel called *La Fortuna*, cruising at the time under a commission from the chief of the Oriental Republic. She was completely fitted out, equipped, and manned, in Baltimore, from which port she sailed on her first cruise, in December, 1816; owned and commanded by citizens of the United States; but commissioned by the government of Buenos Ayres. She sailed again on her second 521\*] cruise, in August, 1817, from the port of Baltimore. This cruise terminated at Buenos Ayres, where she was in part dismantled, some of her rigging and arms being deposited in a store-ship which lay near her. The crew also were discharged. After lying in port four or five weeks, she sailed on her third cruise, having the same armament with which she sailed from Baltimore, and about twenty or thirty of the same crew. Her commander was changed, but was still a citizen of the United States; and she sailed under a commission from the Oriental Republic. On this cruise, the Monte Allegre was taken, and sent into the port of Baltimore, where she was libeled by the Consul-General of Portugal. She was claimed by William Foster, the prize master, in behalf of the Oriental Republic, who alleged, that while she lay in the port of Buenos Ayres, she was purchased by the government of the Banda Oriental.

The reality of this sale constitutes the only question which can arise in this case.

The testimony in support of it is found in the depositions of James Brown, James Williams, William Towson, and Alexander Towson. They mention the partial dismantling of the vessel, and speak of a report that she was sold, but they give no positive information on the subject, nor did they even hear to whom the sale was made. This testimony would weigh very little, were it even uncontradicted. But the regular transmission of her prizes to Baltimore, her returning to that port, at the termination of her cruise, the depositions taken to show that the original proprietors had not

parted with their interest, \*are proofs [\*522 of a continuing American ownership, which are entirely conclusive. There can, then, be no doubt but that the captures made by the *Fortuna* are in violation of the laws of the United States, enacted for the preservation of our neutrality, and that they ought to be restored when brought within our territory.

The *Rainha de los Anjos* was a Portuguese vessel, captured by the *La Fortuna*, in the same cruise in which she captured the Monte Allegre. The cases are, in all material respects, the same.

*Sentences affirmed with costs.*

S. C. 9 Wheat. 616.

Cited—9 Wheat. 641; 11 Wheat. 429.

[LOCAL LAW. CHANCERY.]

CROCKET *v.* LEE.

SAME *v.* SAME.

A question on the validity of a certificate for a settlement right in Kentucky, and of the entry thereof in the surveyor's office.

It is a settled rule, that the decree must conform to the allegations in the pleadings, as well as to the proofs in the cause.

Therefore, when the question is on the validity of a location, and neither its vagueness nor its certainty are distinctly put in issue by the pleadings, the testimony to that point will be disregarded by this court; but if the merits appear to justify it, the cause will be remanded to the court below, with directions to permit the pleadings to be amended.

## APPEAL from the Circuit Court of Kentucky.

\*These causes were argued by *Mr. [523 Sheffey*<sup>1</sup> for the appellant, and by *Mr. Clay*<sup>2</sup> for the respondent.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court:

These causes relate to the same title, and depend on the same question. It is the validity of a certificate for a settlement right granted to Angus Cameron, and of the entry thereof in the surveyor's office.

The certificate is in these words:

"Angus Cameron this day claimed a settlement and pre-emption in the District of Kentucky, on account of residing in the country twelve months before the year 1778, lying at the head right-hand fork of Welles' branch, extending south-east to the head of a small run that empties into the north fork of Licking, including the spring on the head of both branches, about one and a half miles above the war-path

1.—Who cited *Bodley v. Taylor*, 5 Cranch, 229; 6 Cranch, 148; 3 Cranch, 239; 2 Wheat. Rep. 144; 2 Bibb. 144; 1 Bibb. 72; 1 Wheat. Rep. 141; 1 Wheat. Rep. 130; 3 Bibb. 623; 5 Wheat. Rep. 116; 6 Wheat. Rep. 119; 1 Bibb. 228.

2.—Who cited 1 Bibb. 10, 46, 34, 129, 136; 2 Bibb. 109, 114, 259, 476, 479; *Hardie*, 411; 1 Marsh. Kent. Rep. 281; *Print. Dec.* 95; 3 Bibb. 148, 149; *Wheat. Dig. Dec. tit. Local Law, XI.*

NOTE.—See note to *Watts v. Lindsey's heirs*, *ante*, 158.



that crosses the north fork. Satisfactory proof being made to the court, they are of opinion that the said Cameron has a right to a settlement of 400 acres of land, to include the above location, and the pre-emption of 1,000 acres adjoining, and that a certificate issue accordingly.

**524\*]** \*The entry in the surveyor's office conforms to the location expressed in the certificate.

The right of Cameron, both to his settlement and pre-emption, was regularly conveyed to the appellant, in whose name patents have been obtained.

The appellee claims under junior entries, for which patents have been issued, younger than the appellant's patent on the pre-emption warrant, but elder than his patent on the settlement right. The appellant, therefore, filed his bill to obtain a conveyance for the land covered by his settlement right, the legal title to which was in the appellee; and the appellee filed his bill to obtain a conveyance for the land covered by the appellant's patent on the pre-emption right, to which he claimed the equitable title.

Pending the controversy, Lee purchased in the right of a person claiming under a patent older than either of those under which Crocket claimed; but as this patent was founded on a junior entry, the validity of Cameron's certificate was still the question on which the whole case depended.

In the Circuit Court, Crocket's bill was dismissed; and, in the other suit, he was decreed to convey to Lee the land contained in his patent for Cameron's settlement right. The decrees were founded entirely on the opinion that Cameron's location was too vague to be supported. In the Circuit Court, the cause turned almost entirely on this point, and the greater part of the testimony is taken with a view to it. If the validity of Cameron's location be sustained, Crocket must succeed, because his right is prior in time, and superior in dignity, **525\*]** to any title conflicting with it. If Cameron's entry be invalid, then the decrees are right, either because Young's entry is good, or because the legal title was in Lee, when they were made.

The testimony which has been taken in these causes, certainly is very strong in support of the decrees of the Circuit Court; but the counsel for the appellant contends that so much of this testimony as respects the vagueness of Cameron's location must be disregarded, because neither its vagueness nor its certainty has been put in issue. Lee has not averred in his bill, nor alleged in his answer, that this location is vague, nor has he anywhere, or in any manner, questioned its validity.

The principle advanced by the appellant's counsel cannot be controverted. No rule is better settled than that the decree must conform to the allegations, as well as to the proofs in the cause. The location being set out in the pleadings, the court can undoubtedly notice any intrinsic apparent defect. If it be void in itself, no testimony can sustain it, and it would be deemed void on a demurrer to the bill. But if it be not void in itself, if its validity depends upon facts to be proved in the cause, then its validity ought to be put in issue.

The counsel for the appellee does not directly

controvert this principle, but endeavors to withdraw his case from its operation, by contending that terms are used in the pleadings which are equivalent to a direct allegation that Cameron's location is too vague to be sustained.

If in this he is correct, the consequence he draws from it will be admitted; for it [**\*526** will certainly be sufficient, if the matter to be proved be substantially alleged in the proceedings. How, then, is the fact?

In his answer to Crocket's bill, he says that he does not "admit that the survey has been made agreeable to location or to law."

This allegation certainly questions the survey. If it vary from the entry, if it be chargeable with any fatal irregularity, if it be in any respect contrary to law, such defects may be shown, and the party may avail himself of it to the extent justified by his testimony, and by the law. But this allegation is confined to the survey. It does not mount up to the location, nor does it draw that into question. It gives no notice to Crocket that his entry was to be controverted.

The bill filed by Lee is equally defective in this respect. After setting out his own title, he states that of his adversary; and, after reciting the certificate granted to Cameron, subjoins that Crocket claimed the land "in dispute by virtue of the said improvement, and having caused the same to be surveyed contrary to location, and to law, and was to interfere with" his (Lee's) claims, had obtained a prior patent, &c.

This allegation, like that in the answer, draws into question only the survey. It does not controvert the location or entry.

The counsel for the appellant says it would be monstrous, if, after the parties had gone to trial on the validity of the entry, and have directed all their testimony in the Circuit [**\*527** Court to that point, their rights should be made to depend in the appellate court on a mere defect in the pleadings, which had entirely escaped their observation in the court where it might have been amended, and the non-existence of which would not have varied the case.

The hardships of a particular case would not justify this tribunal in prostrating the fundamental rules of a court of chancery—rules which have been established for ages, on the soundest and clearest principles of general utility. If the pleadings in the cause were to give no notice to the parties or to the court of the material facts on which the right asserted was to depend, no notice of the points to which the testimony was to be directed, and to which it was to be limited; if a new case might be made out in proof, differing from that stated in the pleadings, all will perceive the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place. The rule that the decree must conform to the allegations, as well as to the proofs of the parties, is not only one which justice requires, but one which necessity imposes on courts. We cannot dispense with it in this case. But although the entry is not put in issue, the survey is; and if that be made on ground not covered by any part of the entry, the decrees would, on that account, be affirmed.

It must at once occur that in a case where the entry is in reality attended with much uncertainty, there will be some difficulty in showing

**528\***] how much a \*survey varies from it, unless the survey be made on land entirely different from the entry. That does not appear to be the fact in the present case. Cameron's entry calls for the head right-hand fork of Welles' branch, for the head of a small run that empties into the north fork, and to lie about one and a half miles above the war-path that crosses the north fork. The survey is upon the head waters of these streams, and lies a small distance above the war-path that crosses the north fork. There is reason to believe, that, were the location to be sustained, the survey would be found to conform to it in part, though not, perhaps, entirely. This court has no means of ascertaining how far they agree, and how far they disagree, and the decrees of the Circuit Court must be reversed.

But as this reversal is not on the merits of the case, and the court is rather inclined to the opinion that the decrees on the merits are right, no final decree will be directed in either cause, but each will be remanded to the Circuit Court, with directions to permit the parties to amend their pleadings.

ANDREW CROCKET, Appellant, }  
v.  
HENRY LEE, Respondent. }

**DECREE.**—This cause came on to be heard on the bill, &c., and was argued by counsel; on consideration whereof, this court is of opinion that the decree dismissing the plaintiff's bill was erroneous, in this, that the plaintiff is shown to possess the prior and better equitable title, unless his location, which is the foundation **529\***] tion \*to that title, be void for want of certainty, a point not properly examinable under the pleadings in the cause, as they now stand, because it is not put in issue. This court doth therefore reverse the said decree, and doth remand the cause to the Circuit Court, that the parties may be permitted to amend their pleadings, and that farther proceedings may be had therein, according to law.

SAME }  
v. }  
SAME. }

**DECREE.**—This cause came on to be heard on the bill, &c., and was argued by counsel; on consideration whereof, this court is of opinion that the decree directing the defendant to convey to the plaintiff the land therein mentioned, is erroneous in this, that the defendant is shown to possess the prior and better equitable title, unless his location, which is the foundation of that title, be void for want of certainty, a point not properly examinable under the pleadings in the cause, as they now stand, because it is not put in issue. This court doth therefore reverse the said decree, and doth remand the cause to the Circuit Court, that the parties may be permitted to amend their pleadings, and that farther proceedings may be had therein, according to law.

[\*PRACTICE.]

[\*530]

## MACKER'S HEIRS v. THOMAS.

In real actions, the death of the ancestor, without having appeared to the suit, abates the suit, and it cannot be revived and prosecuted against the heirs of the original defendant.

If the heirs be made parties by order of the court in which the suit is brought, and judgment is entered against them by default for want of a plea, upon a summons and count against the original defendant, they may sue out a writ of error, and reverse the judgment.

**MR JUSTICE WASHINGTON** delivered the opinion of the court:

This is a writ of error to a judgment of the Circuit Court for the District of Kentucky. The defendant brought a writ of right in that court against John Macker, the ancestor of the plaintiff in error, for an undivided moiety in a certain tract of land. After a summons served upon Macker, he died, without having appeared to the suit, and a rule was obtained by the plaintiff below, upon the heirs of the defendant, to show cause why the suit should not be revived against them. This rule being served and no cause shown to the contrary, the suit, by order of the court, was revived against the heirs, the plaintiffs in error, and at a subsequent term of the court, judgment by default was entered against them, from which judgment this writ of error is prosecuted.

The main question for the decision of this court is, whether the Circuit Court erred in directing the suit to be revived against the heirs of Macker, and rendering \*judgment **[\*531]** against them? The court considered this point to have been decided in the case of *Green v. Watkins* (6 Wheat. Rep., 260). The question there was, whether in real actions, the death of either party, after a writ of error sued out, abates the suit; and it was decided that it did not. But in examining the general principles of law upon the subject of abatement by the death of parties, it was distinctly laid down, that in real and personal actions, the death of either party, before judgment, did at common law abate the suit; and that the 31st section of the judiciary act of 1789, c. 20, was necessary to enable the action to be prosecuted by or against the representatives of the deceased party, when the cause of action survived. But this section is clearly confined to personal actions, as the power to prosecute or defend is given to the executor or administrator of the deceased party, and not to the heir or devisee.

It is objected by the counsel for the defendant in error, that the defendants in the court below could not sue out and prosecute a writ of error, because they failed to appear and plead to the suit in that court. No case was referred to in support of this objection, and it is confidently believed that none can be found to countenance it. Although the plaintiffs in error did not plead to the suit, they were nevertheless made parties to it by the order of the court, and as such, judgment was rendered against them, and that, too, upon a summons and count against the ancestor. Being, then, parties to the suit, and affected by the judgment against them, they were \*clearly **[\*532]** entitled to sue out a writ of error; and although the judgment was entered by default for want

Cited—3 Pet. 54; 19 How. 130; 1 Wall. 155; 4 Cliff. 373.



of a plea, they may be injured not less by such judgment, than if it had been entered upon a verdict. If judgment in an action of trespass be rendered against one defendant by default, and in favor of the other defendant upon a plea, the former may alone bring a writ of error. (Lev., 220; Hob., 70.) If it should be said that the appearance of the plaintiffs in error in the Circuit Court, by an attorney of that court, cured the error committed in reviving the suit against them, the answer is, that by the death of the ancestor, a new cause of action arose against the heirs, and the plea is not in the same condition as it was in the life-time of the party.<sup>1</sup> The suit having once abated by the death of the defendant, it was out of court, and a new summons and count against the heirs was necessary. Besides, the appearance was not voluntary, but was the consequence of an erroneous order of the court, enabling the plaintiff below to prosecute the suit against the heirs.

It is objected, in the last place, that if the plaintiffs have a right to prosecute this writ of error, they nevertheless cannot assign for error the order of the court reviving the suit, because they failed in that court to appear and except to the opinion of the court in relation to the order. But an exception to the opinion of the court is only necessary when the alleged error could not otherwise appear upon the record. The **533** error in this case was in ordering \*the suit to be revived and prosecuted against the heirs of the original defendant, and proceeding to render judgment against them upon a summons and count against the original defendant, all which sufficiently appears upon the face of this record.

JUDGMENT.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Kentucky, and was argued by counsel for the defendant in error. On consideration whereof, this court is of opinion that the said Circuit Court erred in ordering the suit to be revived and prosecuted against the heirs of the original defendant, and proceeding to render judgment against them upon a summons and count against the original defendant. It is therefore adjudged and ordered that the judgment of the said Circuit Court in this case be, and the same is hereby reversed and annulled. And this court proceeding to render such judgment as the said Circuit Court should have rendered, it is farther adjudged and ordered that the said suit be, and the same is hereby abated.

Cited—1 Cliff. 129.

**534** [\*PRACTICE.]

THE COLUMBIAN INSURANCE CO.

v.

WHEELRIGHT ET AL.

A writ of error will lie from this court upon the judgments of the circuit courts, awarding a peremptory *mandamus*.

ERROR to the Circuit Court for the District of Columbia.

1.—Green v. Watkins, 6 Wheat. Rep. 202.

In this case, which was argued by *Mr. Jones* for the plaintiffs in error, and by *Mr. Sarann* for the defendants in error,<sup>2</sup> the court determined that a writ of error would lie under the act relating to the District of Columbia, which is similar in its provisions to the judiciary act of 1789, c. 20, sec. 22, to reverse the judgment of the Circuit Court, awarding a peremptory *mandamus*, to admit the defendants in error to the offices of directors in the Columbian Insurance Company, and directed *Mr. Jones* to produce affidavits as to the value of the matter in controversy. But it not appearing that it amounted to one thousand dollars, the sum required to give this court appellate jurisdiction from the final judgment or decrees of the Circuit Court for the District of Columbia, the court afterwards directed the writ of error to be quashed. The court was of opinion that there was nothing in controversy but the value of the office, and that its value must be ascertained by the salary. \*Although, therefore, a writ of error **535** might issue to a judgment awarding a peremptory *mandamus* to restore the office where the matter in controversy was sufficient to give jurisdiction to the court, it could not regularly issue in this case.

Writ of error quashed.

Cited—12 Pet. 640, 641; 14 Pet. 565, 566, 607, 618; 22 How. 184; 2 Cranch, C. C. 273.

[COMMON LAW.]

BLIGHT'S LESSEE ET AL.

v.

ROCHESTER.

British subjects, born before the revolution, are equally incapable with those born after, of inheriting, or transmitting the inheritance of lands in this country.

The treaties of 1783 and 1794, only provide for titles existing at the time those treaties were made, and not to titles subsequently acquired.

Actual possession is not necessary to give the party the benefit of the treaty; but the existence of title at the time is necessary.

Where J. D., an alien and British subject, came into the United States subsequent to the treaty of 1783, and before the signature of the treaty of 1794, died, seized of the lands in question; held, that the title of his heirs was not protected by the treaties.

In what cases citizenship may be presumed so as to confirm a title to lands.

The doctrine of estoppel, or the principle of legal policy, which forbids a party from denying the title under which he has received a conveyance, does not apply as between vendor and vendee, especially where the latter has not received possession from the former.

ERROR to the Circuit Court of Kentucky.

This was an ejectment in the court below, brought to recover the possession of lot No. 18, in the town of \*Danville, in the state **536** of Kentucky. It appeared, from the evidence in the cause, that the plaintiffs are the heirs of John Dunlap, who was a citizen of Pennsylvania, and claimed as the heir of his brother, James Dunlap, who died seized of the premises

2.—He cited Bac. Abr. tit. *Mandamus*; 8 Mod. 27; 1 P. Wms. 348.

in question, in the autumn of 1794. James Dunlap was an alien, and a subject of the King of Great Britain, who came to the United States subsequent to the treaty of peace of 1783, and died before the signature of the treaty of 1794. After his death, one Hunter, professing to have purchased of John Dunlap, entered into possession, and conveyed to several persons, parcels of the lot; and to the defendant, Rochester, one parcel, in 1795, who entered into possession thereof, and has occupied the same ever since; having acknowledged the title of said Dunlap, as that under which he held.

Upon this evidence, the counsel for the plaintiffs moved the court to instruct the jury.

1st. That if the jury find the defendant obtained possession under James G. Hunter, who obtained possession as the attorney of John Dunlap, or who claimed under an executory agreement with John Dunlap, and that said defendant has held, and occupied under John Dunlap's title, claiming from said Hunter, as the attorney of said Dunlap, or under an executory agreement, or has, since he was in possession, acknowledged the title of said Dunlap, as that under which he held; that then the defendant is not permitted to impeach or controvert the title of said John Dunlap, by parol evidence that James Dunlap was an alien.

**537\*** 2d. That if the defendant, Rochester, acquired the possession, and has continued to hold as above, the possession of the defendant was not such an adverse possession as would toll the right of entry of said John Dunlap, and the statute of limitations does not apply.

3d. That if James Dunlap occupied the lot, from the date of his deed till his death, and said James G. Hunter and the defendant have continued to hold it under the claim of John Dunlap, his brother, as heir to James; that from these facts, connected with the evidence in the cause, and in the absence of any proof of an inquisition or office found as to the alienage of James Dunlap, and in the absence of any grant or other act of the commonwealth or its officers since the death of said James, in derogation of the title of said James or of said John, they should presume that said James was a citizen of the United States.

4th. That if they believe the evidence, they should find for the plaintiff.

5th. That the jury have a right to presume that James Dunlap was a citizen of the state of Virginia, or of some one of the United States, and if so, John Dunlap was his heir, and capable of inheriting.

6th. That if James Hunter entered under a parol agreement with John Dunlap, the possession of said Hunter was the possession of said Dunlap.

7th. That the inheritance claimed by John Dunlap, as heir to James, is protected by, and within the provisions of the treaty between the United States and Great Britain, signed 19th November, 1794.

The court refused the 1st, 3d, 4th, 5th, 6th, **538\*** and \*7th instructions, moved by the

plaintiff; and gave the second, with this qualification, "that if John Dunlap had either title or the actual possession of the premises after the death of James Dunlap, and before the entry of said Hunter, or of the defendant, then the statute of limitations did not apply."

The defendant moved the instruction, that if James Dunlap was an alien, and died before the 19th November, 1794, then the plaintiff has made out no title to the land in question which will authorize them to find for him; which was given by the court with this qualification, that if the jury find that John Dunlap had actual possession of the premises after the death of James Dunlap, and prior to the time when Hunter took possession, in that event this instruction would not be given.

*Mr. Bibb*, for the plaintiff, (1) stated that the first instruction, moved on the part of the plaintiffs, involved the proposition that Hunter, who entered, claiming under John Dunlap, would be estopped from denying John Dunlap's title by parol, and that the defendant, Rochester, who entered under Hunter, stands in the same predicament with his grantor, and is besides precluded by his own acknowledgement from denying the title from which his own is derived.<sup>1</sup>

\*2. The second instruction asked by the **[\*539]** plaintiff was given by the judge below, but with a qualification. That qualification involves the question discussed on the first instruction, by permitting the defendant to impeach the title of John Dunlap, or by requiring an actual entry by John, after the death of James, and before Hunter or the defendant entered. It is insisted that *pedis possessio* of John was not necessary; that the entry of Hunter, claiming under him, enured to his benefit, and was sufficient to enable Hunter, and all claiming or holding under him, after such entry, to show title derived from John Dunlap.<sup>2</sup>

3. The third and fifth instructions prayed for, may be considered together. In withholding both these instructions, the court has denied to the jury the right to infer one fact from another. From the long uninterrupted possession held under the title of the Dunlaps, and as against the defendant, who had acknowledged John Dunlap's title, the jury ought to have been permitted to fill, by intendment or presumption, after the death of both the Dunlaps, the only chasm alleged by the defendant to exist in that title. Before the establishment of a uniform rule of naturalization under the new constitution, the laws of the different states gave great encouragement to emigration, by conferring the privileges of citizenship on easy terms. The acknowledgement of John Dunlap's title by the defendant, his possession under it, and demand of a deed from John D., was sufficient evidence, of itself, to **[\*540]** warrant the jury to find John D. a citizen, if that were necessary to perfect his title. *Omne majus continet in se minus*; the acknowledgement of his title involved the admission of the fact that he was a citizen.<sup>3</sup>

1.—*Jackson v. Stewart*, 6 Johns. Rep. 34; *Jackson v. Reynolds*, 1 Caines' Rep. 444; *Jackson v. Whitford*, 2 Caines' Rep. 215; *Brandt v. Livermore*, 10 Johns. Rep. 358; *Jackson v. Hinman*, 1b. 292; *Jackson v. Bush*, 1b. 223; *Jackson v. M'Leod*, 12 Johns. Rep. 182; *Jackson v. Graham*, 3 Caines' Rep. 188;

*Phillips v. Rothwell*, 4 Bibb's Rep. 33; *Connelly v. Chiles*, 2 Marsh. Kent. Rep. 242.

2.—*Barr v. Gratz*, 4 Wheat. Rep. 214; *Jackson v. Reynolds*, 1 Caines' Rep. 444; *Jackson v. M'Leod*, 12 Johns. Rep. 182.

3.—*Co. Litt.* 52, b; *Noy. Max.* 16-17.



4. The fourth instruction may be considered as involving the previous instructions moved; for, if the defendant was stopped, to deny John D.'s title, and the statute of limitations did apply to the case, then certainly the plaintiffs were entitled to recover. As to the statute of limitations, as the defendant claimed under John D., and looked to him for the perfection of his title, the possession of the defendant is not such an adverse possession as would toll the right of entry of the heirs of the said John D.<sup>1</sup> To bar the plaintiff in ejectment, the possession of the defendant must have been adverse in its commencement, and so continued.<sup>2</sup> The defendant admitted John D.'s title within twenty years before action brought, and the plaintiffs were residing out of the state of Kentucky, and consequently within the savings of the statute.

5. The sixth instruction asked is grounded upon the local statute of frauds and perjuries, which is similar to the English statute of frauds (29 Car. II., c. 3), and avoids "any contract for the sale of lands, &c., unless the agreement, or **541\*** some note, or memorandum \*thereof, shall be in writing, and signed by the party," &c. Hunter having entered, claiming under John D., and showing no agreement between them, the statute applies to avoid any parol agreement; Hunter was, upon his entry, the tenant at will of Dunlap, and the defendant, coming in under Hunter, is in the same predicament.

7. The treaty of 1794, between the United States and Great Britain, is to be construed liberally, according to its spirit, and the good faith which ought to be observed between sovereigns. The words, "now hold," as used in the 9th article, do not mean an actual possession.<sup>3</sup> These expressions exclude titles acquired after the signature of the treaty, but embrace all titles before the treaty, not confiscated or annulled by legislative acts before the signature of the treaty. The latter clause of this article declares, that "neither they, nor their heirs and assigns, shall be regarded as aliens." As to all the cases provided for by that article, the inheritance is provided for without regard to the common law requisition of mutual or common allegiance between ancestor and heir; and the capacity to make title as heir is placed entirely upon the fact of private relationship between American citizens or British subjects, independent of their political relationship to the one or the other of the two governments. The treaty of 1783 had provided against future confiscations. Taking that and the treaty of 1794 together, as made *in pari materia*, the **542\*** words "now hold" ought not to be confined to cases of actual occupation by British subjects or American citizens, nor to the exclusion of such as would be heirs but for alienage, but would apply to all those claims which were not actually seized upon, or confiscated by the respective governments of the United States or Great Britain; and which would, but for the treaty, be liable to be affected by the common

law doctrines in relation to inheritance. If such be the true construction, John D. might inherit the property of James D. under the treaty of 1794, if James were an alien; because no act of the government has confiscated, escheated, or regranted the premises.

As to the instructions asked on the part of the defendant, they are substantially involved in those which have already been discussed.

*Mr. B. Hardin*, contra, argued, (1) That the defendant, Rochester, was not estopped from disputing the title of the plaintiffs. If the doctrine as applicable between lessor and lessee be insisted on, the answer is, that the defendant, if a tenant, is a tenant at will, with a parol permission to enter. This cannot estop, for no man is estopped by parol from alleging the truth. There must then be a deed to estop. An estoppel consists only of an instrument superior in dignity to the evidence offered. Suppose the fact to be, that John D. sold to Hunter, and that Hunter conveyed to Rochester, and it turns out that D. had no title, can he recover? If a lease be made by deed poll, and the lessor have nothing in the premises, the lessee [**\*543**] is not estopped.<sup>4</sup> It is on principles of legal policy or moral honesty, and not of estoppel, that a lessee is not permitted to deny the estate of his lessor. The court has some discretion in limiting the rule, because, being adopted to promote the purposes of justice, it is not inflexible. It applies only to a person who enters as tenant, and never to one who enters and claims in his own right. It cannot apply as between vendor and vendee, and certainly not where the latter never received possession from the former.

2. As to the treaties of 1783 and 1794, it is the settled doctrine of this court, that they were meant to provide only for titles legally existing at the time the treaties were signed, and not to titles subsequently acquired. It is true that it is not necessary that the parties should have an actual possession of seizin; but it is necessary that the title should be legally vested in them at the time the treaty was made.<sup>5</sup>

*Mr. Chief Justice MARSHALL* delivered the opinion of the court:

The exceptions taken to the opinion of the Circuit Court in this case, may be divided into two parts:

1st. Those which respect the actual title of the plaintiffs.

2d. Those which respect the ability of the defendant to contest that title.

1st. The title of the plaintiffs.

\*They are the heirs of John Dunlap, [**\*544**] who was a citizen of Pennsylvania, and claimed as the heir of James Dunlap, who died seized of the premises in the declaration mentioned, in the autumn of 1794. The defendants allege and prove that James Dunlap was an alien, and subject to the King of Great Britain, who came into the United States subsequent to the treaty of peace, and who died before the signature of the treaty of 1794, and whose title,

1.—Litt., s. 396, 397; Co. Litt. 242; Bull. N. P. 102, 104.

2.—1 Johns. Rep. 158; 3 Johns. Rep. 223; 2 Johns. Rep. 22; 4 Johns. Rep. 230; 9 Johns. Rep. 167; 10 Johns. Rep. 435; 12 Johns. Rep. 368; 1 Marsh. Kent. Rep. 62; 2 Bibb, 506.

3.—Harden v. Fisher, 1 Wheat. Rep. 300; Orr v. Hodgson, 4 Wheat. Rep. 463.

4.—Co. Litt. 47, b; Roll. Abr. 871.

5.—Harden v. Fisher, 1 Wheat. Rep. 310.

therefore, is not protected by either of those treaties.

The court having left the fact to the jury, their verdict has found that James Dunlap died previous to the signature of the treaty of 1794, and the question is, whether the court erred in determining that this case was not either within the treaty of peace or the treaty of 1794.

It has been decided that British subjects, though born before the revolution, are equally incapable with those born subsequent to that event, of inheriting or transmitting the inheritance of lands in this country. Consequently, the sole inquiry in this case respects the effect of the treaties between the United States and Great Britain.

The treaty of peace has always been considered as providing only for titles existing at the time; and as the title of James Dunlap was afterwards acquired, it can derive no aid from that treaty.

James Dunlap, therefore, if he continued to be an alien, continued liable to all the disabilities of alienage, one of which is an incapacity to transmit lands to heirs. Consequently, when he died, the next of kin could take nothing by **545\*** descent. The treaty of 1794, \*like that of 1783, provides only for existing rights. It does not give title. Had James conveyed, or devised the property to John, the title would have vested in him, subject to the right of the government to seize the land; and the treaty would have confirmed that title, so if the law would have vested the estate in him by descent. But as the fact is, he had no title, nothing on which the treaty could operate. It has been said that this court has never supposed actual possession to be necessary to entitle a party to the benefit of the treaty. This is true. But the existence of title, at the time, has always been supposed necessary.

The plaintiffs also insisted that under the circumstances of this case, the jury might presume James Dunlap was a citizen.

The circumstances are the length of time which has intervened since his arrival in this country, and since his first acquisition of real estate, during which there have been no proceedings instituted under the laws of escheat and forfeiture.

The weight which might be allowed to this argument, had the property continued in the peaceable occupation of the heirs of James Dunlap, and had this presumption been required to sustain the title clothed with that possession, is, we think, diminished by the circumstance that the land was, soon after his death, claimed and occupied by a citizen of Kentucky as a purchaser. In such a state of things it is not surprising that no inquiries should be made into his citizenship, and that no person should feel disposed to intermeddle with the affair.

**546\*** \*The alienage of James Dunlap being fully proved, and the laws of Virginia requiring, as indispensable to his citizenship, that he should take the oath of fidelity to the commonwealth, in a court of record, of which the clerk is directed to grant a certificate, we do not think that this fact, which, had it taken place, must appear on record, ought to be presumed, unless there were some other fact, such as holding an office of which citizens alone were capable, or Wheat. 7.

which required an oath of fidelity, from which it might be inferred.

In favor of long possession, in favor of strong apparent equity, much may be presumed; but in a case where the presumption would defeat possession, where the equity is doubtful, where the parties rely upon strict law, courts will be cautious how they lean in favor of presuming that which does not appear, and which might be shown by a record.

The Circuit Court has declined giving the instruction which was required; but, on this point, has given no counter instruction, and has assigned no reason for refusing that which was required. It may have been, that the presumption in favor of a deed from John Dunlap so entirely balances the presumption in favor of the citizenship of James, as to prevent the allowance of either.

If James Dunlap could not be considered as a citizen at the time of his death, the plaintiffs have no title; and the only remaining question arising on the bill of exceptions is, was the defendant restrained \*on the principle [**\*547** of estoppel, or any other principle, from resisting their claim.

It is contended that he is so restrained, because John Dunlap sold to Hunter, and Hunter has conveyed to the present defendant.

It is very certain that these sales do not create a legal estoppel. The defendant has executed no deed to prevent him from averring and proving the truth of the case. If he is bound in law to admit a title which has no existence in reality, it is not on the doctrine of estoppel that he is bound. It is because, by receiving a conveyance of a title which is deduced from Dunlap, the moral policy of the law will not permit him to contest that title.

This principle originates in the relation between lessor and lessee, and so far as respects them is well established, and ought to be maintained. The title of the lessee is, in fact, the title of the lessor. He comes in by virtue of it, holds by virtue of it, and rests upon it to maintain and justify his possession. He professes to have no independent right in himself, and it is a part of the very essence of the contract under which he claims that the paramount ownership of the lessor shall be acknowledged during the continuance of the lease, and that possession shall be surrendered at its expiration. He cannot be allowed to controvert the title of the lessor, without disparaging his own, and he cannot set up the title of another, without violating that contract by which he obtained and holds possession; and breaking that faith which he has pledged, and the obligation of which is still continuing, and in full operation.

\*In considering this subject, we [**\*548** ought to recollect, too, the policy of the times in which this doctrine originated. It may be traced back to the feudal tenures, when the connection between landlord and tenant was much more intimate than it is at present. When the latter was bound to the former by ties not much less strict, nor not much less sacred, than those of allegiance itself.

The propriety of applying the doctrines between lessor and lessee to a vendor and vendee, may well be doubted.

The vendee acquires the property for himself, and his faith is not pledged to maintain



the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon in consequence of some covenant or warranty in his deed. The property having become, by the sale, the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this; nor is either the letter or spirit of the contract violated by it. The only controversy, which ought to arise between him and the vendor, respects the payment of the purchase money. How far he may be bound to this by law, or by the obligations of good faith, is a question depending on all the circumstances of the case; and, in deciding it, all those circumstances are examinable.

If the vendor has actually made a conveyance, his title is extinguished in law as well as equity, **549\*** and it \*will not be pretended that he can maintain an ejectment. If he has sold, but has not conveyed, the contract of sale binds him to convey, unless it be conditional. If, after such a contract, he brings an ejectment for the land, he violates his own contract, unless the condition be broken by the vendee; and if it be, the vendor ought to show it.

In this case a sale by John Dunlap to Hunter is stated, and a conveyance from Hunter to Rochester, the defendant, is also stated, but that conveyance does not appear in the record. Whether it contains any reference to the title of Dunlap, or not, is not shown. The defendant then holds in his own right by a deed of conveyance which purports to pass the legal title. The plaintiffs show no title in themselves, but allege and prove that the title under which the defendant claims is derived from their ancestor. They therefore insist that the defendant is bound in good faith to admit this title, and surrender the premises to them.

But the sole principle on which this claim is founded is, that the defendant must trace his title up to their ancestor, and is bound, therefore, to admit it. But if the deed of the defendant does not refer to their ancestor, and the record does not convey this information, the defendant holds in opposition to the title of John Dunlap, or claims to have acquired that title. If he holds under an adversary title his right to contest that of Dunlap is admitted. If he claims under a sale from Dunlap, and Dunlap himself is compelled to aver that he does, then the plaintiffs themselves assert a **550\*** title against this contract. Unless \*they show that it was conditional, and that the condition is broken, they cannot, in the very act of disregarding it themselves, insist that it binds the defendant in good faith to acknowledge a title which has no real existence.

Upon reason, then, we should think that the defendant in this case, under all its circumstances, is at liberty to controvert the title of the plaintiffs.

But it is contended that this question is settled in Kentucky by authority. There are also several cases quoted from the decisions in New York, which we have not had an opportunity of examining fully. Those we have considered are, we think, distinguishable from this in some

of their circumstances, especially in this material one, that the vendor gave possession to the vendee. But the decisions of one state, though highly to be respected, are not authority in another, especially with respect to land titles. In *Phillips v. Rothwell*, in 4 Bibb., 33, the defendant claimed under a conveyance from the tenant of the plaintiff. That case, therefore, was decided on the doctrine applicable to lessor or lessee.

The case in 2 Marshall, 242, was the case of a purchaser who had not received a conveyance, and who was not allowed to set up an outstanding title in a third person. The report gives us only the opinion of the court, not accompanied by a statement of the case, or the points made at the bar. We therefore cannot tell whether, in asserting his title, the vendor acted in opposition to his contract. We cannot say that the condition on which the sale might depend had not been broken. There is, too, a difference between setting \*up an ad- **[551]** verse title in a third person, to controvert an actual existing title, and resisting a claim made by a person having no title whatever. In the case last mentioned it would appear that the plaintiff had a title which was in itself sufficient to maintain his action; but there was another, and perhaps a superior title, in a third person, with which the defendant was not connected. The rejection of all evidence of this title does not, we think, prove that the same court would have compelled the defendant to acknowledge a title of which no evidence was given, or have rejected proof of any title in himself; especially when the vendee received nothing—not even possession from the vendor.

*Judgment affirmed with costs.*

Cited—12 Wheat. 168; 3 Pet. 47, 50, 122; 4 Pet. 507; 5 Pet. 439; 6 Pet. 384; 10 Pet. 224-226; 14 Pet. 413; 16 Pet. 54; 3 How. 690; 4 How. 296; 5 Wall. 287; 9 Wall. 293, 600; 21 Wall. 488; 2 Curt. 210; 2 McLean. 399; 2 Sumn. 545.

#### [INSTANCE COURT.]

#### THE IRRESISTIBLE. DANIELS, Claimant.

An offense against a temporary statute cannot be punished after the expiration of the act, unless a particular provision be made by law for that purpose.

The proviso in the repealing clause of the Neutrality act of the 20th of April, 1818, did not authorize a forfeiture under the act of the 3d of March, 1817 (which was included in the repeal), after the time when that act would have expired by its own limitation.

THIS cause was submitted without argument.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

\*This is an appeal from the sentence **[552]** of the Circuit Court of the United States for the District of Maryland, dismissing an information filed in that court against the brig La Irresistible, as forfeited under the acts of Congress, made for the preservation of the neutrality of the United States. The offense charged in the information was committed

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under the act of 1817, and the only question is, whether the information can be sustained after the time when that act would have expired by its own limitation.

The act was to continue in force two years after the 3d of March, 1817.

On the 20th of April, 1818, Congress passed an act making farther provision on the same subject, which repealed all former acts on that subject, and among these the act of 1817, and annexed to the repealing clause the following proviso, "Provided, nevertheless, that persons having offended against any of the acts aforesaid may be prosecuted, convicted, and punished, as if the same were not repealed, and no forfeiture heretofore incurred by a violation of any of the acts aforesaid shall be affected by such repeal."

The obvious construction of this clause is, that the power to prosecute, convict, and punish offenders against either of the repealed acts, remains as if the repealing act had never been passed. It does not create a power to punish, but preserves that which before existed. Now, it is well settled, that an offense against a temporary act cannot be punished after the expiration of the act, unless a particular provision be made by law for the purpose.

*Sentence affirmed.*

Cited—9 Wall. 575.

553\*] [\*LOCAL LAW.]

HOLBROOK ET AL.

v.

THE UNION BANK OF ALEXANDRIA.

The turnpike road stock, paid in as a part of the capital of the Union Bank of Alexandria, before its incorporation, became the common property of the association, so as to be subject to be sold and distributed among the members, after the charter, which directed, that the capital stock should consist of money only, was accepted; and those who subscribed the road stock, or their assignees, are not entitled to have the same returned specifically to them.

**A** PPEAL from the Circuit Court for the District of Columbia.

This was a suit in chancery, instituted in the court below, by Holbrook and Alexander, against the Union Bank, to recover from the bank certain shares of road stock, which had been originally subscribed to that bank by them, and to have an account of the profits of that stock, and a payment of whatever should be found to be due to them. The cause was set down for hearing upon the bill, answer, and exhibits, from which it appeared that a number of persons formed themselves into an association, for the purpose of carrying on the banking business, for the term of — years, in the town of Alexandria, under the name of "The Union Bank of Alexandria." That the association adopted certain articles as the basis of their union; by which articles, it was, among other things, agreed, that the subscribers to the 554\*] bank \*should be permitted to pay one-tenth of their subscription in the stock of certain incorporated road companies, and the Wheat. 7.

other nine-tenths in money, at certain periods prescribed in the said articles. That, in pursuance of these articles, the subscriptions to the bank were filled up, and the stocks of various road companies were subscribed, which stocks were different in their respective values. The articles of association authorized the immediate commencement of the banking business. But they provided for, and contemplated an application to Congress for a charter. The bank commenced its business without a charter, and carried on its business until the year 1817, when an act of Congress was obtained, incorporating the bank. This act directed, that the capital stock of the bank should consist of \$500,000, to be paid entirely in money. When this act was passed, a question was raised among the stockholders whether the road stock was to be returned specifically to the subscribers, or whether it was to be blended together into one general mass, and divided among the subscribers, without regard to the value of the respective stocks. The Little River Turnpike stock was the most valuable at the time it was subscribed, and is now much the most valuable stock; and the plaintiffs, Holbrook and Alexander, having subscribed this stock, insisted that the same should be specifically returned to them. The court below decided that they were not entitled to a specific return of this stock, but that it was to be considered the common property of the stockholders, subject to be divided among \*them, without regard to the value of [\*555 their respective stocks; and the cause was brought by appeal to this court.

The cause was argued by *Mr. Swann* for the appellant, and by *Mr. Jones* for the respondent.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court:

The only question is, whether the road stock paid in as part of the capital of the bank became the common property of the company, so entirely that it should be sold and distributed among the members, after the charter of the incorporation—which directed that the capital should consist of money only—was accepted; or should be returned specifically to those who subscribed it, or to the assignees of their shares.

The articles of association show that this stock constituted originally a part of the capital; that it was received from each stockholder as so much money; that it constituted the subject on which the bank traded. Each share represented an equal part of the whole capital, comprehending each description of road stock and of the money paid in; and there was nothing on the face of the certificate which was transferable, indicating that one share was more valuable than another. If, instead of obtaining the act of incorporation, the company had expired or been dissolved by consent, the shares would have been equal, and would have entitled the holders to equal portions of the whole capital. The dividends, during the continuance of the company, must have been \*equal. Had the road stock been sold, [\*556 it must have been carried to the credit of the whole company.

Upon every view we can take of this subject, the road stock can be considered only as



a component part of each share, all individual property in which was lost on its being transferred to the company. It became consolidated with the other part of the capital, and the charter of incorporation did not produce any change in this respect.

*Decree affirmed with costs.*

[COMMON LAW.]

MARBURY v. BROOKS.

A debtor has a right to prefer one creditor to another in payment, and his private motives for giving the preference cannot affect the exercise of the right, if the preferred creditor has done nothing improper to procure it.

But any unlawful consideration, moving from the preferred creditor, to induce the preference, will avoid the deed which gives it.

It is not necessary, to the validity of such a deed, that the creditors, for whose benefit it is made, should have notice of the execution of the deed, provided they afterwards assent to the provisions made for their benefit.

Nor is it any objection, to the validity of the deed, that it was made by the grantor, in the hope and expectation that it would prevent a prosecution for a felony, connected with his transactions with his creditors; if the favored creditors have done nothing to excite that hope, and the deed was not made with their concurrence, and with a knowledge of the motives which influenced the grantor, or was not afterwards assented to by them under some express or implied engagement to suppress the prosecution.

557\*] Nor will it be invalidated by the fact that the trustee, to whom the conveyance is made, being the father-in-law of the debtor, received the conveyance with a view of concealing the felony, and preventing a prosecution of his son-in-law, provided it was not executed with the concurrence of the *cestui que trusts*, and a knowledge on their part of the motives which influenced the trustee, or was not afterwards assented to by them under some engagement to suppress the prosecution.

ERROR to the Circuit Court for the District of Columbia.

This was an attachment sued out by the defendant in error, Brooks, on the 10th February, 1820, to attach the lands, tenements, goods, chattels, and credits of Fitzhugh, an absconding debtor, pursuant to the act of Assembly of Maryland of November, 1795, ch. 56; levied in the hands of the plaintiff in error, Marbury, who was duly summoned as garnishee, on the 11th February, 1820. The garnishee appeared

and pleaded that he had no effects, &c., of the absconding debtor in his hands, upon which an issue was joined and tried by a jury; verdict for plaintiff in the attachment, and judgment in due form against the garnishee.

Upon the trial, evidence was produced on the part of the plaintiff to prove that the said Fitzhugh had, on the 31st of December, 1819, a store of goods in Georgetown, furniture, and other personal property, which came to the hands of the said garnishee, and were afterwards sold and disposed of by him; leaving in his hands, from that time to the present, money and effects of the said Fitzhugh, to a very considerable amount, over and above the debt claimed by the plaintiff in the said attachment; that the said Fitzhugh was, at and before the time of the issuing and \*serving of the [\*558 said attachment, and still is, indebted to the plaintiff in the said sum of \$1,421.30. Whereupon the garnishee, in order to prove that the money and effects so being in his hands were not liable to the attachment, produced and read to the jury a paper writing, purporting to be a bill of sale from the absconding debtor to the garnishee, recorded among the land records of the proper county, on the 3d day of June, next ensuing its date, in the words following:

This Indenture, made this thirty-first day of December, in the year eighteen hundred and nineteen, between Richard H. Fitzhugh, of the one part, and William Marbury, of the other part: Whereas, the said Richard H. Fitzhugh is indebted to the Farmers' and Mechanics' Bank of Georgetown, in the sum of four thousand three hundred dollars; to the Bank of Columbia, in the sum of two thousand eight hundred and fifty dollars; to the Union Bank of Georgetown, in the sum of fifteen hundred and fifty dollars; and to the Branch Bank of the United States, at Washington, in the sum of seven thousand dollars, all current money; for the payment of which, the said Fitzhugh wishes to provide, and therefore executes this deed or instrument of writing. Now, this Indenture witnesseth, that the said Richard H. Fitzhugh, for, and in consideration of the premises, and for the further consideration of five dollars, current money, to him in hand paid by the said William Marbury, the receipt of which is hereby acknowledged, hath given, granted, bargained, and sold, and by these presents doth give, grant, bargain, and sell, unto the said William Marbury, his executors

NOTE.—Assignments.

A debtor, though insolvent, may lawfully prefer one creditor to another, by an assignment, though by so doing, some creditors get nothing. *Brashier v. West*, 7 Pet. 608; *Pearpoint v. Graham*, 4 Wash. 232; *Clark v. White*, 12 Pet. 178; *Tompkins v. Wheeler*, 16 Pet. 106; *Halsey v. Fairbanks*, 4 Mas. 206; *Fuller v. Ives*, 6 McLean, 478; *U. S. v. King*, Wall. C. C. 12; *Lawrence v. Davis*, 3 McLean, 177; *Brooks v. Marbury*, 11 Wheat. 78; *Spring v. So. Car. Ins. Co.*, 8 Wheat. 268; *Bohleu v. Cleveland*, 5 Mas. 174; *Halsey v. Whitney*, 4 Mas. 206; *Maguire v. Thompson*, 7 Pet. 348; *S. C. Baldwin*, 358; *Murrill v. Neill*, 8 How. 414; *Adams v. Blodgett*, 2 Wood. & M. 233; *Caskie v. Webster*, 2 Wall., Jr., C. C. 131; *Murray v. Riggs*, 15 John. 571; *Putnam v. Hubbell*, 42 N. Y. 106; *DeRuyter v. St. Peter's Church*, 3 Barb. Ch. 119; aff'd, 3 N. Y. 238; *Turner v. Jaycox*, 40 N. Y. 470; *Haxton v. Bishop*, 3 Wend. 13; *Hill v. Reed*, 16 Barb. 280; *Spaulding v. Strang*, 38 N. Y. 9; 37 N. Y. 135; *Jacobs v. Reusen*, 36 N. Y. 668; *Putnam v. Hubbell*, 42 N. Y. 146; *Talcott v. Rosenthal*, 22 Hun. 573;

*Mackie v. Cairns*, 5 Cow. 547; *Powers v. Graydon*, 10 Bosw. 630.

An assignment more than six months before the bankruptcy of the assignor, of all the assignor's property, without preferences, valid under bankrupt law. *Mayer v. Hellman*, 1 Otto, 496.

When assignment void or voidable under bankrupt law. *Globe Ins. Co. v. Cleveland Ins. Co.*, 14 Bank. Reg. 311; *Cragin v. Thompson*, 12 Bank. Reg. 81; *Jackson v. McCulloch*, 1 Woods, 433; 13 Bank. Reg. 383; *Re Marter*, 12 Bank. Reg. 185; *Meador v. Everett*, 3 Dill. 214; *Johnson v. Rogers*, 5 Am. L. Rec. 536; *MacDonald v. Moore*, 1 Abb. N. C. 53; *Clark v. Marx*, 6 Ben. 275; *MacDonald v. Moore*, 23 Int. Rev. Rec. 25; *Belden v. Smith*, 16 Bank. Reg. 302; *Re Beisenthal*, 15 Bank. Reg. 1.

A corporation may make an assignment when not restricted by its charter, or by statute. 3 Barb. Ch. 119; 3 N. Y. 238; 3 Wend. 13; 16 Barb. 280.

In New York the legislature enacted that when an incorporated company shall have refused the payment of any of its notes or other evidences of debt, such company cannot assign any of its prop-

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**559\***] and administrators, \*all the stock of goods and merchandise now in the store, on Bridge street, Georgetown, occupied by said Fitzhugh; also, all the household furniture, goods and chattels, in the house situate in First street, in the same town, occupied by said Fitzhugh, as a dwelling-house; also a negro woman, Maria, a negro woman named Chloe, and her children, Westley, Caroline, John, and Nancy, all of which said negroes are now in the possession of said Fitzhugh. And the said Richard H. Fitzhugh doth hereby make over, transfer, and assign to the said William Marbury, his executors, administrators, and assigns, all his books of accounts, notes, bonds, and other securities, to have, and to hold, all the said goods and merchandises, chattels, furniture, negroes, books of accounts, notes, bonds, and securities, unto him, the said William Marbury, his executors, administrators, and assigns, forever; in trust, however, to sell the same, according to the best of his judgment and discretion; and to pay the money thereby arising, as follows: First, to pay the expenses of such sale, and after that, to divide the same between the banks aforesaid, in proportion to the respective amounts due them; and if anything remain, it is to be paid to the creditors of the said Fitzhugh, in proportion to the debts ascertained to be due them."

In witness whereof, the said Richard H. Fitzhugh hath hereunto subscribed his name, and affixed his seal, the day and year before written.

R. H. FITZHUGH.

Signed, sealed, and delivered in my presence, the word "three," being first interlined in the sixth line of the first page. [SEAL.]

THOMAS CORCORAN.

**560\***] \*District of Columbia, Washington County, viz:

On this thirty-first day of December, in the year eighteen hundred and nineteen, personally appeared before me, the subscriber, a justice of the peace, in and for the district and county aforesaid, Richard H. Fitzhugh, party grantor within named, and acknowledged the foregoing instrument of writing to be his act and deed.

THOMAS CORCORAN.

And after the evidence on both sides had been fully examined, the plaintiff, having

offered evidence tending to prove the following facts, prayed the instruction of the court to the jury, if the jury find from the evidence that the said Fitzhugh, being a merchant and trader at Georgetown, in the county aforesaid, had committed divers forgeries of notes, and indorsements of notes, upon which he obtained money and credit to the amount of from fourteen thousand to fifteen thousand dollars; and that he was *bona fide* indebted to the plaintiff and divers other creditors (all of whom are interested, as attaching and general creditors, in the determination of this cause), for goods, wares, and merchandises, and for moneys lent and advanced, to the amount of \$20,000 or upwards, over and above the said forgeries; that William Marbury, the trustee named in the said deed, and the garnishee summoned in this cause, is the father-in-law of said Fitzhugh; and that the said Marbury, before the execution of the said deed, being desirous to screen the said Fitzhugh from disgrace and prosecution for the said forgeries, and understanding that the \*said forg- [**561**eries amounted only to about five or six thousand dollars, had consented to pay off the same, and take a deed of trust or mortgage from the defendant, by way of collateral security for the moneys so to be advanced by him; and that in pursuance of that arrangement, such a deed of trust or mortgage, by way of collateral security, was actually drawn and executed; in which was included the same identical property mentioned and conveyed in and by the deed above given in evidence; but the said Marbury, discovering that the amount of forgeries was in fact so much greater than had been represented, and finding that he would have to pay from fourteen to fifteen thousand dollars, instead of five or six thousand dollars, in order to accomplish his first design of screening said Fitzhugh from disgrace and prosecution, refused to advance any money to take up the forged notes; and said: "I will not ruin my family for you; now, I advise you to make your escape as soon as you can." Whereupon, the said deed, so executed as aforesaid, was cancelled and torn up, and immediately afterwards, another deed (being the same now produced) was drawn by John Marbury, a witness present at its execution; that the said deed was executed after the noon on the day on which it bears date; and that on the night of the same day, the said

erty to any stockholder or officer, for the payment of any debt, nor assign in contemplation of insolvency to any person; and every such assignment shall be void. 1 R. S. N. Y. 603, sec. 4; Haxtun v. Bishop, 3 Wend. 13; Harris v. Thompson, 15 Barb. 62; Robinson v. Bank of Attica, 21 N. Y. 406; Sibell v. Remsen, 33 N. Y. 95; Loring v. U. S. Gutta Percha Co., 36 Barb. 329; Bowen v. Lease, 5 Hill. 221.

An assignment by directors of a company of all its property is void as against stockholders. Smith v. N. Y. Stage Co., 18 Abb. Pr. 419; S. C. 28 How. Pr. 208; Dyckman v. Valiente, 43 Barb. 143; 42 N. Y. 549.

General assignment for benefit of creditors is not absolutely void under the bankrupt act. Voidable, if impaired by proceedings within the time limited by that act. Maltbie v. Hotchkiss, 38 Conn. 80; Beck v. Parker, 65 Penn. 262; Hobson v. Markson, 1 Dill. 424; Reed v. Taylor, 32 Ia. 209; Sedgwick v. Place, 3 Ben. 360; *In re* Hawkins, 34 Conn. 548; Cragin v. Thompson, 2 Dill. 513; Thrasher v. Bentley, 2 N. Y. Supr. 309; S. C. 59 N. Y. 649; McLean v. Meline, 3 Wheat. 7.

McLean, 199; McLean v. Johnson, 3 McLean, 202; *In re* Charles W. Holmes, 1 N. Y. Leg. Obs. 211; Weiner v. Farnham, 2 Penn. 146; 3 Penn. L. J. 440; *In re* Anon. 1 Penn. L. J. 323.

But debtor in making assignment cannot secure to himself the future control of the assigned property or of its proceeds. Haydock v. Coope, 53 N. Y. 68.

Or, reserve other benefit to himself. Barney v. Griffin, 2 N. Y. 365; Goodrich v. Downs, 6 Hill. 438; Strong v. Skinner, 4 Barb. 546; Leitch v. Hollister, 4 N. Y. 211; Mackie v. Cairns, 5 Cow. 547; Elias v. Farley, 3 Keyes, 398; Sheldon v. Dodge, 4 Denio. 217; Hyslop v. Clarke, 14 John. 458; Austin v. Bell, 20 John. 442; Leaving v. Brinkerhoof, 5 John. Ch. 329; Wakeman v. Grover, 4 Paige, 23; aff'd 11 Wend. 117; Armstrong v. Byrne, 1 Edw. Ch. 79; Lentillon v. Moffatt, 4 Edw. Ch. 451; Gasherie v. Apple, 14 Abb. Pr. 64; Berry v. Riley, 2 Barb. 307; Hastings v. Bolknap, 1 Den. 190; Bellows v. Partridge, 19 Barb. 176; Oliver Lee Bk. v. Talcott, 19 N. Y. 146; Dunham v. Waterman, 11 N. Y. 9; Schlusell v. Willett, 34 Barb. 615.



Fitzhugh absconded from the District of Columbia, and was so absconding from that time, until, and at the time the attachment issued in this cause, and ever since; that the creditors, whose debts the said deed purports to secure, were wholly ignorant of the execution, and of the intent to execute the same, until after the same was executed as aforesaid; and were not in any manner privy or consenting thereto; except that the said William Marbury held stock as a trustee in one of the said banks, and John Marbury, the attorney who drew the same, was a stockholder in another of the said banks; that the whole of said property lay within the county aforesaid, and would have been subject to this attachment, but for the said conveyance; that the said deed includes and conveys the whole of the property, choses in action, and estate of every kind, in possession of said Fitzhugh, or to which he was in any manner entitled, at the time of executing the same; that the whole of the debts, which the said deed purports to secure, stood upon no other foundation than that of notes forged by the said Fitzhugh, and passed by him as genuine to the banks respectively mentioned in said deed, and discounted by said banks for him, and the money thereupon advanced to him (such notes, however, being all actually signed or endorsed by said Fitzhugh, and he being liable for the payment thereof), to the respective amounts stated in said deed; and that at the time of the execution of the said deed, it was expected and understood, that it comprehended all the cases in which the said Fitzhugh was involved by means of his said forgeries, and was not intended to comprehend any other, except as to the surplus, after satisfying said forged paper; and that said Fitzhugh, the evening before the execution of the said deed, called on C. Smith, the cashier of the Farmers' and Mechanics' Bank, in said deed mentioned, and a stockholder in the same, and had conversation with him relative to the said forgeries; and that the said Smith, after being informed that the said forgeries amounted to only about five or six thousand dollars, and that he thought he had property enough to pay all his debts, if judiciously managed, said to the said Fitzhugh, that he had no doubt the said Marbury would take up and pay all the said forged notes, and that nothing more would be said about it; and said Fitzhugh begged of said Smith to see said Marbury, and recommend that course to him, which said Smith promised to do the next morning; that when said Smith called for that purpose the next morning, he found said Marbury with said Fitzhugh, and the said John Marbury, Esquire, together at the office of the latter, engaged in drawing a deed; that the said William Marbury declared, in consequence of finding the forgeries amount to so much more than he expected, that he would pay nothing; and the said Smith left the office before the said deed was executed; that on the day of the execution of said deed above given in evidence, a note to which the said W. Marbury's name had been forged by Fitzhugh, and by him passed for value received to one G. R. Gaither, became due and payable at said Farmers' and Mechanics' Bank, where the same was deposited by the holder for collection, said

bank having no interest in the same; that the holder had called at the bank, and expressly ordered the said note to be sent out and presented for payment, in order that the said Marbury might distinctly avow or disavow his signature; and to be protested if not admitted and paid; and that the said Marbury, either in the evening of the same day the deed was executed, and after the execution of the same, or in the morning of the next day, called at said bank and took up said note, after it had been sent out to the notary, and before the return of the protest; that said Marbury, at the same time, took up another forged note and a check due to the said bank (both being also forgeries of the said Fitzhugh), upon neither of which his (Marbury's) name had been forged; and the said two notes and checks were the whole of the paper forged by said Fitzhugh, which was then due and demandable; and said Marbury took up said notes and check in anticipation of funds expected to arise from the property conveyed as aforesaid; and took the receipt of C. Smith, cashier of said bank, for the amount so paid on said forged notes and check, in the words following:

“GEORGETOWN, January 1, 1820.

“Received of William Marbury, twelve hundred and fifty dollars forty cents, part of the debt due the Farmers' and Mechanics' Bank of Georgetown, mentioned in the deed of R. H. Fitzhugh to the said Marbury, dated 31st December, 1819.

\$1,250.40.

C. SMITH.”

That the said Marbury, in a conversation, the day after the execution of said deed, relative to the said deed, and to the circumstances attending the execution of the same, expressed regret at having had anything to do with it; represented that said Fitzhugh had come to him in tears; and entreated him to save him, or screen him from prosecution, and to have the affair hushed up, (or words to that effect); and the said Marbury, in that conversation, expressed it as his wish, that it might be hushed up; and the said Marbury, in the course of conversation, further remarked, that said Fitzhugh seemed scarcely to know what he was about, and would have done anything to get away; and said Marbury further remarked in said conversation, that said Fitzhugh had a rich uncle disposed to assist him, and his father was expected in town in a few days, and that if his debts did not amount to too much, they might all yet be provided for; that he (Marbury) did not suppose the loss, upon winding up said Fitzhugh's affairs, would exceed ten thousand dollars; that if it did not exceed that sum, his friends would arrange the whole, and he (Marbury) himself would be willing to go as far as five thousand dollars, if Fitzhugh's other friends would answer the balance; and the said Marbury further remarked, that if twenty thousand dollars would save him (Fitzhugh) from disgrace, he (Marbury) would pay it; that what he had already done, was to save Fitzhugh from prosecution, he (Marbury) having no interest in it; and that said Marbury, in another conversation, speaking of having taken up the said note due to said Gaither, said he was anxious to get the forged notes out of the way; and that after

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the execution of said deed, the defendant was unwilling to leave the district, and wished to remain at least a week longer; and that the attorney who drew the said deed, being nearly connected with the parties as the son of the trustee, and brother-in-law of said Fitzhugh, persuaded and advised him to quit the district, **566**\*) and among other reasons, urged, \*that if all the parties were satisfied to let him remain unmolested, still Mr. Richard Smith, the cashier of the Branch Bank of the United States (which is one of the banks which the said deed purports to secure), would feel himself compelled to prosecute; and that it would be more than his office was worth to overlook it, on account of the great interest the Bank of the United States felt in prosecuting and bringing to justice persons guilty of forgery; that said William Marbury also urged said Fitzhugh to quit the district, in order to get out of the way of prosecution; and that said Fitzhugh, in the night of the same day said deed was executed, actually fled from justice, and absconded as aforesaid, with the privity and consent of said William Marbury; and that neither he, nor any person on the part of any of the said banks interested in said deed, did ever move in the said prosecution, or attempt to have the said Fitzhugh arrested and brought to justice; and that it was known to the acting officers and agents of the said banks, before the departure of the said Fitzhugh, that he was guilty of said forgeries.

Then the jury may conclude from the said facts and evidence, that the said deed was devised and executed by the said Fitzhugh, and accepted by the said William Marbury, with the motive and intent of prevailing with the holders of the said forged notes to forego a prosecution for the said forgeries; and also, that upon the facts so given in evidence on the part of the plaintiff as aforesaid, if believed by the jury to be true as stated, that the said deed is fraudulent and void as against the plaintiff. Which **567**\*) instruction \*the court gave as prayed. To which the defendant excepted.

And the said garnishee having offered evidence to prove the following facts, viz.: That after the execution of the said deed, the said Fitzhugh was urged by the said John and William Marbury to fly from the district; that the said Fitzhugh made great objections to going away, and wished to remain a week, and upon being told that he would be in danger of arrest and prosecution if he did so, the said Fitzhugh replied that he could not be arrested until the meeting of the court; but upon being satisfied that he might be called before a magistrate, and immediately arrested, and the observation before stated being made about Mr. R. Smith, and being told of the punishment to which he was exposed, he consented to go. And he further offered to prove, by the evidence of the said John Marbury, a witness sworn in the cause, that he was not certain who first proposed the drawing of the new deed; but to the best of his recollection, the proposal came from said Fitzhugh, and that said W. Marbury was requested by said Fitzhugh to become the trustee; to which he consented. That at the time of the execution of the said deed, the said Fitzhugh executed the same voluntarily, and that no expectation was held out to him, either by Wheat, 7.

himself, or by Mr. W. Marbury, or any other person to the witness's knowledge, either then or at any time before, that by executing the same he would be saved from a prosecution; nor was there any promise or expectation given, that they, the said Marburys, or either of them, would endeavor to prevail with the \*holders of the said forged notes, or [**568** any other persons, to forbear arresting or prosecuting the said Fitzhugh; and further, that neither the witness nor W. Marbury ever made any such application to any of the said holders, or to any other person; and further, that at the time of the execution of said deed, all expectation of preventing a prosecution, or concealing the said forgeries, was abandoned, and that the only mode pointed out to said Fitzhugh, for avoiding said prosecution, was by an immediate flight; and all the said forged notes still remain in said banks, except the two notes and the check mentioned in the statement of plaintiff's evidence; and upon the evidence, offered as aforesaid, both on the part of plaintiff and the garnishee, and so stated as aforesaid, the garnishee, by his counsel, prayed the court to instruct the jury.

If the jury believe, from the evidence, that R. H. Fitzhugh, owing the debts mentioned in the deed offered in evidence, executed and delivered the same voluntarily and without any threat of prosecution, and without any promise or agreement made to him; that in case of executing it, he would not be prosecuted, then the plaintiff is not entitled to recover. But the court refused to give the instructions as prayed by the defendant, and in lieu thereof, gave the following instructions, to wit:

If the jury believe, from the evidence, that R. H. Fitzhugh, owing the debts mentioned in the deed offered in evidence, executed and delivered the same (voluntarily and *bona fide*), and without any threat of prosecution, and without any promise or agreement made to \*him, and without any expectation on [**569** the part of said Fitzhugh, raised by the acts of said Marbury, or of some of the persons interested in the said trust—that in case of his executing it he would not be prosecuted, and that possession of the said goods accompanied and followed the execution of the said deed, then the plaintiff is not entitled to recover. To which refusal the defendant excepted; and the plaintiff excepted to the instructions granted by the court.

And the defendant, by his counsel, then prayed the court to instruct the jury, that if they believed from the evidence that the said R. H. Fitzhugh, owing the debts mentioned in the deed offered in evidence, executed and delivered the same without any persuasion or threats, and upon his own proposal, and without any understanding with anybody, that by executing the same he should be saved from prosecution, and that nothing was said or done by any person for the purpose of influencing him by any such consideration to execute the same, and that the previous understanding between him and said Marbury, as to the latter paying and taking up the said forged papers was before the execution of the said deed abandoned, and that there was no understanding between the said Fitzhugh and the said Marbury, that they, or either of them, should for-



bear prosecuting him, or should attempt to prevail with the holders of said forged paper to forbear prosecuting him on account of the same, nor any understanding with said holders that they should so forbear, and that no attempt whatever was ever made so to prevail upon the **570**]\* said holders nor in any manner \*to prevent such prosecution; and that said Fitzhugh, at the time of executing such deed, asserted that he had property enough, if judiciously managed, to pay the said forged paper and all his other debts also; and that said Marbury and the said holders of said forged notes could have instantly prosecuted the said Fitzhugh for said forgeries without violating any promise or understanding that had subsisted between them; and that unless he had absconded as aforesaid, he would have been by the said holders immediately prosecuted for said offenses, and that such prosecution was not in any manner avoided by the execution of said deed, but only by his absconding from the district, then the jury may and ought to presume that the said deed was executed *bona fide* and for a valuable consideration; and that the plaintiff is not entitled to recover; which instruction the court gave. To which opinion and direction the plaintiff excepted.

And thereupon the plaintiff prayed the court to instruct the jury, that if, under all the circumstances before given in evidence, the jury shall find that the obtaining of impunity or forbearance of prosecution, for said forgeries, formed no part of the consideration or inducement for the execution of the said deed, with said Fitzhugh, or with any other person, directly or indirectly concerned, still if the jury find from the evidence that the great majority of the creditors of said Fitzhugh, in number and value, were by means of said deed unjustly and purposely hindered, delayed, and defeated in their proper suits and remedies, for the recovery of their said debts, upon the absconding **571**]\* of said Fitzhugh, and that the \*said deed was executed as aforesaid, with the purpose and design of preventing and defeating any legal recourse in behalf of such majority of creditors, against the property and effects which said Fitzhugh intended to leave behind, and did leave behind him, when he fled from justice as aforesaid; and if it be further found that no creditor whatever of the said Fitzhugh was party or privy, or in any manner consenting to the execution of the said deed, then the said deed is fraudulent and void in law, as against the plaintiff. Which instruction the court gave; but also instructed the jury that the preference given by the said deed to some of the creditors of said Fitzhugh, did not of itself make the said deed fraudulent and void in law. To which also the defendant excepted.

And the defendant further prayed the court to instruct the jury as follows:

If the jury should believe, from the evidence, that Richard H. Fitzhugh, owing the debts mentioned in the deed, executed the same under an expectation that it might have prevented him from being prosecuted for the forgeries, and that neither the said William Marbury, nor any of the holders of the said forged notes, nor persons interested in the same, held out to him any such expectations, then the said deed is valid, and the plaintiff not entitled to recover.

Which opinion the court refused to give, but instructed them as follows:

If the jury should believe, from the evidence, that Richard H. Fitzhugh, owing the debts mentioned in the deed, executed the same under an expectation that it might prevent him from being prosecuted for \*the forgeries, and [**572** that neither the said William Marbury, nor any of the holders of the said forged notes, nor persons interested in the same, held out to him any such expectation, then the said deed is valid (unless there should be some other objection to it), and the plaintiff not entitled to recover.

To which refusal the defendant by his counsel excepted; and the plaintiff also excepted to the instructions given by the court.

A verdict and judgment thereon having been rendered for the plaintiff, Brooks, in the court below, the cause was brought by writ of error to this court.

This cause was argued by the *Attorney-General* and *Mr. Key*<sup>1</sup> for the plaintiff in error, and by *Mr. Jones*<sup>2</sup> for the defendant in error.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court:

This is a writ of error to a judgment rendered in the Circuit Court of the United States for the county of Washington. In the Circuit Court the controversy turned entirely on the validity of the deed of the 31st of December, 1819. The jury found against its validity, and the cause depends in this court on the correctness of the instructions under which the verdict was found.

\*After the testimony was concluded, [**573** the plaintiff in the Circuit Court moved that court to instruct the jury, that if they find from the evidence the facts which it was offered to prove, and which are stated at large in the bill of exceptions, "that then the jury may conclude from the said facts and evidence that the said deed was devised and executed by the said Fitzhugh, and accepted by the said William Marbury, with the motive and intent of prevailing with the holders of the said forged notes to forego a prosecution for the said forgeries; and also upon the facts so given in evidence on the part of the plaintiff as aforesaid, if believed by the jury to be true as stated, that the said deed is fraudulent and void as against the plaintiff."

This instruction the court gave as prayed. It consists of two parts. First, that which authorizes the jury to infer "the motive and intent" with which the deed was executed; and second, that which declares the deed "fraudulent and void as against the plaintiff," if the facts given in evidence by him, as stated in the bill of exceptions, are believed to be true.

This last part of the instruction may possibly have been intended to depend on the first. It may have been intended to say, that if the jury should draw the conclusion which was authorized by the court, respecting the motive and intent with which the deed was executed, they should then find the deed fraudulent

1.—They cited 1 Johns. Cas. 205; 2 Johns. Ch. Rep. 297; 4 Wheat. Rep. 503; 13 Vin. Abr. 517, pl. 10, 541; pl. 3, Ambl. 596; 4 East's Rep. 13; 5 T. R. 424; 8 T. R. 528.

2.—He cited 9 Johns. Rep. 337; 5 Cranch, 350; 6 Mass. Rep. 339; Cowp. 434; Roberts on Frauds, 585.

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and void as against the plaintiff. But such is not the direction of the court, as it appears in the case before us. The second clause of the **574\*** instruction \*is entirely independent of the first, and the jury is directed to find the deed fraudulent and void, if the facts stated in the bill of exceptions are believed.

The testimony of the plaintiff would certainly justify the conclusion, respecting the motive and intent with which the deed was executed and received, that he wished the jury to draw; and, although the instructions on this point might have been expressed in terms less exposed to cavil, we will not say that they withdraw from the jury their right of deciding for or against that conclusion. If the case rested on this branch of the opinion of the court, we feel some difficulty in saying that it was too strongly expressed.

But the second branch of this instruction cannot, we think, be sustained.

Had the motive and intent with which the deed was executed and received been left to the jury; and had they been instructed, "that, if they believed it to have been executed and received with the motive and intent of prevailing with the holders of the forged notes to forego a prosecution for the said forgeries, then the deed would be fraudulent and void against the plaintiff," the single question of law respecting the validity of such a deed would have been presented to this court. But the instruction, as given, does not depend on this conclusion. It depends on their believing that the facts stated in the bill of exceptions are proved; and they are informed that if those facts are true, the deed is void. To sustain this instruction, the facts must be such as clearly to amount to a fraud.

The first fact is, that Marbury, the father-in-**575\*** law \*of Fitzhugh, and the trustee in the deed, when first informed of the forgeries which had been committed, being desirous of screening his son-in-law from disgrace and from punishment, and being informed that the forged notes amounted to only \$5,000 or \$6,000, agreed to take up the notes on receiving a conveyance of property for his indemnity; but on finding that their amount was much more considerable than he had supposed, he tore up the deed, and refused to engage himself for the notes.

This part of the transaction has been denominated a fraud. We cannot think it one. To advance money for a son-in-law to repair the frauds he had committed, even with the hope of concealing the perpetration of them, is not, we think, an offense which may not be excused; nor can a security taken for the repayment of money so advanced be deemed fraudulent. If the notes were to be taken upon condition that the holders would forbear to prosecute the criminal, or if the repayment of the money advanced were to depend upon his escape from prosecution, the validity of the contract might well be questioned. But the undertaking of Marbury was unconditional, as was the security for the repayment of the money advanced. The only feature in the transaction to which blame is attached is the attempt of a father-in-law to conceal the forgeries of a son-in-law, by paying off the notes he had forged. It may be the duty of a citizen to accuse every offend-

er, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man. This **[\*576]** fact certainly indicates the interest taken by Marbury in the escape of Fitzhugh, but goes no farther.

On canceling this first deed, Marbury said to Fitzhugh: "Now, I advise you to make your escape as soon as you can." And immediately after it was canceled, the deed now in contest was drawn by a person then present, which comprises all the property of Fitzhugh of every description, and purports to secure all those creditors who were then understood to be holders of the forged notes. It did not appear that the creditors, for whose particular benefit the deed was made, had any notice of the transaction; but William Marbury, the trustee, and John Marbury, who drew the deed, were severally stockholders in two of the banks for whose debts it provided. It was also proved that the evening before the execution of the deed, Fitzhugh called on C. Smith, the cashier of one of the banks, and a stockholder in it; and in a conversation with him respecting the forgeries, said that Marbury would pay the notes. That Smith called on Marbury next day, while the deed was preparing, but on being told that he would not pay the notes, departed before it was executed. Two of the forged notes fell due about that time, and were taken up by the trustee on the day after the deed was executed. It appeared that Fitzhugh was anxious to remain some time longer in the district, but was urged both by William Marbury and John Marbury, who was son of William, to escape immediately, as he would certainly be prosecuted by the Bank of the United States if he remained; and that he did abscond the \*night succeeding the execution of **[\*577]** the deed. It appeared, from the declarations of Marbury himself, that his object, throughout the whole transaction, was to save Fitzhugh from prosecution.

It is sufficiently obvious that Marbury acted as the friend and adviser of Fitzhugh, and in the hope that, if the notes should be taken up, the creditor banks would not pursue him out of the district. It is stated that they have not instituted any prosecution against him, but it is not stated that it has been in their power to do so, or that they know where he is.

Do these facts, of themselves, avoid the deed?

That a debtor has a right to prefer one creditor to another cannot be denied, and that his private motives for giving this preference, provided the preferred creditor has done nothing improper, cannot annul this right, is equally certain. On the other hand, it will be also admitted that any unlawful consideration moving from the preferred creditor to induce this preference, may avoid the deed which gives it. Had Mr. Marbury acted as the agent of the banks holding the forged notes, or with their knowledge and concurrence; had they been in any manner pledged not to prosecute Fitzhugh should the notes be taken up, either before or after the deed was executed, and while it was in the power of Marbury to withhold from them the money produced by the property conveyed, the case would be a strong one against the banks. But there is no ingredient of this



sort in the case; at least, none is submitted to the jury. The fact, in its strongest aspect, is, that a deed was made, giving this preference. **578\***] in the hope that it would propitiate \*the preferred creditors, and prevent their being so active as they might otherwise be in proceeding against the criminal. But the facts, as they stand, show no agreement made at any time to forbear to prosecute, nor that the interest of the creditors would be in any manner affected by the institution of a prosecution, and carrying it on to the conviction of the offender.

If Fitzhugh had remained, and his crime had not been discovered, he might have sold all the property comprised in this deed, and might have applied the money to the notes he had counterfeited. His hope that this act would conceal the crime, and save him from punishment, would not have vitiated the transaction.

Had he, on determining to abscond, executed to Mr. Marbury the very deed now in question, conveying all his property in trust for the creditors who are preferred in that deed, and afterwards for other creditors, without any previous communication with any person whatever, would such conveyance have been distinguishable from an absolute sale? Would the hope in his own bosom, that such conveyance might have the effect of exempting him from a prosecution, unaccompanied by any act of the favored creditors giving countenance to such hope, avoid the deed?

The consideration moving from the creditor would be a real debt, and, consequently, a valuable and fair consideration. It would not be tainted by any secret hope working in the mind **579\***] of the maker \*of the deed. It would not be the less fair on account of that hope. We think that the validity of such a deed could not be drawn into question.

The only circumstance which can create any doubt in this case, is, that the father-in-law of the maker of the deed, the man who took a strong interest in his escaping prosecution, and who advised his flight, is made the trustee. How far ought this circumstance to affect the preferred creditors?

There are cases in which notice to a trustee may affect the *cestui que trust*, and in which the acts of a trustee may be considered as the acts of the *cestui que trust*; but we are not prepared to say that this is one of those cases. Mr. Marbury was not a trustee selected for this purpose by the bank. They were entirely ignorant of all that was passing between him and Fitzhugh. He was not, then, agent in obtaining the deed. He was not empowered to act for them, or to make any representations in their name, or to bind them in any manner whatever. He is the agent of Fitzhugh to sell his property and pay his debts in the order prescribed by himself. He had a right to prescribe this order, and the secret hopes of himself or his agent cannot affect those who never did any act to inspire those hopes.

This deed is absolute on its face, and there is no allegation that its effect was to depend on any subsequent agreement of the banks for the suppression of the prosecution. There is no evidence of any communication between the banks and Marbury before the deed was re-**580\***] corded and irrevocable. Suppose \*Marbury had applied to the banks, the deed not

being delivered as an escrow, and had told them that unless they would consent to suppress the prosecution, he would not allow them to take any benefit from the deed, would his attempt to deprive them of its benefits be supported in law? We think it would not. Suppose Marbury had, in consequence of the actual institution of a prosecution against Fitzhugh, refused to act under the deed. Would not a court of chancery have decreed him to execute the trust, or have appointed some other trustee to execute it? It certainly would.

It is, then, the opinion of the court, that, even supposing the deed to have been executed in the hope and expectation that it would operate as a suppression of the prosecution, the favored creditors having done nothing to excite that hope, and being entirely ignorant of the transaction, ought not to be affected by it.

But that this was the motive to the deed, though highly probable, is not certain. Fitzhugh might have been impelled by other considerations to give these particular creditors the preference. The court was not, we think, at liberty to say that the deed was void, in consequence of any motive which the court might impute to its maker. The motive was a fact of which the jury was to judge.

There are in the case some facts which seem to be introduced for the purpose of raising a suspicion that the banks might have had notice of the forgeries before the execution of the deed, and of the transactions between Fitzhugh and Marbury. But \*the cause was not [**581** put on this point, nor do any of the instructions given by the court refer to it. There is no allusion to notice to all the banks, and the deed would not be void, on account of notice to one, so far as respected others.

There are several opinions given by the court, which are dependent on this single principle: That the communications between Fitzhugh and Marbury, though unknown to the banks, avoid the deed. The cause, so far as it is now before the court, essentially depends on this single principle. This court is of opinion, that in this, the Circuit Court erred, and that the deed is not void, unless Marbury acted with the concurrence or knowledge of the banks, or unless they assented to it under some engagement, express or implied, to suppress the prosecution.

*Judgment reversed, and a venire de novo awarded.*

See S. C. 11 Wheat. 78.

Cited—11 Wheat. 85; 16 Pet. 118, 119; 4 Mason, 213, 215; 2 Wood. & M. 238, 357.

[COMMON LAW.]

DORR

v.

THE PACIFIC INSURANCE COMPANY.

Under a policy containing the following clause: "And lastly, it is agreed, that if the above vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten, then the assurers shall not be bound to pay their subscription on this policy," and it was found

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by the jury that the vessel was seaworthy at the time of the commencement of the risk, and when she sailed on the voyage insured. Held, that proof, by a regular survey, of unsoundness at any subsequent period of the voyage, discharged the underwriters.

**582\*** *An exemplification of a condemnation of the vessel in a foreign court of vice-admiralty, reciting the certificate of surveyors, that the vessel was unworthy of being repaired, and unsafe and unfit ever to go to sea again, and produced in evidence by the insured to prove the loss, is "a regular survey," in the language of the above clause.*

But the survey must correspond with the contract, and if the vessel be declared unseaworthy for any additional cause, besides being "unsound or rotten," it is not conclusive evidence of unseaworthiness.

## ERROR to the Circuit Court for the Southern District of New York.

This was an action of *assumpsit* upon a policy of insurance subscribed by the defendants on the 8th September, 1819, whereby they insured the ship *Holofern*, belonging to the plaintiff, and valued at \$6,125, on a voyage from Wiscasset, in Maine, to Havana, in the West Indies. The policy contained the following clause:

"And lastly, it is agreed, that if the above vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten, then the assurers shall not be bound to pay their subscription on this policy."

A special verdict was found by the jury, stating that the ship *Holofern* was the property of the plaintiff, and sailed on the voyage, insured, on the 9th September, 1819, and in the course of the voyage she met with violent gales, in consequence of which she sprung a leak, and after attempting, in vain to pursue her voyage, was compelled to bear away for New Providence, and arrived in the harbor she grounded, from an insufficient depth of water, **583\*** but was got off \*and a regular survey was had upon her by surveyors appointed by the Vice-Admiralty Court at said Nassau, and upon such survey the said ship was condemned in the manner stated in the sentence of condemnation, of which the following is a copy:

*Bahama Islands, New Providence.*

## IN THE INSTANCE COURT OF VICE-ADMIRALTY.

SHIP HOLOFERN, JOHN S. THOMPSON,  
MASTER.

*In the name of God, Amen!*

L. S. At a court of vice-admiralty held the twenty-sixth day of October, one thousand eight hundred and nineteen, before me, the Worshipful Theodore George Alexander, Esquire, judge and commissary of the said court, John S. Thompson, the master of the American ship *Holofern*, by William Kerr and Henry M. Williams, his proctor in that behalf duly appointed, came into court, and alleged, that on the twentieth day of this instant month of October, he did exhibit a libel or information against the said ship, when he gave the court to understand and be informed, that on the 8th day of October instant, the said John S. Thompson, by his proctor aforesaid, did

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make humble petition to the court, stating, that on the ninth day of September last past, he sailed in and with the said ship from Wiscasset, in the state of Massachusetts, bound on a voyage to Havana, in the Island of Cuba, with a cargo of lumber, spars, oars, anchors, and coals, and on the eighteenth day of the same month, in latitude 28° 39', by observation, he experienced a very violent gale of wind, during which the said ship sprung a leak; \*that all hands were, in con- [**584** sequence thereof, employed at the pumps until the twenty-fourth of the same month, when he had proceeded on his voyage as far as the Bahama bank; that at that time the people, being nearly exhausted by incessant labor at the pumps, they insisted on bearing up for New Providence, which he thought it prudent to do as the wind was then westerly, and ahead for the Havana; that he accordingly proceeded for New Providence with the said ship, and arrived in the harbor of Nassau on the twenty-sixth day of the said month of September; that since the arrival of the said ship in the said port, a part of her cargo had been landed, and, upon his inspecting and examining into her condition, he conceived her not only unfit to proceed to sea again in her present state, but altogether unworthy of being repaired. And he therefore prayed that a warrant might forthwith issue out of this honorable court, according to law and the usage and practice of the said court in such cases, to cause the said ship to be surveyed and examined by persons duly competent in that behalf, who might report as to the true state and condition of the said ship. And thereupon a warrant did issue accordingly, directed to William Gibson and John Russell, of the Island of New Providence, shipwrights, and Samuel Clutsum, of the same place, late a master mariner, who did certify, on the nineteenth day of October instant, on oath, that on the eighth day of October instant they repaired on board the said American ship *Holofern*, John S. Thompson, master, riding at anchor in the harbor of Nassau, but not finding the said ship more than half \*dis- [**585** charged, they could not then properly proceed to examine into her state and condition. And they did further certify, that on the sixteenth day of October instant, the said ship being then nearly discharged, they were enabled to inspect and examine into her state and condition, and having done so minutely and diligently, they found her to be in a very leaky state, and having at the same time caused a part of her inside ceiling to be stripped off, they discovered the said ship to be in a very decayed condition. And they did further certify, that they were of opinion, that the said ship was altogether unworthy of being repaired, and that she ought to be condemned as being unsafe and unfit ever to go to sea again.

Wherefore the said William Kerr and Henry M. Williams, as the lawful proctor aforesaid, prayed me, the Worshipful Theodore George Alexander, Esquire, judge and commissary as aforesaid, that right and justice might be duly administered to them and their party in the premises; that the said ship *Holofern* might, together with boats, tackle, apparel, and by the decree of this honorable court, be condemned as unfit for further service, and



furniture, be ordered to be sold by the marshal of this court, and the proceeds thereof might be paid to the said John S. Thompson, or his agent, for the use of the owners and proprietors and insurers thereof, and that such other proceedings might be had and done in the premises as should be agreeable to law, and the style and practice of the admiralty. And whereas, the usual and proper monition hath been issued and returned in this cause, and no **586\*** person having appeared \*to show cause why the said ship should not be condemned agreeable to the prayer of the said master, therefore, I, the said Theodore George Alexander, Esquire, judge and commissary as aforesaid, having considered the whole proceedings had and done before me in this cause, do hereby adjudge, pronounce, and declare the said ship unfit for the further service, and as such do condemn the said ship, and direct that the same, together with her boats, tackle, apparel, and furniture, be forthwith sold by the marshal of the said court, and the proceeds paid to the said John S. Thompson, or his agents, for and upon account and use of the owner, proprietors, and insurers thereof.

In testimony whereof, I, the said Theodore George Alexander, Esquire, judge and commissary as aforesaid, have hereunto set my hand and caused the seal of the said court to be affixed, at Nassau, the twenty-sixth day of October, in the year of our Lord one thousand eight hundred and nineteen.

(Signed) THEO. G. ALEXANDER,  
J. C. V. A.

*Bahama Islands, New Providence.*

#### IN THE VICE-ADMIRALTY INSTANCE COURT.

In the case of the American ship Holofern. John S. Thompson, master, I certify the foregoing paper writing to be a true copy of the decree made and given in the above cause.

In testimony whereof, I have hereunto set my hand, and caused the seal of the said court to be affixed, this seventeenth day of July, in **587\*** the year of our Lord one thousand eight hundred and twenty.

ALEXANDER M. EDWARDS,  
*Dep. Reg. C. V. A.*

The special verdict also found, that the said condemnation was obtained through the agency of John and George K. Storr, a mercantile house at New Providence, to whom the Holofern was consigned by her captain, and that the said John and George K. Storr (though ignorant of the insurance in this case), were the general agents of the defendants to manage their concerns at New Providence.

The special verdict further stated, that in consequence of this condemnation the ship was sold, and the voyage lost; that the plaintiff exhibited to the defendants the requisite preliminary proofs of interest and loss, more than thirty days before bringing the action.

That the said ship was seaworthy at the time of the commencement of the said risk, and when she sailed upon the voyage insured; and assessed the plaintiff's damages, in case he was entitled to recover, at \$6,625.20.

The record also contained a bill of exceptions, by which it appeared that the plaintiff produced a copy of the record of the said Vice-Admiralty Court, as preliminary proof of loss, and the judge charged the jury that the said copy of the said sentence of condemnation having been produced in evidence by the counsel for the plaintiff, as preliminary proof of loss, \*was, as against the plaintiff, sufficient evidence of a regular survey, in the absence of any proof to the contrary; to which opinion the plaintiff's counsel excepted.

It further appeared, that the said admiralty proceedings at New Providence were conducted under the directions of Messrs. John and George K. Storrs, a mercantile firm of that place, under whose charge the captain had placed the Holofern. The Messrs. Storrs were authorized by a general power of attorney, set out in the bill of exceptions, to attend to the interests of the defendants at New Providence, but there was no evidence that they were apprised that the defendants had insured the Holofern.

The counsel for the plaintiff, for the purpose of proving that the said condemnation had been fraudulently obtained, inquired of the captain of the Holofern, who was a witness in the cause, whether he ever made the statement represented by the said sentence of condemnation, to have been made in his petition to the said court, to wit, that he conceived that the Holofern was not only incapable to proceed to sea in her then state, but altogether unworthy of being repaired? This question was overruled by the judge.

The same witness was then asked, by the plaintiff's counsel, whether the inside ceiling of the said ship was ever stripped off, as stated in the said sentence of condemnation, and whether she was not in such a situation, by reason of the position of such parts of her cargo and ballast as remained on board, and of the water in the hold, that it could not have \*been **589** stripped off as there stated? This question was in like manner overruled.

The witness was then asked, whether he had not been informed by Gibson, one of the surveyors, that the Holofern was not condemned on account of her being rotten, but because she could not be hove down to be repaired, for want of conveniences for that purpose at New Providence. This question was also overruled.

The same witness was then asked, whether he did not, by directions from the Messrs. Storrs, after the sale of the ship and cargo (at which sale the witness was not present), call upon the said Gibson, as having purchased part of the said cargo at auction, for the price thereof, and receive the same. The judge having ascertained, by inquiry of the plaintiff's counsel, that they had been in possession of the account sales of the said cargo, signed by the Messrs. Storrs, but that the same had been sent to Maine, to recover a loss upon a policy on the cargo subscribed there, overruled the said question.

The plaintiff's counsel excepted to the several decisions overruling the said questions.

*Mr. H. D. Sedgwick*, for the plaintiff in error, argued, (1) That the sentence of condemnation, of the Court of Vice-Admiralty at New Providence, and the survey stated therein, be-

ing subsequent to the commencement of the risk, could only prove the unseaworthiness of the ship, at the time of the survey.<sup>1</sup>

**590\***] \*The clause in question has always been considered, both in arguments at the bar, and in the decision of the courts, not as varying the reciprocal rights and duties of the parties, but simply as a stipulation in relation to evidence; nothing farther is required of the insured than to furnish a competent vessel at the inception of the voyage, and all subsequent accidents and losses are at the risk of the insurer, and of consequence, it was held in the case cited, that a report of surveyors in regard to the state of the ship on the 16th of October, was not competent, or if competent, not conclusive evidence of her condition, on the 9th September preceding. It had been suggested, that the decision in the *Marine Insurance Company v. Wilson* was founded on the particular state of the pleadings; but there was no intimation in that case, that the defense would have been available in any other form, and the case was decided for the plaintiff on the ground that it did not appear by the record that any evidence was offered to prove the vessel unsound on the 24th October, except the report of the surveyors, which was made on the 26th November, and that there was no parol testimony to explain the report, or apply it to the time of the commencement of the risk.

2. It is necessary for the protection of the insurers, that it should appear by the survey, that the rottenness of the ship was the exclusive cause of her condemnation. Such is the clear result of all the cases.<sup>2</sup>

**591\***] \*Now, here it does not appear that the ship was irreparable from unsoundness solely. On the contrary, it appears by the special verdict, that she "met with violent gales, in consequence of which she sprang a leak." The Holofern is stated by the survey to have been in a leaky state; the cause of that leakiness is not stated, but it is to be referred to the leak sprung in consequence of the perils insured against. The rule has been laid down more strongly than we contend for. "Springing a leak is a peril insured against, and any accident which can be traced to the springing of a leak, in a calm or in a storm, and after a long or short absence from port."<sup>3</sup>

The condemnation proceeded as well on the ground of the leakiness of the vessel, as of her decayed condition; and it is sufficient for the plaintiff, if it appear that the leakiness was not, of necessity, to be solely ascribed to the decay. In this case, the language of the record may fairly be considered as amounting to no more than this: "By the extraordinary violence of the gale, the ship was so sprung, and started in her timbers and planks, as to be in a very leaky state, and to require a thorough repair to be made tight. She was decayed, as all ships are, and not so sound a vessel as to render extensive repairs expedient."

It appears, from the whole record, that there **592\***] was \*no proof that a regular survey had been had on the ship.

The bill of exceptions is part of the record; and if necessary, the special verdict may be amended by it. As a general rule, all errors and defects may be amended when there is anything by which the amendment can be made. The provision for amendments made by the law of the United States, is much more liberal than any of the English statutes of Jeofails.<sup>4</sup> The practice of amending verdicts is familiar. It is often done from the notes of the judge, at the term subsequent to the trial, and such notes are certainly much less authentic than a bill of exceptions, settled at the time, and sealed by the judge as making part of the record.

Although the fact of a survey having been had on the Holofern, is directly stated in the special verdict, we have a right, therefore, to resort to the bill of exceptions, to see upon what evidence the fact is so stated.

It is obvious to remark a very striking difference between this case and every other to be found in the books, in which the application of this clause in a policy of insurance was brought in question. In every other case the survey itself, or an authenticated copy, was produced in evidence, and is set out in the case. Here no survey was produced; no copy proved, nor even an extract given from the survey. What the survey was, or whether it ever had any existence as a written document, does not appear. All the evidence we have of it, is an account or summary \*(and probably an imperfect [**593** one]), which is contained in the record of the Vice-Admiralty Court, and it is apparent from this record, that the words of the surveyors are not given. If there ever was any paper in writing signed by the surveyors, it has been wholly remodeled. All the tenses of the verbs are changed.

The defendant should have produced the survey itself, or at least have distinctly and unequivocally required the plaintiff to produce it. They did neither.

Upon what evidence, then, do the defendants rely to substantiate the fact in question? Solely on the record of the Court of Vice-Admiralty at New Providence.

It is first to be observed that the clause in question in the New York policies (of which this is one) differs in one respect from the correspondent clause in the policies of the cities south of New York, upon which adjudications have been had. In the southern policies, the phraseology is such as might seem to point to judicial proceedings; here the words are, "if the above vessel, upon a regular survey, should be thereby declared, &c.;" distinctly placing the bar on the survey alone.

The great question between the parties is, whether the decree in the Vice-Admiralty Court is conclusive evidence of a regular survey; for if not conclusive, the verdict in our favor will entitle us to judgment.

It will scarcely be pretended, that independently of the stipulation in the policy, the record of the Vice-Admiralty Court, or even the survey itself, however authenticated, \*would [**594**

1.—*Marine Ins. Co. v. Wilson*, 3 Cranch, 187.

2.—*Guamiguez v. Cox*, 1 Bin. 592; *Watson et al. v. Ins. Co. of N. A. Condry's Marsh.* 169, note b; *Am-Whcat*, 7.

*rayd v. Union Ins. Co.*, 2 Bin. 394; *Stienmitz v. United Ins. Co.*, 2 Ser. & Rawle, 293.

3.—*Patrick v. Hallett*, 3 Johns. Cas. 76.

4.—*Judiciary Act*, 1789, c. 20, s. 32.



be conclusive evidence, or any evidence of the unseaworthiness of the vessel.

It has been settled too often, and upon too solid grounds, that admiralty surveys, and the decrees of courts thereon, are *ex-parte* proceedings, and wholly inadmissible as evidence between the insurer and insured, to make it necessary to do anything more than refer to the authorities.<sup>1</sup>

The precise reason for introducing the clause in question into the policy, was because these surveys were not evidence antecedently. It is evident, therefore, that if the record in question have any validity, either as evidence of a survey or otherwise, such validity must be acquired wholly from the stipulation in the policy without which the survey itself, and the adjudication of the court thereon (however efficacious as a foundation of the title in a *bona fide* purchaser) would, as between the parties to this suit, be mere nullities.

What, then, is the stipulation which is now pressed against us? If we allow it all the effect contended for on the other side, it is no more than this—a regular survey shall be taken as conclusive proof of unseaworthiness. The stipulation regards the fact, not the manner in which it is to be proved; there is no stipulation as to evidence.

The just construction of the contract requires that there should be a written survey, under the hands of the surveyor. As has been observed, **595\*** such a survey \*did exist, and was proved in every case reported in the books. Now, we insist that our stipulation, which merely makes this document evidence, does not in any degree dispense with the ordinary and regular proof of the existence and contents of the document itself. The record of the Vice-Admiralty Court was not competent to establish this document, and, as before observed, it does not even attempt to do it.

If the record be conclusive evidence of the fact and contents of the survey, it must be for one of two reasons.

1. Because it was produced by the plaintiff; or, 2. By its own efficacy.

1st. The plaintiff was bound, by a provision in the policy, to produce to the defendant preliminary proof of loss, thirty days before the commencement of the suit, and it was necessary to show on the trial that he had exhibited this evidence of the defendant.

In point of fact, the decree of condemnation in the Vice-Admiralty Court of New Providence occasioned, or rather consummated that loss, and, therefore, the plaintiff produced a copy of that decree. His having done so furnishes no reason why the recitals in that decree should be evidence against him, much less why they should be received as incontrovertible; and the hardship of such a rule is the greater in a case like the present, where the plaintiff was required to produce the evidence. A protest of the master is usually produced among the preliminary proof, but it was never supposed that the insured was conclusively bound by all the allegations the captain might choose \*to

insert in it. On the contrary, it has been held to afford no legal evidence.<sup>2</sup>

The general rule is, that a document coming from the possession of a party is evidence against him, only where he claims under it, and then it is subject to explanation. Here we claim in opposition to it.

It may still be urged that the plaintiff was bound to produce the survey. If it were necessary, we should wholly deny this position. The policy imposes no such obligation on the insured but simply to produce to the underwriters "proof of interest and loss." In every other respect the parties contest upon the usual principle, viz., that each produces the evidence in his own favor. Both parties so understood their reciprocal rights and duties. The defendants required the production, not of the the survey, but of the decree of condemnation. The plaintiff furnished the document as the decree of condemnation, and nothing else. We say, then, as Lord Kenyon justly observed in a similar case,<sup>3</sup> the record of the Court of Vice-Admiralty proves the fact of the condemnation, and proves nothing else.

It is a rule properly and fully settled that the underwriters can make no objection to the preliminary proofs at the trial, except such as they may at the time they were exhibited. The insured is only bound to produce what is specially required.<sup>4</sup> The special verdict in this case finds that the plaintiff, on the defendants' requisition, produced the copy of the \*de-**[597]** cree of the Vice-Admiralty Court, "whereupon the defendants required no further preliminary proof, but refused to pay on the ground of unseaworthiness." Agreeably to the spirit of the rule, they ought now to be held to the ground then taken.

Again, this objection, viz., that we were bound to produce the survey, assumes a very important fact, which we by no means admit, viz., that there is or ever was a written document signed by the surveyors, which could be produced. This throws us back to the great and only question in this part of the cause, viz., whether the record of the Vice-Admiralty Court is conclusive evidence.

But we contend, that independently of its production by the plaintiff, the sentence of the Vice-Admiralty Court has not, by virtue of the stipulation of the parties, or its own efficacy, any such conclusive effect as is contended for by the defendants.

It may be said that the necessary effect of the clause is to refer the parties to the municipal regulations of any port where the vessel may happen to be in distress, for there the survey must be had. We admit this in its fullest extent. The foreign court is to order the survey, appoint the surveyors, and the proceedings are all to be conducted according to the local regulations. But this is all. The parties here made no stipulation as to the rules of evidence, upon which the cause is to be tried here. It is universally true that the evidence is to be given according to the *lex fori*. We consented that the Vice Admiralty Court of New Providence

1.—Abbott v. Seabor, 3 Johns. Cas. 39; Wright v. Barnard, 2 Esp. N. P. Cas. 701; S. C. Park. on Ins. 548, 6th Lon. Ed; Saltus v. Commercial Ins. Co., 16 Johns. Rep. 487.

2.—Senat v. Parker, 7 T. R. 158.

3.—Wright v. Barnard, *ubi sup*.

4.—Vose v. Robinson, 9 Johns. Rep. 192.

might order the survey; but then we were to be bound by the survey itself, produced in **598\***] \*court here, or a copy duly proved according to our rules of evidence, and not by a partial garbled statement of that survey which the register or other officer of that court might choose to make.

The court below erred in overruling the several questions put to the witness Thompson. The petition was the foundation of the jurisdiction of the court. The decree of a prize court (a much stronger case) has been held void for want of a libel, as without it there could be no jurisdiction.<sup>1</sup> Suppose in this case there had been no petition, then the acts of the court would have been wholly founded on the assent of the party.

The answer of the witness to the second question overruled by the judge, might have shown, not merely *crassam negligentiam* in the surveyors, but direct fraud and falsehood.

The third question is precisely similar to one which was considered proper by the Supreme Court of the state of New York.<sup>2</sup> The court there says, "the evidence of the declaration of Rogers (one of the surveyors) was admissible, because, though the plaintiff offered the survey as preliminary proof, yet the defendants offered it as proof in chief, and the plaintiff had a right to show the contradictory declaration of Rogers as a witness for the defendant."

The object of the last question was to show that the conduct of one of the surveyors **599\***] ceded from \*interested motives, and thus to render more probable the fraudulent intent imputed to him. It was overruled on the ground that better evidence might have been produced. But the account sales, which is a commercial document, only admissible by a relaxation of the rules of evidence in regard to foreign transactions, was not so good evidence, as the *res gesta*, which he offered to prove. The witness, it is true, was not present at the sale, but he offered to prove the fact of his recovering payment from the surveyor, as a purchaser of part of the cargo.

The rule is universal, that fraud may be proved, and when proved, will vitiate all proceedings. It must be proved directly, when the party injured by it has a direct opportunity; and, therefore, in the ordinary case of misconduct of jurors or arbitrators, the party must move to set aside the verdict or award. But this rule does not hold where the person injured was not a party to the proceedings, and of course had no such opportunity. Whatever objections a party to the proceedings might take at the time, a third person may take at any time, when the proceedings are made to bear against him. But it may be said, that the captain was our agent, and the proceedings were at his instance. This begs the question; for if the loss were such as to authorize the abandonment, then the captain by relation was the agent of the underwriters. Besides, the Messrs. Storrs were the agents of the defendants. Their interference in the proceedings is liable to strict

scrutiny, and any impropriety ought to invalidate proceedings conducted under their direction, even though it were shown (as it is not) that the captain connived with them.

\*The case most analogous to this in [**\*600** common law proceedings, is that of a jury of view. Now, suppose it was shown that such a jury never went on the land in question, would not their verdict have been set aside? The evidence he offered was equivalent to this. It was not necessary for us to show any agency of the defendants in the alleged misconduct of the surveyors. The evidence of fraud is necessarily circumstantial. It was enough that they sought to profit by it.

*Mr. Griffin*, contra, contended, (1) That, by the *lex loci contractus*, it was the business of the assured to produce the survey;<sup>3</sup> and that it was to be proved, not by examining the surveyors, but by an authenticated copy of the proceedings. This the plaintiff did produce, and read in evidence. It was a copy of all the proceedings. The sentence of condemnation, disconnected with the survey, would be unmeaning. Nor is it any objection, that the survey is set forth by way of recital. It would not have been better authenticated had it been in *hæc verba*. A party producing in evidence, a deed or other instrument, is bound by the recitals.

But the objection to the competency of the evidence was too late. The bill of exceptions does not state that it was taken, until the judge charged the jury;<sup>4</sup> but it evidently implies that the objection was \*not taken sooner; [**\*601** and the plaintiff recognized the survey, as being in evidence, by attempting to impeach it.

2. As to the objections to the rejected testimony, which was offered to show the survey to be incorrect. The survey was given in evidence by the assured. Expunge it, and what cause for a total loss appears? In that event, the judgment would necessarily have been for the defendants. Now, it is a rule that a party cannot call a witness, and then impeach him. The reason assigned by Mr. Justice Buller is, that it "would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying the witness if he spoke against him."<sup>5</sup> This rule applies with equal force to impeaching a document, introduced by the party who seeks to impeach it. In the only case where the assured was allowed to contradict the survey, it was given in evidence not by himself, but by the underwriters.<sup>6</sup>

3. But this survey was a proceeding of a nature that the law does not allow to be impeached. It may be likened to an award of arbitrators, being a tribunal of the parties' own creation; and you cannot, under the general issue, in an action at law, impeach the award of arbitrators, even for partiality or corruption.<sup>7</sup> The reason assigned for this doctrine is, that it would be a surprise on the opposite party. \*And does not this reason emphatically [**\*602** apply to the case now under consideration?

1.—Sawyer v. Maine Fire Ins. Co. 12 Mass. Rep. 291.

2.—Haff. v. Mar. Ins. Co., 8 Johns. Rep. 163.

3.—Haff. v. Mar. Ins. Co., 4 Johns. Rep. 132.

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4.—Russell v. Union Ins. Co., 4 Dall. 423.

5.—Bull. N. P. 297; Phillips' Evid. 232.

6.—Haff. v. Mar. Ins. Co., 8 Johns. Rep. 163, 167.

7.—Wiles v. Maccarmick, 2. Wils. 148; Kyd on Awards, 327.



Neither can corruption or partiality be pleaded to an action on the arbitration bond.<sup>1</sup> The only remedy is by a bill in equity, where all persons implicated may be made parties. In the present case, the assured might have applied to the Court of Admiralty, or filed his bill in chancery.

Perhaps, however, the survey may be more properly likened to the verdict and judgment of a court. The policy contemplates, that the survey is to be a judicial act, when it requires "a regular survey."<sup>2</sup> The policy vests jurisdiction in the Court of Admiralty at the port of necessity; and in the present instance, the agent of the assured called that jurisdiction into activity. It is a settled maxim, that a verdict and judgment cannot be impeached. The sanctified character of a judicial proceeding attaches itself even to a foreign sentence, which is conclusive as to those facts which it professes to decide; and that, too, even if the sentence is founded on unjust and piratical principles.<sup>3</sup> During the French revolution, the firmness of the English judges was put to a severe test in respect to the principle now in discussion, and so was that of this court in the case of a judgment founded on the Milan decree.<sup>4</sup> Had it been competent, the party aggrieved would doubt-  
**603**less \*have been able to prove error, partiality, and even corruption in many of these foreign proceedings. But the reason why he could not be permitted to do this is stated by Mr. Justice Johnson, who says: "Not being at liberty, as it were, to lift the mantle of justice cast upon their decrees, it is, as to other tribunals of justice, immaterial what errors it covers; neither the fallibility of the judge, the perjury of witnesses, nor the oppression and injustice of nations, will sanction a deviation from this general rule."<sup>5</sup> The only inquiry the court feels itself authorized to make, is, had the foreign tribunal jurisdiction? And there is but a single instance where the sentence or judgement is not conclusive; and that is where the party claiming the benefit of it appears before our courts to enforce it.<sup>6</sup> So, also, other matters beside awards, verdicts, and judgments, are held unimpeachable. Thus, evidence was refused, to show that the official certificate of a regularly-appointed *laud surveyor* contained incorrect statements.<sup>7</sup>

We may perhaps concede another case in which judicial proceedings may be impeached, viz., where the judgment is proved to have been obtained by fraud or unfair practices, by the party attempting to avail himself of it. But the fraud here meant is not fraud in the officers of the court, but in the party. No fraud is imputed to the underwriters; and as to the agents, none can with justice be imputed to them. Besides they were only the general agents of the  
**604**\*defendants, and not their agents to perpetrate frauds. As to this survey, they were the agents of the assured, and did not at the time know that there was any insurance.

4. As to the other rejected evidence, the first

item of it is the answer to the question, whether the master authorized the statement relative to the irreparable condition of the vessel. Here the assured calls upon his captain to swear that the statement contained in the petition presented by his proctors to the court was untrue. The acts of the attorney in the course of judicial proceedings bind his principal, and this, even if he have in fact no authority from the principal. The remedy must be against the attorney.<sup>8</sup> Here the authority of the proctors is not disputed. It is only contended that they misconceived or misrepresented the statement of their client.

All the other items of rejected evidence are liable to the objection that they contradict the record. Besides, affidavits of jurymen (and surveyors stand in the like predicament) cannot be admitted to impeach their verdict.<sup>9</sup>

As to the answer to the question, whether the Messrs. Storrs did not direct the master to call on one of the surveyors, as being a purchaser at the sale of the cargo, for the price, &c. Beside the consideration \*that the account of [**605** sales was better evidence; the declarations, or directions, of an agent, except when they are part of the *res gesta*, are not evidence against the principal. The circumstances, too, were irrelevant. No fair presumption flows from a purchase of part of the cargo.

5. As to the supposed collision between the survey and the finding of the jury, it may be observed, that there is no necessary collision. The survey finds the vessel unseaworthy on the 16th of October. The jury find that she was seaworthy when she sailed, on the 9th of September. But ships have the principle of decay inherent in their constitutions, and how can the court, judicially, say that during the 37 days which elapsed between the sailing and survey, the vessel may not have passed by the progress of decay from a state of bare seaworthiness to unseaworthiness? And, even supposing there is a collision, the finding of the jury must give way to the survey, because the finding in opposition to the survey was incorrect. Perhaps the court ought, upon the production of the survey, to have directed the jury to find for the defendants, and to have rendered *instanter* that judgment which they rendered afterwards. But was this delay error, and such an error as the plaintiff can take advantage of?

The agreement that the survey shall be conclusive, is the voluntary agreement of the parties. Persons of full age and sound minds have a right to make what contracts they please; and to have them enforced, provided they be not unlawful. Courts \*will not inquire wheth- [**606** er the clause be reasonable or unreasonable, expedient or inexpedient. It can be no more disregarded than any other part of the policy, such as a warranty. Does the court ever inquire into the reasonableness of a warranty?

The case cited from 3 Cranch,<sup>10</sup> 137, does not agitate the conclusiveness of the survey. It

1.—Braddick v. Thompson, 8 East Rep. 344.

2.—Coit v. Delaw. Ins. Co. 1 Cond'y's March. 159, n.

3.—Croudson v. Leonard, 4 Cranch, 434.

4.—Williams v. Armroyd, 7 Cranch, 423.

5.—Rose v. Himely, 4 Cranch, 512, Appx.

6.—Phillips v. Hunter, 2 H. Bl. 410.

7.—Pollard v. Dwight, 4 Cranch, 421.

8.—Anonymous, 1 Salk. 86; 1 Keb. 89; Reinholdt v. Alberti, 1 Binn. 461; Denton v. Noyes, 6 Johns. Rep. 296.

9.—Vaise v. Delaval, 1 T. R. 11; Jackson v. Williamson, 2 T. R. 281; Owen v. Warburton, 4 Bos. & Pull. 326; Rogers v. Rogers, 4 Johns. Rep. 485.

10.—Mar. Ins. Co. v. Wilson.

turned on the state of the pleadings. The plea was, that the vessel was unsound when she sailed on the 24th of October; and the court refused to direct the jury that the survey made on the 26th of November was evidence of that fact. All the other cases admit that a condemnation for rottenness or unsoundness alone, is a conclusive bar.

The special verdict finds the survey to be a regular survey. It is not to be expected that such surveys will adopt the very words of the clause. They are made abroad, and frequently in a foreign language; and such a coincidence would be suspicious. It is sufficient if it appear from the whole survey, that rottenness is the sole ground of condemnation. The survey condemns, in strong and decisive terms, and no cause is intimated but decay. It is true the surveyors find the vessel leaky. But was not rottenness a sufficient cause for that? They condemn her "as being unsafe and unfit ever to go to sea again." Now, there is but one disease in a vessel that is incurable, that is, rottenness; and there can be no doubt, from the face of the survey, that the vessel was condemned for unsoundness. The object of the clause was **607**\*] to have the state of a vessel definitely ascertained where she is broken up, and examined. It is a wise provision, which has been sanctioned by experience, and adopted in other states, and ought not to be made a dead letter by interpretation.

Mr. H. D. Sedgwick, in reply, stated, that it had been contended that it was the plaintiff's duty to have excepted at the trial to the proof of the survey. He did all that from the nature of the case could have been done. The proof, such as it was, of the survey, was inseparably connected with the preliminary proof of loss, which he was bound to produce. When the defendant's counsel claimed the effect now sought to be given to the supposed survey, the plaintiff resisted, and excepted to the opinion of the judge that the decree was sufficient evidence of the survey.

Besides, the plaintiff's guarded and qualified admission, viz., that the copy produced was a true copy of the record of the Vice-Admiralty Court, shows the intention of the parties. The defendants were therefore fully put upon their guard, and would have produced and proved the survey, if they could have done so.

An analogy is supposed to exist between the report of the surveyors, and the award of arbitrators; it is said that an award cannot be impeached under the general issue; and that partiality cannot be pleaded to an administration bond. But these remarks, true or false, apply only to the common law rules of pleading. We **608**\*] are ready to admit that the plea *nul tiel record*, which denies the fact of the award, would not lay a proper foundation for evidence to show partiality in the arbitrators. But it is enough for our argument, that an award may be impeached for the misconduct of the arbitrators; and whether for this purpose the resort be, as stated on the other side, to a court of equity, or whether the common law tribunals are competent to the purpose, is a matter wholly depending on the municipal institutions of the country. Some remedy is confessedly provided. Now, here we had none but to impeach the survey, as we sought to do, on the trial.

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The opposing counsel showed how much he was pressed by this consideration, when he referred us to the Vice-Admiralty Court at New Providence, to have the proceedings overhauled in that tribunal. Such an application would be without a precedent. A survey is never granted, but upon the application of the ship-master, founded on present necessity. The Holofern may now be at the bottom of the ocean, or if in existence, not at New Providence; and if she were there, how could a survey now ascertain what her state was on the 8th of October, 1819, the time when the survey was had, and to which the question relates?

Supposing that we are wrong in contending that the recitals of the decree are not evidence against us, inasmuch as we produced the decree, still it is competent to us to disprove them. The rule is merely that a party shall not impeach the character of his own witnesses. He may disprove any facts stated by them. This is the more essential in the case of a \*wit-**609**ness produced by necessity, *e. g.*, the subscribing witness to a deed or will. The evidence in relation to the survey was in this case produced by us of necessity.

But we are told that if the survey be struck out of the case, there is no ground to support the verdict for either a total or partial loss. There are these grounds: our policy, a vessel seaworthy when the voyage commenced, the springing a leak, and being forced from her course by the violence of the winds and waves, stranded in going into a port of necessity, there condemned for causes not legally shown, or not fully shown, or falsely stated; the voyage lost, ship and cargo sold, and the damages assessed.

It is always to be remembered, that we produced the decree as that which, in point of fact, occasioned the loss, without reference to its being void or valid in point of law. Suppose the decree had shown that the ship had been libeled and sold for wages, would this have been more than *prima facie* evidence?

The decree in question was that of an instance court. The cases cited against us of the conclusiveness of foreign sentences, are all those of prize courts, and the conclusive effect of the adjudication of these tribunals, is founded on peculiar reasons of international law.<sup>1</sup> This conclusive effect has been incautiously extended to cases between insurer and insured, where the title of the property is not drawn in question, but arises collaterally, and the ablest \*judges have expressed their regret at [**610** this application of the principle,<sup>2</sup> and the effort is now to restrict it within as narrow limits as possible. It is enough for us, however, that this principle has never been applied to any but prize jurisdictions. It is against first principles, that a man should be bound by a decree to which he is not a party. The effect sought to be given to this decree of an instance court, is greater than could be claimed for a judgment of a court of Westminster Hall, or even for a domestic judgment, unless against the same party, and after full notice.

1.—Croudson v. Leonard, 4 Cranch, 434.

2.—Fisher v. Ogle, 1 Campb. N. P. Rep. 418; Marshall v. Parker, 2 Campb. 70; Robinson v. Jones, 8 Mass. Rep. 540; Sawyer v. Maine Fire Insurance Company, 12 Mass. Rep. 291.



Mr. Justice JOHNSON delivered the opinion of the court:

The material question in this cause arises on the construction of a clause in the policy, expressed in these words, "and lastly, it is agreed that if the above vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten, or incapable of prosecuting her voyage on account of her being unsound or rotten," then the assurers shall not be bound to pay their subscription on this policy. The special verdict negatives the proposition of the vessel's being unsound at the time of her sailing, and it is contended for the plaintiff, that this neutralizes the condemnation and survey given in evidence; that contracts of insurance in their nature have **611\***] reference to the commencement \*of the risk, at least with relation to questions of seaworthiness; and as it is impossible for a sound vessel to become rotten in a month, it is argued that the verdict of the jury ought to prevail against the evidence, or influence of the condemnation.

But we think otherwise. The words of the contract expressly look forward to a future event, "if the said vessel, upon a regular survey, should be thereby declared unseaworthy;" obviously contemplating two objects: First, that a state of rottenness ascertained at any period of the voyage insured shall be conclusive evidence of original unsoundness; second, that the determination of that fact by means of a regular survey should be received as conclusive evidence between the parties. It is unquestionably true in the abstract, that a certificate of survey is not legal evidence; because the examination of the surveyors themselves would be better. But parties may by compact adopt that or any other, as the criterion for deciding on their relative rights; and in the case before us, the rights of the parties are made to depend on the fact of the survey rather than on the truth of it. They have chosen a rule of decision for themselves, and we are not to inquire into their motives or prudence in doing so. Whether the survey in this instance was duly substantiated, is the next question which the case presents. And here it becomes altogether unnecessary to decide whether a condemnation, in ordinary cases, carries with it the evidence of the fact or of the fairness of the survey. For, it must be observed that the exemplification of the proceedings in the Court of Vice-Admiralty **612\***] in New Providence \*was produced in evidence by the plaintiff himself. He claimed for a total loss, and to support this claim it became necessary to show that the vessel was condemned and sold, and the voyage broken up in New Providence. But if this exemplification should be admitted to prove those facts alone, without exposing the causes which led to them; if the eyes of the jury were to be shut against everything but the outside of the record, *non constat*, but the vessel may have been condemned for some cause for which the underwriters were not liable, and his case would not have been made out. Such subtleties cannot be countenanced; the survey was a part of the *res gesta*, and the plaintiff could not possibly have made out the loss without introducing the survey which led to it.

The survey was, therefore, properly in evi-

dence, and that it was "a regular survey," in the language of the covenant, is to be deduced from two considerations: First, if there was any irregularity in the survey, it is attributable to the plaintiff's own agents; for even the Storrs, in this case, although the general agents of the company, were voluntarily selected by the captain. But, second, the survey bears every evidence of regularity or authenticity that can reasonably be required. On this subject, the nature of the contract of insurance casts the parties on the municipal regulations of all the world. Every commercial country has its own regulations on the subject of surveys. It is properly a subject of admiralty jurisdiction; since mariners and freighters have to claim the aid of the admiralty to release them from their contract in cases of a defect of seaworthiness. A \*regular [**613** survey must, therefore, in every instance, be such as is known to the laws and customs of the port in which a vessel happens to be. In this instance, both from the jurisdiction assumed by the court, and the known habits of British jurisprudence, the mode of passing a survey through a court to give it authenticity, may well be adjudged a regular survey according to the laws of the port into which this vessel was forced. If this be the case, it follows that the exemplification of the proceedings of that court is not only admissible evidence, but perhaps the only evidence that could be received of the survey. And as to the idea of extracting the original return from the files of that court, to produce it here, it will not bear reflection. The same considerations fully justify the court below in rejecting the evidence of the captain, offered to rebut the decision of a court, and that decision, both procured by the plaintiff's own agent, and produced by himself in evidence.

But it is contended, that though the construction of the covenant be with the defendants, and the survey be held to be legally before the jury, and "a regular survey" within the meaning of the policy, still it is not conclusive against the plaintiff, inasmuch as it certifies the existence of other causes of loss, besides the decayed state of the vessel.

It is unquestionably true, that the survey must respond to the covenant, and if the vessel be declared unseaworthy, for any additional cause, besides her being, in the language of the policy, "unsound or rotten," the defeasance, if it may be so called, will not avail the defendant. But what is the case here? \*All [**614** the facts to be gathered from the exemplification of the condemnation, taking it from the commencement to the close, are, that the vessel encountered tempestuous weather, that she was forced to put into New Providence, in consequence of springing a leak; that the captain, "conceiving her not only unfit to proceed to sea again in her present state, but altogether unworthy of being repaired," libeled her in the admiralty, and prayed a warrant of survey upon her. Upon issuing the warrant, the surveyors proceeded to an examination, and finding the vessel very leaky, stripped off part of her ceiling, and found her, as they report, "in a very decayed condition." They thereupon certified her to be "altogether unworthy of being repaired, and that she ought to be condemned

as being unsafe and unfit ever to go to sea again." Here decay is exhibited exclusively as the mortal disease, and everything else is either inducement or consequence. A bad vessel might have made a safe voyage, had she experienced no trying weather, and a good vessel would have encountered gales without injury. Springing a leak was the consequence of that state of decay which weakened the whole fabric, and her being unworthy of repair, or unfit to go to sea, was no additional cause of condemnation, but the mode in which her disease produced her destruction. Causes upon similar policies, and under similar circumstances, have in several instances passed in review before the tribunals of this country, and received decisions consonant to this. The case between the *Marine Insurance Company of Alexandria and Wilson*, 615\*] decided in this court, did \*not resemble Wheat. 7.

this in any prominent feature, except that the policy contained the same clause, and the defense was attempted under the protection of it. But neither in the evidence nor in the pleadings, did the defendants bring themselves within the provisions of the clause.

This court is therefore of opinion, that there was no error in the decision of the court below. But an inconsiderable omission (made palpable by the briefs furnished by both parties) having been committed in copying the record, and which leaves it doubtful in what form this decision is to be certified to the court below, this court will, for the present, order a *certiorari* to issue, that the correction may be duly made.

*Certiorari awarded.*

Cited—10 Wheat. 416; 22 How. 417; 3 Sumn. 42, 43; 1 Ware, 491.











## VII WHEATON.

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7 Wheat. 1-7, 5 L. 381, *MILLER v. KERR*.

**Public lands.**—Warrant and survey do not, in themselves, constitute legal title; until grant, person acquiring an equity holds a right subject to examination, p. 6.

Cited and rule applied in *Michigan Co. v. Rust*, 168 U. S. 593, 42 L. 592, 18 S. Ct. 209, affirming right of land department to determine validity of rights claimed in land against government, until title passes; *Wynn v. Garland*, 16 Ark. 460, land department may annul a pre-emption right for cause any time before issuance of patent, holding further as to right of chancery to go back of patent to determine rights.

**Public lands.**—An equity arising from entry of land made on a warrant which had been issued by mistake cannot be sustained against a patent issued on a junior entry, p. 7.

Cited in *Parkison v. Bracken*, 1 Pinn. 181, 39 Am. Dec. 298, holding, in action at law, in case of conflicting patents, the first patent is conclusive. Cited without special application of the principle in *Wallace v. Saunders*, 7 Ohio, 177; *arguendo*, in *Ware v. Brush*, 1 McLean, 535, F. C. 17,171, and same case on appeal, 15 Pet. 106, 10 L. 677, as to when courts will go back of patent to examine equities; to same effect, *Arnold v. Grimes*, 2 Iowa, 13. Cited erroneously, *arguendo*, *Lindsey v. Miller*, 6 Pet. 676, 8 L. 542. Cited, *arguendo*, *McClung v. Hughes*, 5 Rand. 477, case decides as to when equity will lend its aid to one having prior equities against a grantee.

Modified in *Parker v. Wallace*, 3 Ohio, 494, holding senior entry upon resolution warrant, surveyed and patented conformable to laws of congress, may be aided in equity against an elder patent on a junior entry. Distinguished in *Hoofnagle v. Anderson*, 7 Wheat. 218, 5 L. 438, where court was asked to set aside a complete legal title, founded on a warrant issued by mistake, in favor of an entry made after consummation of that title; *Thomas v. White*, 2 Ohio St. 549, holding patent issued on warrant and survey, unless such entry be absolutely void, transfers title, which will not be set aside for irregularities in making entry.

**Miscellaneous.**—Cited in *Galloway v. Pinley*, 12 Pet. 299, 9 L. 1092, as authority for holding claims for land for services in the "Virginia State line" cannot be satisfied out of lands in Ohio.



military district; *Brown v. Clements*, 3 How. 665, 11 L. 774, and in *Keyser v. Sutherland*, 59 Mich. 460, 26 N. W. 867, as authority for rule, that acts of ministerial officer beyond his powers or contrary to law are void.

7 Wheat. 7-13, 5 L. 382, *NEWSOM v. PRYOR*.

**Bounds and boundaries.**—The most material and certain calls control those which are less material and certain, and call for natural object controls both course and distance, p. 10.

The following citing cases affirm and apply the rule: *Brown v. Huger*, 21 How. 321, 16 L. 130, holding where survey and patent call for boundary to run down to and along a river, the river was intended as boundary, and courses must be disregarded; *Higuera v. United States*, 5 Wall. 836, 18 L. 471, where natural objects were held to control; *County of St. Claire v. Lovington*, 23 Wall. 62, 23 L. 62, where survey begins at stake on bank of river and is carried to a point in river, the river running along the general course of line, the tract surveyed is bounded by the river; *Cleveland v. Smith*, 2 Story, 290, F. C. 2,874, where description calls for a certain tree standing on a certain line, in case tree is not on line, tree will be considered as boundary; *Brown v. Huger*, 4 Fed. Cas. 396, where magnetic line conflicts with line running from permanent sensible objects, it must be abandoned; *Garrard v. Mines*, 82 Fed. 585, affirming the rule; *Gaveny v. Hinton*, 2 G. Greene, 349, where grantor reserves a house which was supposed to be on a certain strip on west side of quarter section of land sold, but which proved to be east of east line of strip, grantor was held entitled to house; *Carmichael v. Foley*, 1 How. (Miss.) 592, where the call for quantity appeared more certain and material than did call for boundaries; *Rix v. Johnson*, 5 N. H. 524, 22 Am. Dec. 474, bounding land as running to stake at river, thence to stake by river, makes river a boundary; *Coburn v. Coxeter*, 51 N. H. 164, and *Erwin v. Moore*, 6 Cow. 717, quantity being the least certain part of a description must yield to boundaries or other more certain description; *Jackson v. Wendell*, 5 Wend. 147, holding where place of beginning can be ascertained, and two first courses can be run according to description, whole patent will not be deranged because subsequent lines and monuments conflict; *Hathaway v. Power*, 6 Hill, 457, where description by lot number was held to prevail over that part of description stating number of acres in tract; *Whiteside v. Singleton*, Meigs, 218, holding where grant calls for certain number of poles to "stake, crossing river," line must cross river, though distance terminates before reaching it; *Hubert v. Bartlett*, 9 Tex. 104; *George v. Thomas*, 16 Tex. 87, 67 Am. Dec. 616, where boundary line was partially marked. Cited and rule approved, *arguendo*, in *Stafford v. King*, 30 Tex. 270, 271, 94 Am. Dec. 307, 308; *Smith v. Chapman*, 10 Gratt. 473, 474. Cited generally, *Doe*

v. Hildreth, 2 Ind. 284, as to boundary line where land bounds on water-course; Kellogg v. Smith, 7 Cush. 383, as to when line varying from true course but acquiesced in as true line for number of years, will be considered true line; Jennings v. Brizeadine, 44 Mo. 335, and Hunter v. Hume, 88 Va. 30, 13 S. E. 307, as to admission of parol evidence to explain description; Bowman v. Farmer, 8 N. H. 403, but holding, where description calls for boundary line, beginning at mouth of creek and running due west up said creek, the creek being very crooked does not control magnetic line. The general proposition is approved in Opdyke v. Stephens, 28 N. J. L. 86, but under facts, there being no monuments, courses and distances were held to control; and in Jackson v. Camp, 1 Cow. 612. Cited generally, without special application of the rule in Barnard v. Good, 44 Tex. 641. Cited in Boon v. Hunter, 62 Tex. 588, as to what descriptive calls will be considered when it is shown no actual survey was ever made. Notes, 30 Am. Dec. 735, 737, 16 Am. Rep. 524.

Modified in Miller v. Cullum, 4 Ala. 582, in case giving monuments controlling influence, absurd consequences would ensue, if courses furnish more certain guide, they will be followed.

**Bounds and boundaries.**—There is no distinction between a call to stop at a river and a call to cross a river, p. 12.

**Miscellaneous.**—Cited in Williamson v. Simpson, 16 Tex. 441, as to reluctance of courts to adopt a rule which would lead to uncertainties in titles. Cited generally, Hull v. Fuller, 7 Vt. 106, as to duty of courts to correct manifest mistakes in contracts; Oakley v. Hibbard, 1 Pinn. 681, not in point.

7 Wheat. 13-22, 5 L. 384, TAYLOE v. SANDIFORD.

**Damages.**—In general a sum in gross, to be paid for nonperformance of an agreement, is considered as a penalty, and not as liquidated damages; a fortiori, when it is expressly reserved as a penalty, p. 17.

Cited and rule applied as follows: Watts v. Camors, 115 U. S. 361, 29 L. 408, 6 S. Ct. 94, to agreement in charterparty; White v. Arleth, 1 Bond. 325, F. C. 17,536, and holding it is optional with plaintiff either to sue for penalty or for actual damage; Beck v. Milling Co., 52 Fed. 703, 705, 10 U. S. App. 465, in determining right of party to rescind contract not performed within time stipulated but substantially performed after short delay; Hooper v. Savannah R. R. Co., 69 Ala. 535, holding, when it is doubtful whether sum stated was intended as liquidated damages, or as penalty, it will be construed as the latter; Nash v. Hermosilla, 9 Cal. 587, 70 Am. Dec. 677, where sum to be paid in case of breach of conditions in contract between landlord and tenant, was held a penalty and not liquidated damages; Smith v. Wedgwood, 74 Me.



460, to agreement to pay certain sum in case a drain was not completed within specified time; *Higginson v. Weld*, 14 Gray, 172; *Kelly v. Seay*, 3 Okl. 533, 41 Pac. 618, and *Smith v. Brown*, 164 Mass. 587, 42 N. E. 102, where parties stipulated sum should be considered as penalty; *Davis v. Gillett*, 52 N. H. 130, to agreement not to engage in specified business within certain time and place; *Whitfield v. Levy*, 35 N. J. L. 155, is to same effect; *Lansing v. Dodd*, 45 N. J. L. 528, to condition in agreement to convey land; *Curry v. Larer*, 7 Pa. St. 472, 49 Am. Dec. 488, to agreement in covenant to deliver coal by certain date; *March v. Allabough*, 103 Pa. St. 340, and *Smith v. Wainwright*, 24 Vt. 104, to agreement not to enter into business within specified limits. Cited generally as to meaning of word "penal;" *Huntington v. Attrill*, 146 U. S. 667, 36 L. 1127, 13 S. Ct. 227, dissenting opinion, *Johnson v. Potomac Assn.*, 13 Fed. Cas. 793, without application; dissenting opinion, *Johnson v. Clarke*, 30 Fed. Cas. 1097, without application. Cited as containing discussion of general subject, *Watts v. Sheppard*, 2 Ala. 444; *Williams v. Green*, 14 Ark. 321. Cited, arguendo, *Andrews v. Jones*, 3 Blackf. 443, where the liability in an agreement in mortgage, that whole sum should be due on failure to make certain payments, was held not to be a penalty. Cited in *Hamilton v. Overton*, 6 Blackf. 207, 38 Am. Dec. 137, as to rule of interpretation when sum is designated a penalty; notes, 1 Ind. 445, and 11 Ind. 77. Cited in *Foley v. McKeegan*, 4 Iowa, 7, 8, 66 Am. Dec. 110, 112, where it is said, courts, in determining whether contract provides for penalty or liquidated damages, will not always be guided by terms used by parties, but will be governed by their intent, as shown by facts surrounding case. Cited, without special application of the rule, in *McIntire v. Cagley*, 37 Iowa, 678, deciding as to nature of agreement in note to pay attorney's fees. Cited as authority for holding, when it is doubtful whether sum was intended as a penalty or liquidated damages, it will be considered a penalty, *Cheddick v. Marsh*, 21 N. J. L. 467. Cited as bearing on subject, *Thoroughgood v. Walker*, 2 Jones (N. C.), 22, holding, where sum was stipulated for breach of agreement, and amount of damage caused by breach was readily ascertainable, such sum will be considered a penalty. Note, 1 Am. Dec. 334, 30 Am. Rep. 29.

Distinguished in *United States v. Hatch*, 1 Paine, 345, F. C. 15,325, holding the sum, in a bond given by master of ship for performance of certain act, is intended as a forfeiture, and not as a penalty to cover damages which may be assessed; *Taylor v. Marcella*, 1 Woods, 304, F. C. 13,797, where there was part performance and acceptance under contract; *Degraff v. Wickham*, 89 Iowa, 727, 728, 57 N. W. 420, 421, where contract provided for payment at certain rate per diem in case contract should not be performed within specified time, there being no evidence as to cost or rental value of house which was subject of contract; *Geiger v. Mary-*

land, 41 Md. 15, where it was expressly stipulated that the sum should be considered liquidated damages.

**Application of payments.**—One owing under distinct contracts may apply payments to either, and this without express direction at the time, if accompanied by circumstances demonstrating its application, p. 20.

Cited and principle applied in *Howland v. Rench*, 7 Blackf. 237, where application of payments by creditor was shown from circumstances; *Adams Co. v. Black*, 62 Ind. 134, when intention of payor can be gathered from circumstances, application should be made in accordance with such intention; *Mitchell v. Dall*, 2 Harr. & G. 173, where debtor designated by letter to what debt payment should be applied; *Lauten v. Rowan*, 59 N. H. 217, where debtor's intention was shown by surrounding circumstances; *Roakes v. Bailey*, 55 Vt. 543, holding, where debtor, without knowledge of dissolution of firm, made payments supposing them to apply on partnership debt,—the law will apply them as he intended. Cited, arguendo, in *The Pioneer*, Deady, 80, F. C. 11,177, as to implying appropriation; *Randall v. Lettes*, 12 Fla. 535, in discussion on general subject. Cited as not being in point for point cited, *Hansen v. Rounsavell*, 74 Ill. 241, although apparently approved. Approved generally, *Conduitt v. Ryan*, 3 Ind. App. 9, 29 N. E. 163, holding further as to rule where appropriation is made by neither party. Cited in *Mitchell v. Dall*, 4 Gill & J. 372, but no inference will be drawn as to debtor's intention from fact payment was made by surety. Cited, arguendo, *Summers v. Loder*, 12 N. J. L. 106. Cited generally, *White v. Trumbull*, 15 N. J. L. 319, 29 Am. Dec. 690. Cited in *Robinson v. Doolittle*, 12 Vt. 249, as an instance where debtor's intention was shown by surrounding circumstances.

Distinguished in *Nichols v. Knowles*, 3 McCrary, 478, 17 Fed. 494, where payment was not voluntary but by compulsory process; *Stafford v. Walker*, 12 S. & R. 196, where there was but one entire contract.

Miscellaneous.—Cited, *Page v. Patton*, 5 Pet. 310, 8 L. 137, for what point not clear.

7 Wheat. 23-27, 5 L. 387, *TAYLOR v. MYERS*.

**Public lands.**—The owner of a survey made in conformity with his entry, and not interfering with any other person's right, may abandon his survey after it has been recorded, p. 27.

Cited and rule approved in *Galt v. Galloway*, 4 Pet. 341, 7 L. 879, where a warrant, under laws applicable to Virginia military lands, was withdrawn after survey thereunder had been made and recorded. Cited, arguendo, *Hollingsworth v. Holshousen*, 17 Tex. 49. Cited in *Jackson v. McGavock*, 5 Rand. 519, but to what point is not clear.



Distinguished in *Jackson v. Clark*, 1 Pet. 637, 639, 7 L. 294, 295, facts show no abandonment; *Holt v. Hemphill*, 3 Ohio, 236, where question raised was whether warrant having been entered and surveyed could, after withdrawal, be entered and surveyed elsewhere.

**Public lands.**—Proviso of act of 1807, as to Virginia military land warrants annulling locations made on lands previously surveyed, applies to subsisting surveys, not to those abandoned, p. 27.

Cited in *Lindsey v. Miller*, 6 Pet. 678, 8 L. 543, in discussion as to object of act of 1807. Reviewed in *McArthur v. Dun*, 7 How. 269, 12 L. 696, no application.

Distinguished in *Miller v. Lindsay*, 1 McLean, 34, F. C. 9,580, where survey was not supported by right of entry; *Saunders v. Niswanger*, 11 Ohio St. 302, 307, provisions of act do not extend to surveys made on invalid warrant.

7 Wheat. 27-34, 5 L. 388, *GREEN v. WATKINS*.

**Writ of right.**—In action under writ of right, tenant may introduce evidence to show title in third person for purpose of disproving defendant's seizin, p. 29.

Cited and rule applied in *Inglis v. Trustees*, 3 Pet. 133, 172, 7 L. 629, 643, holding in writ of right the tenant may, on the mise joined, set up a title out of himself and in a third person; *Rollins v. Clay*, 33 Me. 140, applying rule in an action of trespass. Cited, *arguendo*, *Barr v. Galloway*, 1 McLean, 482, F. C. 1,037. See note, 1 Blackf. 89.

**Writ of right.**—Demandant in order to maintain suit must show seizin either in fact or in law, p. 30.

Cited and applied in *Lyon v. Mottuse*, 19 Ala. 465, holding count in pleadings which does not allege such seizin is bad. Cited, *arguendo*, *Wood v. Mansell*, 3 Blackf. 130, as to whether grantee must show actual possession before he can maintain an action of trespass.

**Seizin.**—Patent confers constructive seizin, pp. 30, 32.

Cited to this point in *Dawson v. Watkins*, 2 Rob. (Va.) 268, holding further as to right of tenant to introduce evidence to disprove such constructive seizin. See note, 50 Am. Dec. 174.

**Writ of right.**—Where demandant proves actual seizin, tenant cannot prove superior outstanding title, p. 33.

Cited and principle similarly applied in *Bolling v. Mayor*, 3 Rand. 570.

Distinguished in *Carter v. Ramey*, 15 Gratt. 348, where seizin was constructive, holding under such circumstances tenant may disprove such seizin by showing better title in another.

7 Wheat. 35-38, 5 L. 390, PAGE v. BANK.

**Evidence.**—Under a count for money had and received, a bill or note is prima facie evidence against the drawer or indorser, although presumption of money received is rebuttable, p. 37.

Cited and rule applied in *Hopkins v. Orr*, 124 U. S. 513, 31 L. 525, 8 S. Ct. 591, action of assumpsit on promissory note; *Benjamin v. Tillman*, 2 McLean, 214, F. C. 1,304, acceptance is evidence of money had and received by acceptor to use of drawer; *Frazer v. Carpenter*, 2 McLean, 237, F. C. 5,069, rule applied in action between holder and acceptor of bill of exchange; *Sandford v. Norton*, 14 Vt. 232, indorser in blank, not payee, may always show by parol the extent of his liability; *Bank v. Jackson*, 9 Leigh. 231, 235, and if it be shown that indorser was mere accommodation indorser, recovery cannot be had on money counts. Cited, arguendo, *Bank v. Moss*, 6 How. 37, 12 L. 334; *Brown v. Noyes*, 2 Wood. & M. 78, F. C. 2,023. Approved in *Brown v. Tower*, Minor. 372, application not clear. Cited, without special application of the rule, in *Springfield v. Hickox*, 2 Gil. 248, note, 1 Blackf. 234. Cited, arguendo, *Banking Co. v. Myer*, 12 N. J. L. 148, holding a note is but rebuttable evidence of money had and received by maker to use of holder, or of money paid by holder to use of maker; *Johnson v. Catlin*, 27 Vt. 91, 62 Am. Dec. 624, as to right of cashier, who is payee of note given for value, to maintain action in his own name upon money counts; *Austin v. Burlington*, 34 Vt. 512. See valuable note, 52 Am. Dec. 756, 757.

Distinguished in *Smith v. Frye*, 14 Me. 464, where guaranty was written over name of payee of note, indorsed in blank, without his consent; *Cayuga Bank v. Warden*, 6 N. Y. 30, where statute makes indorsement evidence per se of money lent indorser; *Bank v. Evans*, 9 W. Va. 381, 384, where surety signs as maker he will be bound equally with maker.

Miscellaneous.—Cited in *Moses v. Bank*, 149 U. S. 302, 37 L. 745, 13 S. Ct. 901, apparently not in point; in *Stone v. Lawrence*, 4 Cr. C. C. 12, F. C. 13,484, as authority for holding where there is a variance between note set out in pleadings and one offered in evidence, such note cannot be admitted.

7 Wheat. 38-45, 5 L. 391, Ex parte KEARNEY.

**Constitutional law.**—Supreme Court may issue habeas corpus where a person is imprisoned under warrant or order of any court of the United States, p. 42.

Cited as authority for this rule in *Ex parte Watkins*, 7 Pet. 572, 8 L. 788, and in dissenting opinion in same case, p. 581, 8 L. 791; in dissenting opinion, *In re Kaine*, 14 How. 130, 132, 14 L. 356, 357, where party was held under commitment by commissioner acting under treaty of 1842, with Great Britain; dissenting opinion, *Ex parte Wells*, 18 How. 317, 5 L. 426, holding proposition true pro-



vided court is acting under its appellate jurisdiction. Cited generally in discussion of habeas corpus, *Holmes v. Jennison*, 14 Pet. 623, 628, also, note, *In re Barry*, 136 U. S. 613, 34 L. 509; S. C., 42 Fed. 125, F. C. 1,059, 10 L. 624, 627. Cited in *Ex parte Terry*, 128 U. S. 301, 32 L. 408, 9 S. Ct. 78; S. C., 13 Sawy. 460, where court holds, writ need not be awarded if it appear on showing of petitioner, that if brought into court, and cause of commitment inquired into, he would be remanded to prison. Cited, *arguendo*, *In re Wong Guy*, 6 Sawy. 241, 47 Fed. 719, where it is held Federal courts have jurisdiction under habeas corpus to inquire into validity of State statutes and State judgments based thereon. Cited in *Barrett v. Hopkins*, 2 McCrary, 132, 7 Fed. 314, holding United States Circuit Court may issue writ of habeas corpus to inquire into validity of judgment of a court-martial. Cited, *arguendo*, *In re Haskell*, 52 Fed. 797, as to when Federal courts will grant writ of habeas corpus when petitioner is held under sentence of State court; *Peltier v. Pennington*, 14 N. J. L. 318, as to power of Federal courts to issue writ of habeas corpus.

Qualified in *Ex parte Parks*, 93 U. S. 23, 23 L. 788, holding writ should not issue unless court below has acted without jurisdiction or has transcended its powers; *Ex parte Reed*, 100 U. S. 23, 25 L. 539, and *In re Lennon*, 166 U. S. 552, 41 L. 1112, 17 S. Ct. 659, where it was sought to have writ of habeas corpus perform functions of writ of error.

**Constitutional law.**—Supreme Court has no general authority to review on error or appeal judgments of Circuit Courts in criminal cases, p. 42.

Cited and this rule applied in the following: *Ex parte Watkins*, 3 Pet. 208, 7 L. 655, when court was asked on habeas corpus proceedings to review judgment of Circuit Court; *In re Metzger*, 5 How. 190, 12 L. 110, holding Supreme Court has no jurisdiction to issue habeas corpus for purpose of examining commitment by district judge, at chambers, under treaty with France; *In re Kaine*, 14 How. 119, 129, 14 L. 351, 355 (S. C., 14 Fed. Cas. 83, 87), in denying habeas corpus to party committed by commissioner appointed under treaty of 1842, with Great Britain; dissenting opinion, *Ex parte Lange*, 18 Wall. 185, 187, 188, 205, 21 L. 882, 888, and this cannot be done indirectly by means of writ of habeas corpus; *New Orleans v. Steamship Co.*, 20 Wall. 392, 22 L. 357, holding contempt a specific criminal offense; *United States v. Sanges*, 144 U. S. 319, 36 L. 449, 12 S. Ct. 612, holding writ of error does not lie on behalf of United States in criminal case; *In re Davison*, 22 Blackf. 476, 21 Fed. 621, to proceedings in habeas corpus, where petitioner was held under sentence of court-martial; *United States v. Miller*, 2 Cr. C. C. 248, F. C. 15,772, where petition for writ of habeas corpus was denied, petitioner having been committed for contempt; *United*

States v. Plummer, 3 Cliff. 27, F. C. 16,055, where applicant for writ of error had been convicted of a capital offense in Circuit Court; Ex parte Veremaitre, 28 Fed. Cas. 1149, on habeas corpus, District Court cannot review facts of case over which an inferior court has exclusive jurisdiction. Cited, *arguendo*, in Decatur v. Paulding, 14 Pet. 600, 603, 604, 10 L. 610, 612, as to conclusiveness of judgment of court whose jurisdiction is final; dissenting opinion, Tennessee v. Davis, 100 U. S. 283, 25 L. 657; Ex parte Yarbrough, 110 U. S. 653, 28 L. 274, 4 S. Ct. 153, as authority for holding Supreme Court may review judgment of Circuit Court in criminal matters for purpose of ascertaining whether Circuit Court has acted within its jurisdiction; *arguendo*, in dissenting opinion, Sparf v. United States, 156 U. S. 176, 39 L. 387, 15 S. Ct. 321. Cited without application of the principle in Ex parte Davis, 7 Fed. Cas. 47. Cited, *arguendo*, in Curry v. Marvin, 2 Fla. 417, in determining constitutionality of a State act which limited jurisdiction of State Supreme Court; Whitten v. State, 36 Ind. 203; Cartwright's Case, 114 Mass. 239, as authority for holding proceedings in contempt are in nature of criminal proceedings; Yarbrough v. State, 2 Tex. 527, where a like rule is affirmed of appellate powers of State Supreme Court.

Distinguished in Forsyth v. United States, 9 How. 572, 13 L. 263, on ground of special statute affecting territorial courts; Worden v. Searls, 121 U. S. 25, 30 L. 857, 7 S. Ct. 820, on ground that proceedings were not criminal; United States v. McElroy, 2 Mont. 496, when appeal was from territorial District Court to territorial Supreme Court; State v. Knight, 3 S. Dak. 515, 44 Am. St. Rep. 813, 54 N. W. 414, where question presented was whether contempt proceedings could be brought up for review in State court by writ of error.

Federal courts have unquestionable authority to commit for contempt, p. 42.

Cited in support of this proposition U. S. v. Jacobi, 1 Flip 110, F. C. 15,460, a contempt for disobeying Federal court process.

**Contempt.**—Where a court commits for contempt, its adjudication is a conviction and its commitment in consequence is execution, p. 43.

Cited and doctrine applied in *In re Muller*, 7 Blatchf. 25, F. C. 9,911, holding court has no power to discharge or remit sentence; *Erwin v. U. S.*, 37 Fed. 480, 2 L. R. A. 234, and *Taylor v. U. S.*, 45 Fed. 539, holding contempt proceedings a "cause" within meaning of word as used in fee bill; *Van Hoorebeke v. United States*, 46 Fed. 459, is to the same effect. Cited in *Ex parte O'Brien*, 127 Mo. 488, 30 S. W. 160, holding contempt of court is a criminal offense; also, *State v. Horner*, 16 Mo. App. 194; *Williamson's Case*, 26 Pa. St. 19, 67 Am. Dec. 382. Cited in *Sessions v. Gould*, 63 Fed.



1002, 26 U. S. App. 368, as authority for holding a conviction in contempt proceedings is a judgment in a criminal case; also to same effect, *State v. Markuson*, 5 N. Dak. 150, 64 N. W. 935; *Floyd v. State*, 7 Tex. 216, and *Jordan v. State*, 14 Tex. 440, 441; *Butler v. Fayerweather*, 91 Fed. 459, holding commitment of witness for contempt in equity case, a final order reviewable on error. Cited, arguendo, *Fanshawe v. Tracy*, 4 Biss. 499, F. C. 4,643, in determining against whom the offense of contempt is committed; In re *Ellerbe*, 4 McCrary, 451, 13 Fed. 532, and *Lester v. People*, 150 Ill. 424, 41 Am. St. Rep. 384, 37 N. E. 1004, as to nature of contempt proceedings, and to same effect, In re *Litchfield*, 13 Fed. 868. Cited, arguendo, *State v. Nathans*, 49 S. C. 204, 27 S. E. 54, where authorities are collected and discussed; *State v. Knight*, 3 S. Dak. 514, 44 Am. St. Rep. 813, 54 N. W. 414; and *Snow v. Snow*, 13 Utah, 22, 43 Pac. 622, where contempts are classified. Cited generally in *Casey v. State*, 25 Tex. 385, where court holds contempt of court is not an offense within the meaning of the penal code; *Una v. Dodd*, 38 N. J. Eq. 462, arguendo, as to character of offense.

**Contempt.**—Discussion of right of courts to punish for, at common law, p. 43.

Cited in *Ex parte Bun*, 2 Cr. C. C. 392, F. C. 2,186; *Ex parte Stickney*, 40 Ala. 168, as authority for holding courts punished for, at common law. Cited, arguendo, *Cossart v. State*, 14 Ark. 541, as to rule at common law as to writ of error and habeas corpus in contempt proceedings; *Cooper v. People*, 13 Colo. 371, 22 Pac. 801, 6 L. R. A. 492, in such proceedings, one court should not judge jurisdiction of another of co-ordinate dignity and authority. Cited generally, *Town v. Springer*, 9 Ga. 132; *Ex parte Wright*, 65 Ind. 511, as containing discussion of general subject; also *Baldwin v. State*, 126 Ind. 31, 32, 25 N. E. 822. Cited as approving rules of common law on subject, *Watson v. Williams*, 36 Miss. 343. Cited generally, dissenting opinion, In re *Pierce*, 44 Wis. 447.

**Contempt.**—Supreme Court will not inquire into cause of commitment where party has been committed for contempt by court of competent jurisdiction, p. 44.

Cited and rule applied in *New Orleans v. Steamship Co.*, 20 Wall. 392, 22 L. 357, where court refused to reverse a judgment by Circuit Court, inflicting fine for contempt; *Hayes v. Fischer*, 102 U. S. 122, 26 L. 96, and *Ex parte Terry*, 128 U. S. 306, 32 L. 400, 9 S. Ct. 80; S. C., 13 Sawy. 465, are to the same effect; *Newport Light Co. v. Newport*, 151 U. S. 539, 38 L. 263, 14 S. Ct. 433, holding act of State Court of Appeals in ordering court below to discharge rule for contempt, it is not subject of review in Federal Supreme Court; *Ex parte Nugent*, 18 Fed. Cas. 472, where petitioner for writ of habeas corpus was imprisoned for contempt by order of senate;

Ex parte McCarthy, 29 Cal. 400, holding legislative assembly may refuse to party summoned before it for contempt, the aid of counsel; Tyler v. Hamersley, 44 Conn. 409, 26 Am. Rep. 474, and Caro v. Marwell, 20 Fla. 18, matters of contempt are entirely within province of court adjudging same, and are not subject to review on writ of error; Clark v. People, Breese, 341, 12 Am. Dec. 178, holding that in case of abuse of discretion by committing judge, remedy is by indictment or impeachment; First Church v. Muscatine, 2 Iowa, 71, each court of record is sole and final judge in matters of contempt; Ex parte Adams, 25 Miss. 889, 890, 59 Am. Dec. 240, 241, holding as to procedure where discharge is sought on habeas corpus; Phillips v. Welch, 11 Nev. 194, holding State Supreme Court has no appellate jurisdiction in cases of contempt, where proceeding is purely criminal; Phillips v. Welch, 12 Nev. 179, where State Supreme Court refused, on certiorari, to review case on merits; State v. Towle, 42 N. H. 541, 544, 545, where justice of peace has jurisdiction to punish as contempt, his sentence will not be revised on habeas corpus; Williamson's Case, 26 Pa. St. 17, 18, 67 Am. Dec. 379, 380, the power to deal with an offense of this kind belongs exclusively to the court in which it is committed; Ex parte Whitmore, 9 Utah, 444, 35 Pac. 525, petitioner will not be discharged on habeas corpus unless committing court acted beyond its jurisdiction; In re Falvey, 7 Wis. 640, imprisonment by order of legislative assembly; Ex parte Whitmore, 9 Utah, 444, 35 Pac. 525, refusing to disturb commitment for contempt, no excess of jurisdiction appearing; Ex parte Tinsley, 37 Tex. Crim. Rep. 527, 66 Am. St. Rep. 820, 40 S. W. 307, refusing to consider propriety of order disobeyed by contemnor, jurisdiction to make the order appearing. Cited, arguendo, Holmes v. Jennison, 14 Pet. 621, 10 L. 623. Cited in In re Callicot, 8 Blatchf. 94, F. C. 2,323, as to jurisdiction of circuit judge to review on habeas corpus. Cited, arguendo, United States v. Bedford Bridge Co., 1 Wood. & M. 440, F. C. 15,867. Cited as to what is contempt in State v. Tugwell, 19 Wash. 252, 52 Pac. 1061, 43 L. R. A. 723; Una v. Dodd, 39 N. J. Eq. 180, holding party accused of contempt cannot excuse himself by showing the judgment or order violated is erroneous in point of law. See valuable note, 22 Am. St. Rep. 417, 422, 423.

Distinguished in case of Electoral College, 1 Hughes, 588, F. C. 4,336, where it clearly appeared from record State court had exceeded its powers; Indianapolis Water Co. v. American Co., 75 Fed. 977, where contempts are classified, and cases in which proceedings will be considered criminal pointed out; Ex parte Gould, 99 Cal. 362, 37 Am. St. Rep. 59, 33 Pac. 1112, 21 L. R. A. 752, and Stuart v. People, 3 Scam. 404, where committing court exceeded its jurisdiction. Distinguished on statutory grounds, Wells v. Commonwealth, 21 Gratt. 504; Chappell v. Giles, 10 Wis. 102. Criticised in In re Spofford, 62 Fed. 444.



**Habeas corpus.**—Supreme Court will not grant writ where party has been committed for contempt by court of competent jurisdiction, p. 45.

Cited as authority for same ruling in State Supreme Court, dissenting opinion, *Ex parte Hardy*, 68 Ala. 335; also, *Robb v. McDonald*, 29 Iowa, 334, 4 Am. Rep. 214; *Gorham v. Luckett*, 6 B. Mon. 648, "the only inquiry, on application for writ, is whether tribunal had power to punish for contempt in any case." Cited, *arguendo*, dissenting opinion, *Hyatt v. Allen*, 54 Cal. 364, as to right to issue habeas corpus in exercise of appellate jurisdiction; dissenting opinion, *Ex parte Edwards* 11 Fla. 190; dissenting opinion, *Koehler v. Hill*, 60 Iowa, 675, 15 N. W. 644. Cited in *Ex parte Rollins*, 80 Va. 317; *Ex parte Marx*, 86 Va. 44, 9 S. E. 477, as authority for holding writ of habeas corpus cannot be used in place of writ of error. See also note, 67 Am. Dec. 397.

Distinguished in *Ex parte Holman*, 28 Iowa. 152, where committing court was held to have exceeded its powers; *Tinsley v. Anderson*, 171 U. S. 105, sustaining Supreme Court's jurisdiction on appeal from order of State court committing for contempt, where a Federal privilege was set up by the defendant.

Miscellaneous.—Cited, *arguendo*, dissenting opinion, *Ex parte Crane*, 5 Pet. 210, 8 L. 100, as to necessity of courts proceeding according to uniform principles; and to same effect, *Decatur v. Paulding*, 14 Pet. 604, 10 L. 612, and *Holmes v. Jennison*, 14 Pet. 626, 10 L. 626. Cited, *Ex parte Terry*, 128 U. S. 309, 32 L. 410, 9 S. Ct. 81; S. C., 13 Sawy. 468, and *In re Bogart*, 2 Sawy. 409, F. C. 1,596, for statement, "fact that a power may be abused forms no solid objection against its exercise." Cited in note to *In re Burrus*, 136 U. S. 608, 34 L. 507; *In re Barry*, 42 Fed. 121, F. C. 1,059, and *In re Salisbury*, 16 Ill. 351, as to jurisdiction of United States courts. Cited in *Bethuram v. Black*, 11 Bush, 632, as to discretion left with judge in issuance of writ of habeas corpus; *Knapp v. Thomas*, 39 Ohio St. 389, 48 Am. Rep. 469, not in point. Cited generally, *Ex parte Degener*, 30 Tex. App. 574, 17 S. W. 1111, as to kinds of jurisdiction.

7 Wheat. 46-58, 5 L. 393, *BAYLEY v. GREENLEAF*.

**Equity.**—The lien of vendor of real property is defeated by an alienation to a bona fide purchaser without notice, p. 50.

Cited and principle applied in *Fitzgerald v. Richmond*, 9 Fed. Cas. 191, holding a mortgagee for valuable consideration a bona fide purchaser as against lienholder who asserted his claim subsequent to giving of mortgage; *Houston v. Stanton*, 11 Ala. 423, holding assignee of note given by bona fide purchaser from vendee, may enforce collection of note as against original vendor's lien; *Woody v. Fislar*, 55 Ind. 594, where purchase was without notice

of lien; *Selby v. Stanley*, 4 Minn. 76, purchase without notice of existing lien; *Kilpatrick v. Kilpatrick*, 23 Miss. 127, 55 Am. Dec. 81, and *Boone v. Barnes*, 23 Miss. 139, applying rule to purchaser at sheriff's sale; *Adams v. Buchanan*, 49 Mo. 70, holding purchaser under attachment proceedings comes within rule; *White v. Dougherty*, 1 Mart. & Yerg. 323, 17 Am. Dec. 808, to case of bona fide purchaser of personal property; *Moore v. Holcombe*, 3 Leigh, 600, 601, 24 Am. Dec. 685, 686, holding vendor has no lien on bonds given his vendee by purchaser from vendee after assignment to innocent third party for value. Affirmed, *Poe v. Paxton*, 26 W. Va. 612, in determining lien of vendor of equitable title. Cited, *arguendo*, *Halfman v. Ellison*, 51 Ala. 551. Cited without particular application of the rule, *Watkins v. Wassell*, 15 Ark. 86.

Modified, *Dufphey v. Frenaye*, 5 Stew. & P. 241, where second vendee had notice of lien before paying all of purchase price; *Mitchell v. Dawson*, 23 W. Va. 89, subvendee is liable after notice to extent of purchase money not paid. Distinguished, *Cahoon v. Robinson*, 6 Cal. 227, holding vendor of realty has lien on same for purchase price when in hands of administrator; *Mounce v. Byars*, 16 Ga. 477, a surety on a note given before purchase of land, is not such a creditor as may defeat vendor's lien; *Eubank v. Poston*, 5 T. B. Mon. 293, mortgagee with notice of lien stands in same position as purchaser with notice; *Nailor v. Fisk*, 27 Miss. 264, purchaser bought with notice of lien; *Kelly v. Mills*, 41 Miss. 274, 275, 276, 277, holding purchasers at sheriff's sale and judgment creditors are not purchasers for valuable consideration, but are mere volunteers.

**Equity.**—The vendor of real property, who has taken no security for purchase money, retains an equitable lien for it on land against vendee and his heirs, p. 50.

Cited and principle applied, *Hardin v. Boyd*, 113 U. S. 765, 28 L. 1144, 5 S. Ct. 775, holding vendor holds title in trust; *Coos Bay Co. v. Crocker*, 6 Sawy. 580, 4 Fed. 582, vendee is trustee of vendor in respect to purchase money; *Wellborn v. Williams*, 9 Ga. 88, 52 Am. Dec. 429, where excellent discussion of vendor's lien may be found; *Moreton v. Harrison*, 1 Bland. Ch. 498, such lien is an incident of every contract for the sale of real estate; *Iglehart v. Armiger*, 1 Bland Ch. 527, and lien may arise as incident to sale of equitable interest; *Clowler v. Rawlings*, 9 Smedes & M. 127, 47 Am. Dec. 109, holding taking personal security from vendee does not destroy lien; *Parker v. Kelly*, 10 Smedes & M. 191, holding further as to rights of assignee of notes given for purchase money; *Bledsoe v. Games*, 30 Mo. 451, holding vendor of equitable title has same lien as vendor of legal; *Brinkerhoff v. Vansciven*, 4 N. J. Eq. 258, and fact that vendee gave mortgage to third party for part of purchase money will not affect lien; *Herbert v. Scofield*, 9 N. J.



Eq. 493, if part of purchase money remains unpaid, grantor has a lien to that amount on premises sold; *Maroney v. Boyle*, 141 N. Y. 467, 38 Am. St. Rep. 822, 36 N. E. 512, and the mere taking of promissory note for purchase money does not waive lien; *Kent v. Gerhard*, 12 R. I. 94, 34 Am. Rep. 613, holding where vendee, a feme covert, gives her sole note and mortgage to secure payment, vendor does not lose his lien thereby; *Manly v. Slason*, 21 Vt. 279, 52 Am. Dec. 65, and a purchaser from vendee who buys knowing that some part of purchase money has not been paid, takes with notice of lien; *Graves v. McCall*, 1 Call, 419, affirming right of vendor to pursue lands in hands of purchaser who took with notice; *Crowe v. Colbeth*, 63 Wis. 646, 24 N. W. 480, where lien was enforced against heirs. Cited approvingly without particular application of the rule in *Kirksey v. Mitchell*, 8 Ala. 409. Cited generally, *Bankhead v. Owen*, 60 Ala. 466, as to nature of vendor's lien. Cited, arguendo, *Godwin v. Collins*, 4 Houst. 60, *Colquit v. Thomas*, 8 Ga. 263, as to nature of lien. Cited without application of rule, *Williams v. Chapman*, 17 Ill. 425, 65 Am. Dec. 671. Cited, arguendo, *Fair v. Howard*, 6 Nev. 315, 316, as bearing on question when mortgagee will be considered bona fide purchaser.

Distinguished in *Hall v. Click*, 5 Ala. 364, 39 Am. Dec. 328, and *Lewis v. Ragan*, 7 Gill & J. 124, 125, 28 Am. Dec. 197, where vendor took note for purchase price and assigned same without recourse, assignee has no lien; *Shall v. Biscoe*, 18 Ark. 158, assignee of note given by vendee to vendor for purchase money is not subrogated to vendor's lien rights; dissenting opinion, *Scott v. Warren*, 21 Ga. 416, holding when mortgage given for purchase money, vendor's lien no longer exists; *Briggs v. Hill*, 6 How. (Miss.) 364, 369, 38 Am. Dec. 442, 446, holding vendor's lien does not pass to assignee of note given for purchase price.

Criticised in *McCandlish v. Keen*, 13 Gratt. 622. Cited in *Herring v. Cannon*, 21 S. C. 217, 53 Am. Rep. 666, remarking that the principle of secret liens is contrary to the laws and policy of South Carolina. Denied in *Womble v. Battle*, 3 Ired. Eq. 189, holding the doctrine does not obtain in North Carolina; *Frame v. Sliter*, 29 Or. 130, 45 Pac. 292, 34 L. R. A. 693, nor in Oregon; *Ahrend v. Odiorne*, 118 Mass. 267, 19 Am. Rep. 454; *McCorkle v. Montgomery*, 11 Rich. Eq. 132, "the doctrine has never prevailed in South Carolina;" to same effect, dissenting opinion, *Carraway v. Carraway*, 27 S. C. 590, 5 S. E. 165. Denied, *Smith v. Allen*, 18 Wash. 6, 63 Am. St. Rep. 867, 50 Pac. 784, 39 L. R. A. 84.

**Vendor's lien.**—*Quære*, whether lien can be asserted against assignees of a bankrupt, or other creditors coming in under purchaser by act of law, p. 51, ff.

Referred to in *Ex parte General Assignee*, 10 Fed. Cas. 166, holding assignment by operation of law passes rights of bankrupt in same plight as he possessed them; and to same effect, *In re Perdue*,

19 Fed. Cas. 220, 2 Bank. Reg. 67. Cited in *Webb v. Robinson*, 14 Ga. 225, 226, 229, holding creditors who become such without notice of vendor's lien, and those claiming under such creditors, are protected against lien; dissenting opinion, *Eubank v. Poston*, 5 T. B. Mon. 301, 309, holding lien cannot be asserted against vendee's mortgage; *Bank v. Stone*, 80 Ky. 121, lien may be asserted against assignee in bankruptcy; *Shirley v. Sugar Refinery*, 2 Edw. Ch. 511, 512, 513, holding conveyance to assignee for benefit of creditors does not defeat the lien; *Gann v. Chester*, 5 Yerg. 209, holding lien cannot be asserted against purchaser under foreclosure sale. Cited *Whiteley v. Trust Co.*, 76 Fed. 79, 43 U. S. App. 643, 34 L. R. A. 306, for thorough discussion of general subject. Cited, *arguendo*, *Haskell v. Sevier*, 25 Ark. 161, in determining character of lien created by unrecorded mortgage. Cited generally, *Hammond v. Peyton*, 34 Minn. 530, 27 N. W. 72, as to general subject; *Ellis v. Singletary*, 45 Tex. 40, as to rights of creditors in property covered by vendor's lien.

**Equity.**—Vendor of real property cannot assert his lien against creditors holding under bona fide conveyance from vendee, p. 57.

Cited and principle applied in *Judson v. Corcoran*, 17 How. 615, 15 L. 233, where assignee of claim against Mexico gave no information thereof until subsequent assignee had successfully prosecuted his claim before commissioners; *In re Butler*, 2 Hughes, 249, F. C. 2,235, where assignee of vendor's claim failed for fifteen years to assert his claim, during which time other liens were created by vendee; *Bank v. Tompkins*, 57 Fed. 23, 13 U. S. App. 300, where vendee, bank president, conveyed to bank; dissenting opinion, *Tuttle v. Walton*, 1 Ga. 64, holding corporation having secret lien on shares of stock cannot enforce same against bona fide purchaser at execution sale; *Dawson v. Insurance Co.*, 27 Minn. 414, 8 N. W. 144, holding lien will not prevail against claim of creditor, which claim accrued subsequent to lien and without notice of it; *Dunlap v. Barnett*, 5 S. & M. 710, 45 Am. Dec. 271, where creditors held under mortgage from vendee; *Fain v. Inman*, 6 Heisk. 11, 19 Am. Rep. 580, holding vendor's equitable lien subordinate to a specific lien acquired by a creditor of vendee, with or without notice, before proceedings are instituted to enforce such equitable lien. Cited generally in *Boone v. Chiles*, 10 Pet. 210, 9 L. 400, as to principle, that equitable title, prior in time, is better in right; *Byers v. Fowler*, 12 Ark. 285, 54 Am. Dec. 286, and *Shelton v. Lewis*, 27 Ark. 197, are to same effect. Cited without application, *Roberts v. Broom*, 1 Harr. 64. The following cite this case as authority for holding a pre-existing debt is valuable consideration for a promise: *Work v. Brayton*, 5 Ind. 398; *Babcock v. Jordan*, 24 Ind. 20, where promise was contained in a mortgage; *Moore v. Fuller*, 6 Or. 274, 25 Am. Rep. 526, where wife gave mortgage in satisfaction of husband's debts; dissenting opinion,



Oakley v. Hibbard, 1 Pinn. 682, debts were sufficient consideration for assignment.

Distinguished in Leland v. Ship Medora, 2 Wood. & M. 116, F. C. 8,237, holding assignee by operation of law is not like assignee a purchaser for value. Modified in Chance v. McWhorter, 26 Ga. 318, holding vendor's lien is not defeated by mortgage given by vendee to secure debt contracted before purchase; Briscoe v. Bronaugh, 1 Tex. 338, 46 Am. Dec. 118, where creditor took with notice of lien. That part of opinion which seems to hold pre-existing debt is valuable consideration for transfer of property is criticised in Twelves v. Williams, 3 Whart. 493, 31 Am. Dec. 544.

Vendor's lien should be preferred to any other subsequent equal equity, unconnected with a legal advantage, or equitable advantage which gives a superior claim to the legal estate, p. 57.

Cited with approval in Butterfield v. Okie, 36 N. J. Eq. 483, holding claim of vendee's mortgagee without consideration is subordinate to vendor's lien. Cited, arguendo, Cox v. Romine, 9 Gratt. 29; Hoult v. Donahue, 21 W. Va. 300, as to conflicting equities.

Distinguished in Wells Fargo Co. v. Smith, 2 Utah, 47, where prior creditor had failed to record his lien, his rights were postponed to subsequently acquired legal rights of others.

Miscellaneous.—Cited in Rice v. Rice, 36 Fed. 861, not in point. Cited in Briscoe v. Bronaugh, 1 Tex. 330, 46 Am. Dec. 112, as to whether vendor must have legal title to lot to entitle him to lien for purchase money. Cited without application in Tingle v. Fisher, 20 W. Va. 507.

7 Wheat. 58-59, 5 L. 397, BROWDER v. McARTHUR.

Practice.—The Supreme Court will not grant a rehearing in a cause after it has been remitted to the court below, p. 58.

Rule affirmed and followed in Peck v. Sanderson, 18 How. 42, 15 L. 262; Bushnell v. Crooke Co., 150 U. S. 83, 37 L. 1007, 14 S. Ct. 22, an application for rehearing cannot be entertained after expiration of term at which judgment rendered; Lovett v. Florida, 29 Fla. 401, 11 So. 179, 16 L. R. A. 316, appellate court loses jurisdiction after remittitur issues and is lodged in lower court; Merchants' Bank v. Grunthal, 39 Fla. 394, 22 So. 687, is to same effect; Kingsbury v. Buckner, 70 Ill. 517, former adjudication is conclusive on second appeal as to points decided; Stationery Co. v. Hentig, 31 Kan. 323, motion for rehearing will not be entertained when made in second term after decision was rendered; Carr v. Green, Rich. Eq. Cas. 409, Court of Appeals will grant rehearing only on newly-discovered evidence. Cited, arguendo, in Noonan v. Bradley, 12 Wall. 129, 20 L. 281, stating an exception in case of fraud; Tyler v. Magwire, 17 Wall. 283, 21 L. 583. Approved, arguendo, in Poole v. Nixon, 19 Fed. Cas. 1000. See note, 21 Am. Dec. 119.

Modification suggested in *Legg v. Overbagh*, 4 Wend. 193, 21 Am. Dec. 118, if remittitur is irregularly obtained or erroneously entered. Approved generally in *Chambers v. Hodges*, 3 Tex. 529, but court is not prevented from declaring a judgment void in a case not legally before it.

**Appeal and error.**— On second appeal of same cause Supreme Court will not inquire into merits of original decree, p. 59.

Principle applied by the following citing cases: *Washington Bridge Co. v. Stewart*, 3 How. 426, 11 L. 664, holding after case has been decided upon its merits and remanded, it is too late on second appeal to allege court had no jurisdiction to try first appeal; *Sizer v. Many*, 16 How. 103, 14 L. 863, holding, where appeal was taken from order of Circuit Court fixing costs, Supreme Court will not look to original appeal for purpose of acquiring jurisdiction; *Supervisors v. Kennicott*, 94 U. S. 499, 24 L. 260, whatever has been decided in Supreme Court on appeal cannot be re-examined on a subsequent appeal of same case; *Bissell Co. v. Goshen Co.*, 72 Fed. 553, 43 U. S. App. 41, holding like rule applies in Circuit Court of Appeals; *Semple v. Anderson*, 4 Gilm. 562, holding State Supreme Court will not go back of its former adjudication in same case, even though it acted without jurisdiction on first hearing; *Hobson v. Doe*, 4 Blackf. 490, where court refused to consider errors alleged to have happened prior to former judgment. Cited, *arguendo*, *Ex parte Sibbald*, 12 Pet. 492, 9 L. 1169. Cited, application not clear, in *Kingsbury v. Buckner*, 134 U. S. 671, 33 L. 1055, 10 S. Ct. 645. Cited generally in *Dodge v. Gaylord*, 53 Ind. 369, as to where decision of Supreme Court becomes law of case.

**Miscellaneous.**— Cited in *Metcalf v. Watertown*, 68 Fed. 861, 34 U. S. App. 107, not in point.

7 Wheat. 59-122, 5 L. 398, **RICARD v. WILLIAMS.**

**Possession of land** by party, claiming it as his own in fee, is prima facie evidence of his ownership and seizin of the inheritance, p. 105.

Cited and rule applied in *Milsap v. Stone*, 2 Colo. 139, in action of ejectment; *Mason v. Park*, 3 Scam. 533, holding this is sufficient proof of ownership to maintain ejectment or trespass for injury to inheritance; *Davis v. Easley*, 13 Ill. 198, 200, holding further as to evidence admissible to show possession; *Gosselin v. Smith*, 154 Ill. 78, 39 N. E. 981, and such title will descend; *McFarlane v. Ray*, 14 Mich. 471, these facts are prima facie evidence of title as against one who shows no right in himself; *Dale v. Faivre*, 43 Mo. 557, this gives sufficient title to maintain ejectment against one claiming under possession alone; *Roebke v. Andrews*, 26 Wis. 318, 340, holding as to admission in evidence of declarations made by possessor



during possession, relative to title; explained in dissenting opinion, S. C. p. 340. Cited in *Winchester v. Stevens Point*, 58 Wis. 358, 17 N. W. 549, as authority for holding possession is evidence of seizin. Approved without particular application of the rule to question at issue, *Brooks v. Bruyn*, 18 Ill. 542, 68 Am. Dec. 581; *White v. Loring*, 24 Pick. 322. Cited in *Straw v. Jones*, 9 N. H. 402, as to necessity of possession being continuous; *Southampton v. Mecox Bay Co.*, 116 N. Y. 16, 22 N. E. 392, without particular application. Note, 60 Am. Dec. 602.

**Adverse possession.**—Mere possession evidences no more than present occupation by right, p. 106.

Cited and principle applied in *Kirk v. Smith*, 9 Wheat. 288, 6 L. 92, holding to give title possession must be adverse; *Stillman v. White Rock Co.*, 3 Wood. & M. 549, F. C. 13,446, possession to be adverse must be consistent with the idea of a deed, or raise presumption of one; *Spalding v. Grigg*, 4 Ga. 87, permissive possession cannot affect title; *Grube v. Wells*, 34 Iowa, 150, entry without color or claim of right does not set statute of limitations in motion; *Arnold v. Stevens*, 24 Pick. 111, 35 Am. Dec. 308, there can be no presumption of a regrant of a profit from possession by owner not inconsistent with rights of grantee; *McDonald v. Fox*, 20 Nev. 371, 22 Pac. 236, holding where party occupies land up to a fence, believed to be on the boundary line, his occupation is not adverse if his intent is to occupy to boundary line only; *Cobb v. Davenport*, 32 N. J. L. 385, to incorporeal hereditament; *Bedell v. Shaw*, 59 N. Y. 50, and the quality and extent of right acquired by possession depends on the claim accompanying it; *Draper v. Monroe*, 18 R. I. 401, 28 Atl. 341, where there were no acts on part of claimant of title by adverse possession which were inconsistent with permissive occupation. Cited, *arguendo*, dissenting opinion, *Stafford v. Watson*, 41 Ark. 31, bare possession is *prima facie* evidence of right to possession; *Lancey v. Brock*, 110 Ill. 615, holding as to presumptions arising from subsequent possession when prior possessor did not hold under claim of ownership. Cited generally in *Walsh v. McIntire*, 68 Md. 418, 13 Atl. 351, and *White v. Keller*, 114 Mo. 484, 21 S. W. 861, as to nature of possession which must be shown in order to base title on adverse possession; *arguendo*, *Stark v. Smith*, 5 Ohio, 456, as to when mere length of possession will be considered evidence of title; generally on this point in *McKinney v. Daniel*, 90 Va. 704, 19 S. E. 881.

Distinguished in *Bradstreet v. Huntington*, 5 Pet. 445, 8 L. 186, where grantee of tenant in common entered into possession claiming whole estate; *Skipwith v. Martin*, 50 Ark. 154, 6 S. W. 518, where possessor claimed in fee; *Magee v. Magee*, 37 Miss. 154, where jury inferred adverse possession from other acts taken in connection with possession.

**Evidence.**— Possession not proved to be wrongful will be presumed to be lawful, p. 107.

Principle applied in *Burke v. Negro Joe*, 6 Gill. & J. 143, an act will be presumed to be lawful when the commencement is not proved to be wrongful; *McEwen v. Portland*, 1 Or. 302, and title given thereby must prevail until complainants show a better one. Cited generally in *Roberts v. Richards*, 84 Me. 9, 24 Atl. 427, as to presumption of possession being in subordination to true title; with approval in *Orr v. Hollidays*, 9 B. Mon. 60, as to lessors in action of ejectment.

**Adverse possession.**— A disseizor cannot qualify his own wrong, p. 107.

Cited, arguendo, to this point in *Carpenter v. Webster*, 27 Cal. 562.

**Evidence.**— Presumptions of a grant arising from lapse of time are applied to corporeal as well as incorporeal hereditaments, p. 109.

Cited and rule applied in *Fletcher v. Fuller*, 120 U. S. 547, 30 L. 762, 7 S. Ct. 674, to corporeal hereditament; *Williams v. Nelson*, 23 Pick. 144, 34 Am. Dec. 48, where easement was presumed from twenty years' flowage of the land of another; *Hanes v. Peck*, Mart. & Y. 232, 233, "court will instruct jury to presume grant from long-continued and uninterrupted possession;" *Hale v. Marshall*, 14 Gratt. 494, a party in possession claiming under an equitable title for twenty-five years may be presumed to have received a conveyance of legal title. Cited generally in *Jenkins v. Pye*, 12 Pet. 262, 9 L. 1079, as to force that will be given to presumptions. Approved but not applied in *United States v. Chaves*, 159 U. S. 464, 40 L. 220, 16 S. Ct. 62; *Arnold v. Stevens*, 24 Pick. 110, 35 Am. Dec. 308. Cited generally in *Warfield v. Lindell*, 30 Mo. 289, 77 Am. Dec. 622, as to reasons for rule; and to same effect, *Downing v. Pickering*, 15 N. H. 349. Cited in discussion as to doctrine of presumptions in *Jackson v. Schaubert*, 7 Cow. 199; also in *Schauber v. Jackson*, 2 Wend. 47, and *Jackson v. Mancius*, 2 Wend. 363. Cited in reviewing authorities on doctrine of presumption of grant arising from lapse of time, *Blake v. Davis*, 20 Ohio, 242; also *Caul v. Spring*, 2 Watts, 396. Cited generally in *Townsend v. Downer*, 32 Vt. 206, as to grounds on which rest presumption of grant; to same effect, *Edwards v. Van Bibber*, 1 Leigh, 194.

**Grant.**— Presumption of, cannot arise where claim is of such nature as to be at variance with supposition of, p. 110.

Cited and rule affirmed in *Ransdale v. Grove*, 4 McLean, 285, F. C. 11,570, where under facts it appeared claimant acquired title from another source; *Jackson v. Porter*, 1 Paine, 467, F. C. 7,143, where occupant claimed title from Indians who were able to grant no more than a possessory interest; *McClaskey v. Barr*, 47 Fed. 163, evidence showed that within period of statute of limitations claim-



ants had sought to purchase title; *Nelson v. Butterfield*, 21 Me. 235, where servient tenant cannot maintain suit to prevent act, a grant cannot be presumed; *Snoddy v. Kreutch*, 3 Head, 305, where claimant of title through adverse possession did not show possession of disputed land; *Smith v. Higbee*, 12 Vt. 124, where title is claimed from a deed which is shown to be void, it will not be presumed there was an independent grant; *Townsend v. Downer*, 32 Vt. 193, where surrounding circumstances were inconsistent with supposition of grant. Cited in note, 11 Wheat. 318, 6 L. 485. Cited generally in *Edson v. Munsell*, 10 Allen, 569, as to conditions which must be shown in order to warrant a jury to presume a grant; *Wallace v. Minor*, 7 Ohio, 250, holding patent cannot be presumed where proper records contain no evidence or indication of a grant having been made; *Taylor v. Watkins*, 26 Tex. 693, without particular application.

**Grant.**—In general, presumption of, is limited to periods analogous to those of statute of limitations, in cases where statute does not apply, p. 110.

Rule applied, *Union Water Co. v. Crary*, 25 Cal. 509, 85 Am. Dec. 149, holding a presumption of grant arises from five years' continued adverse possession and use of water; *Williams v. Turner*, 7 Ga. 353, where limitation period of statute was followed; *Burdick v. Heivly*, 23 Iowa, 514, from ten years' actual adverse possession and use of premises, grant will be presumed; *House v. Montgomery*, 19 Mo. App. 179, 180, in determining length of time required to acquire an easement by prescription; *Wallace v. Fletcher*, 30 N. H. 447, 448, an adverse, exclusive and uninterrupted enjoyment for twenty years of an incorporeal hereditament affords a conclusive presumption of a grant; *Rogers v. Mabe*, 4 Dev. 189, 190, grant will be presumed from twenty years' possession of land as owner; *Cornett v. Rhudy*, 80 Va. 714, holding, as to things incorporeal, twenty years' adverse, exclusive, undisturbed possession affords conclusive presumption of title; to same effect, *Rogerson v. Shepherd*, 33 W. Va. 315, 10 S. E. 635, collecting authorities. Cited in general discussion of subject, *Fletcher v. Fuller*, 120 U. S. 550, 30 L. 764, 7 S. Ct. 676; also in *Roundtree v. Brantley*, 34 Ala. 552, 73 Am. Dec. 471, as to period of adverse enjoyment required to give right to easement. Cited without particular application, *Fitzhugh v. Crogan*, 2 J. J. Marsh. 436, 19 Am. Dec. 146, in discussion of legal presumptions; *Hunt v. Hunt*, 3 Met. 185, 37 Am. Dec. 134. Cited, arguendo, *Edson v. Munsell*, 10 Allen, 567.

**Evidence.**—Where other circumstances are very cogent and full, a grant may be presumed within a period short of the statute of limitations, p. 110.

Apparently doubted, *Gilman v. Tilton*, 5 N. H. 233, holding adverse user of water for period short of twenty years, is not, of itself, sufficient ground to sustain presumption of a grant.

**Executors and administrators.**—Purchaser from an administrator enters into land by operation of law, so that he is under the estate of the intestate, p. 114.

Cited and principle applied, *Crandall v. Gallup*, 12 Conn. 376, holding there is no privity between administrator and purchaser under sale by order of court. Cited, *arguendo*, *Covell v. Weston*, 20 Johns. 420; *McPherson v. Cunliff*, 11 Serg. & R. 427, 14 Am. Dec. 648, in general discussion of estoppels.

**Executors and administrators.**—As long as administration legally subsists or may be granted, power to subject lands to payments of decedent's debts continues if land remains in heirs' possession, and it is not defeated simply by an alienation or disseizin of the heirs, p. 114.

Quoted on this point, *Florida, etc., Co. v. Finlayson*, 91 Fed. 16, enforcing a judgment against land in possession of heirs of the debtor.

**Administrators.**—Power of, to sell realty for payment of debts, in Connecticut, must be exercised within a reasonable time, to be fixed by analogy to statute of limitations, pp. 115, 117.

Cited and principle applied, *Mays v. Rogers*, 37 Ark. 160, holding a delay for ten years unreasonable; *Roth v. Holland*, 56 Ark. 637, 639, 35 Am. St. Rep. 129, 131, 20 S. W. 522, 523, an unexcused delay of seven years is unreasonable; *Griswold v. Bigelow*, 6 Conn. 265, 267, 268, holding, where creditor sought to take advantage of his lien within a year after his claim accrued, there was no laches, and power of administrator is not defeated by alienation by heir or devisee; *Wooster v. Hunt's Co.*, 38 Conn. 260, 261, creditors by laches waived right to compel sale; *Dorman v. Lane*, 1 Gilm. 147, where administrator, being creditor, neglected for fifteen years to apply for power to sell intestates' realty; *Unknown Heirs v. Baker*, 23 Ill. 437, creditor who fails to prosecute his claim within seven years waives his right; *State v. Probate Court*, 40 Minn. 300, 41 N. W. 1034, application to sell, made after lapse of ten years, held properly refused; *Mooers v. White*, 6 Johns. Ch. 387, one year after administrator has entered on the execution of his trust will, generally, be considered a reasonable time; *Ward v. Barrows*, 2 Ohio St. 251, holding power given executor by will to sell land becomes legally inoperative, when estate is settled or all claims presumptively settled. Cited, *arguendo*, *Hall v. Brewer*, 40 Ark. 443, as to respective rights of vendee of heir and creditor of estate. Cited generally, *McCoy v. Nichols*, 4 How. (Miss.) 39, as to right of administrator, when twenty years have elapsed after a decree, to take steps in relation thereto which will prejudice the interest of the heir, or persons holding under him. Cited without particular application, *Hatch v. Kelly*, 63 N. H. 31. Cited, generally, *Lliddel v. McVickar*, 11 N. J. L. 56, 19 Am. Dec. 381, holding each case must, in some



measure, depend on its own circumstances. Cited generally, *McPherson v. Cunliff*, 11 Serg. & R. 440, 14 Am. Dec. 662, in discussion of power to attack, collaterally, sales of Orphans' Court. Reason for rule approved, *Porter v. Cocke*, Peck, 47, in construction of Tennessee statute of limitations. Cited, *Hickman v. Gaither*, 2 Yerg. 204, application not clear; *McCoy v. Morrow*, 18 Ill. 526, 68 Am. Dec. 581, where from failure to prosecute claim within reasonable time, creditor was held to have waived lien as against purchaser from heirs. Note, 26 Am. St. Rep. 26.

**Descent.**—In general, entry of one heir inures to benefit of all, but one may disseize coheirs and hold adversely, p. 120.

Cited and principle applied in *Westenfelder v. Green*, 76 Fed. 928, where guardian of certain heirs entered, claiming exclusive title in his wards; *Vaughan v. Bacon*, 15 Me. 457, 33 Am. Dec. 628, holding the relinquishment by disseizor to one of several cotenants of all right of seizin, has the effect to put all tenants in common in seizin and possession of their shares respectively; *Bird v. Bird*, 40 Me. 403, and *Warfield v. Lindell*, 38 Mo. 581, 90 Am. Dec. 449, applying rule to possession by one cotenant; *Jackson v. Brink*, 5 Cow. 484, where cotenant after acquiring possession by notorious acts asserted entire estate; *Clapp v. Bromagham*, 9 Cow. 555, 577, where one cotenant entered claiming the whole; *Caperton v. Gregory*, 11 Gratt. 508, entry by one coparcener claiming entire estate. Cited generally, as authority for rule, *Hoffman v. Beard*, 22 Mich. 65, application vague; also, *Lambert v. Blumenthal*, 26 Mo. 474. Approved without particular application, *Clark v. Wood*, 34 N. H. 453. Cited, *arguendo*, *La Frombois v. Jackson*, 8 Cow. 619, 18 Am. Dec. 486. Cited generally, *Jones v. Porter*, 3 Penn. & W. 135, as to extent of possession by entry under deed conveying part only.

**Adverse possession.**—Ouster or disseizin will not be presumed from mere fact of sole possession, p. 121.

Principle applied, *M'Kneely v. Terry*, 61 Ark. 541, 33 S. W. 956, mere taking of rents by one tenant does not show ouster of cotenants; *Squires v. Clark*, 17 Kan. 87, applying rule to possession of one cotenant; *Edwards v. Bishop*, 4 N. Y. 64, 65, holding a tenant in common, in order to maintain ejectment against his cotenant, must show an actual denial of his title by cotenant. Cited generally, *Owen v. Morton*, 24 Cal. 376, in determining what amounts to ouster of cotenant. Approved without particular application, *Munroe v. Luke*, 1 Met. 471. Cited generally, *Dubois v. Campau*, 28 Mich. 318, where question was presented as to kind of presumption arising from possession by one cotenant, who gave leases and received rents, for more than twenty years, with knowledge of cotenant.

Qualified, *Oglesby v. Hollister*, 76 Cal. 141, 9 Am. St. Rep. 180, 18 Pac. 148, holding jury is warranted in inferring ouster from

exclusive possession by one tenant in common for great number of years, without accounting to cotenant. Distinguished, *Parker v. Proprietors, etc.*, 3 Mct. 102, 37 Am. Dec. 125, where one tenant in common granted whole estate, the deed of which was recorded, and cotenants did not set up claim until after statute of limitations had run; *Gray v. Darby*, Mart. & Y. 423, where one holding under void deed but claiming the fee, was held to disseize real owner.

**Liens.**—Creditors of an intestate have a lien on the intestate's land which may be enforced through the instrumentality of the administrator acting through Court of Probate, p. 121.

Cited to this point, but without particularly applying this rule, *Crandall v. Gallup*, 12 Conn. 374. Cited, *arguendo*, *Davis v. Vansands*, 45 Conn. 602.

**Miscellaneous.**—Cited as to pleadings, *Lull v. Davis*, 1 Mich. 81, 82, without particular application. Cited, *Thorpe v. Corwin*, 20 N. J. L. 319, not in point; *Bogardus v. Church*, 4 Sandf. Ch. 743, and *Gibblehouse v. Stong*, 3 Rawle, 452, to what point not clear; *Duke v. Thompson*, 16 Ohio, 48, not in point. Cited generally, in *Martin v. Robinson*, 67 Tex. 380, 3 S. W. 556, and *Jackson v. Astor*, 1 Pinn. 162, 39 Am. Dec. 294, as to power of appellate court to review proceedings of Probate Court. Cited, dissenting opinion, *Oakley v. Hibbard*, 1 Pinn. 681, not in point. Cited, but not in point, *Link v. Doerfer*, 42 Wis. 395, 24 Am. Rep. 420.

7 Wheat. 122-157, 5 L. 414, **BOULDIN v. MASSIE'S HEIRS.**

**Public lands.**—Patent issued on military warrant, under Virginia law, is *prima facie* evidence that every prerequisite of law was complied with, p. 151.

Cited and principle applied, *Bagnell v. Broderick*, 13 Pet. 448, 10 L. 241, holding in action at law the patent is conclusive; *People v. Mauran*, 5 Den. 398, patent is *prima facie* evidence that all things preliminary have been complied with.

**Evidence.**—A public officer may prove that, according to invariable practice of his office, certain official entries made could only have been made upon the production of a written instrument, the existence of which is now the subject of dispute, p. 153.

Rule applied in *State v. Mayor*, 52 Md. 422, holding such proof sufficient to show that vouchers once existed, on which it is shown payments were made.

**Presumptions.**—An assignment of a land warrant may be presumed from surrounding circumstances, p. 156.

Cited in *McArthur v. Gallaher*, 8 Ohio, 518, as containing discussion of general subject. Cited without particular application, *Stark v. Smith*, 5 Ohio, 457.



**Evidence.**—When patent is issued on assignment of warrant, which is lost, same proof of its existence is not required as if part of title, p. 156.

Cited in *Edgell v. Conaway*, 24 W. Va. 754, in determining evidence necessary to show loss or destruction of a document, before secondary evidence of its contents is admissible.

Miscellaneous.—Cited in *Brush v. Ware*, 15 Pet. 107, 10 L. 678, and *Kittridge v. Breaud*, 4 Rob. (La.) 83, 39 Am. Dec. 516, to effect that patent under Virginia law conveys legal title, but leaves equities open. Cited, *Doe v. Eslava*, 9 How. 447, 13 L. 210, not in point.

7 Wheat. 158-163, 5 L. 423, *WATTS v. LINDSEY'S HEIRS*.

**Equity.**—It is a rule of equity, as well as of law, that party must recover on strength of his own title, and not on weakness of adversary's, p. 161.

Rule reaffirmed, *Hogan v. Kurtz*, 94 U. S. 775, 24 L. 319, action of ejectment; *Lake Superior Co. v. Cunningham*, 44 Fed. 832, where defendant in ejectment attacked plaintiff's title; *Lingan v. Henderson*, 1 Bland Ch. 249, and if facts stated in bill are not sufficient, complaint cannot resort to extraneous matter to supply defect; *Grand Gulf Ry. Co. v. Bryan*, 8 Smedes & M. 265, and where plaintiff relies on equitable title he must show perfect equitable title; *Huntington v. Allen*, 44 Miss. 662, and *Griffin v. Harrison*, 52 Miss. 826, in action to quiet title.

**Public lands.**—Valid entry must be such that objects called for are so described, or so notorious, that others, by using reasonable diligence, can readily find them, p. 161.

Rule cited with approval, *McNeel v. Herold*, 11 Gratt. 314, 316.

**Evidence.**—One witness cannot prove existence of fact by notoriety or general reputation, pp. 162, 163.

Cited in note, 18 Am. Rep. 207, to this point.

7 Wheat. 164-211, 5 L. 425, *MATTHEWS v. ZANE*.

**Public lands.**—No sale of public land can take place in absence of a receiver, p. 205.

Cited with approval, *Groom v. Hill*, 9 Mo. 325 (322), holding unavailing an application to register and deposit of money with him in absence of receiver.

**Appeal and error.**—In error to State court alleging a decision against a title claimed under Federal law, Supreme Court can examine only that title, not other equities creating new title, p. 206.

Cited, *arguendo*, *Magwire v. Tyler*, 47 Mo. 126.

**Statutory construction.**—A statute, for commencement of which no time is fixed, is operative from its date, p. 211.

The following citing cases affirm and apply this rule: *Lapeyre v. United States*, 17 Wall 198, 21 L. 608, holding act took effect from time it was officially attested by president of United States; *United States v. Chong Sam*, 47 Fed. 883, is to same effect; *Salmon v. Burgess*, 1 Hughes, 359, F. C. 12,262, and date is reckoned from hour president's signature was affixed; *Seymour v. State*, 51 Ala. 54, to act licensing peddlers; *McGinnis v. Egbert*, 8 Colo. 51, 5 Pac. 658, to act fixing time for commencement of annual period for unpatented claims; *Smets v. Thomas*, Charl. (Ga.) 537, and *Heard v. Heard*, 8 Ga. 384, to statute regulating procedure; *Coal Co. v. Barber*, 47 Kan. 30, 27 Pac. 115, holding where statute affects an act done on same day statute went into effect, the exact hour of publication may be shown; *Commonwealth v. Brooks*, 109 Mass. 357, applying rule to city ordinance; *Ex parte De Hay*, 3 S. C. 565, to act changing bounds of judicial district. Cited, *arguendo*, *Taylor v. Brown*, 147 U. S. 643, 37 L. 314, 13 S. Ct. 551, in determining from what date time should be computed in construing act forbidding alienation of lands by Indians for period of five years; *In re Ankrim*, 3 McLean, 285, F. C. 395, where question was raised whether petition for discharge in bankruptcy filed on day bankruptcy act was repealed was effectual. Cited generally, *United States v. Collier*, 3 Blatchf. 339, F. C. 14,833, in discussion of effect of later acts on prior, with which it is inconsistent; *The Hiawatha*, Blatchf. Pr. Cas. 5, F. C. 6,451, without particular application. *Approved without application*, *Parkinson v. State*, 14 Md. 200, 74 Am. Dec. 533. Cited, *Leschi v. Washington*, 1 Wash. Ter. 17, application not clear.

Distinguished, *Martin v. Berry*, 37 Cal. 218, and *Temple v. Hayes*, Morris, 10, on ground that time was fixed by act. Modified, *Parkinson v. Brandenburg*, 35 Minn. 295, 59 Am. Rep. 326, 28 N. W. 919, holding, in computing time when statute went into effect, day of its passage is to be excluded.

**Miscellaneous.**—Cited generally, *Warren Co. v. Insurance Co.*, 2 Paine. 517, F. C. 17,206, as to effect of retroactive statutes; *Lewis v. Lewis*, 9 Mo. 190 (189), 43 Am. Dec. 546, as to jurisdiction of State courts regarding pre-emption of public lands. Note, 91 Am. Dec. 197, as to judgment of State courts reviewable by United States Supreme Court.

7 Wheat. 212-218, 5 L. 437, **HOOFNAGLE v. ANDERSON.**

**Public lands.**—Patent cures any defects in preliminary steps required by law as conditions precedent to issuance of, p. 214.

Cited and rule applied, *Spencer v. Lapsley*, 20 How. 272, 15 L. 906, where irregularities were alleged as to the survey; dissenting



opinion, *Doolan v. Carr*, 125 U. S. 636, 31 L. 851, 8 S. Ct. 1237, the majority holding want of power in officer of land office to issue patent may be shown in action at law by extrinsic evidence; *Noble v. Union River R. R. Co.*, 147 U. S. 175, 37 L. 127, 13 S. Ct. 274, holding conclusive the decision of secretary of interior, in exercise of his power, that designated railway company is entitled to right of way over public land; *Janes v. Wilkinson*, 2 Kan. App. 369, 42 Pac. 738, holding patent erroneously issued, while voidable by government, cannot be attacked by naked possessor of land; *Bruckner v. Lawrence*, 1 Doug. 33, where question was raised as to mistakes in survey on which patent was based; *Hammond v. St. Louis Schools*, 8 Mo. 83, where principle is applied to claim of title confirmed by congress; *Thomas v. White*, 2 Ohio St. 549, where entry and survey was irregular; *White v. Allen*, 3 Or. 111, holding objections to mode of proofs and other preliminary steps are of no force after issuance of patent; *Todd v. Fisher*, 26 Tex. 242, to patent issued for State lands by commissioner of land office; *Horsky v. Moran*, 53 Pac. 1067, holding town-site patent could not be collaterally attacked by holder of placer claim who had not perfected his title. Cited generally, *St. Louis Smelting Co. v. Green*, 4 McCrary, 235, 13 Fed. 210, as authority for rule, in action of ejectment patent cannot be attacked collaterally; *Silver Bow Co. v. Clark*, 5 Mont. 425, 5 Pac. 582, in discussion of effect of rulings of land department where it has acted beyond its jurisdiction.

Distinguished, *Chamberlain v. Marshall*, 8 Fed. 409, where patent was issued without authority of law; also, *Lake Superior Canal Co. v. Cunningham*, 44 Fed. 839, following view of majority in *Doolan v. Carr*, *supra*; *Mantle v. Noyes*, 5 Mont. 294, 5 Pac. 864, where patent was issued for lands which had previously been sold.

**Public lands.**—Equity will never sustain an entry as against an earlier patent, for the patent appropriates the land it covers and it is no longer subject to location and the government alone can attack a patent for irregularity, p. 215.

Cited to this point, dissenting opinion, *Doolan v. Carr*, 125 U. S. 636, 31 L. 851, 8 S. Ct. 1237, majority permitting evidence of want of authority in land office agent to issue patent; *Horsky v. Moran*, 53 Pac. 1067, holding town site patent not attackable collaterally by holder of placer claim who had not perfected his title.

**Public lands.**—Equity considers entry as the commencement of title, pp. 215, 217.

Cited and applied in *Parker v. Wallace*, 3 Ohio, 494, holding, rights acquired by senior entry will be aided in equity against elder patent on junior entry; *Price v. Johnston*, 1 Ohio St. 392, entry made in name of deceased person is void; *Stubblefield v. Boggs*, 2 Ohio St. 218, holding, by entry, an equitable estate of inheritance vests in person in whose name entry is made. Cited generally, *Tal-*

bott v. King, 6 Mont. 108, 9 Pac. 442, as authority for rule that patent is given operation by relation at date of initiatory step.

**Public lands.**— Patent is title from its date, and is conclusive against all those whose rights did not commence previous to its emanation, p. 217.

Cited and explained, *Stringer v. Young*, 3 Pct. 341, 7 L. 700, but apparently no application; *United States v. Arredondo*, 6 Pet. 732, 8 L. 562, application not clear. Cited generally, *Smelting Co. v. Kemp*, 104 U. S. 645, 26 L. 878, holding patent duly executed for lands which land department was authorized to convey, cannot be collaterally impeached in action at law; *Porter v. Robb*, 7 Ohio, 210, and *Decourt v. Sproul*, 66 Tex. 372, 1 S. W. 339, after patent is issued land is no longer unappropriated. Cited in discussion, *M'Clung v. Hughes*, 5 Rand. 471, as to when equity will afford relief against fraud in acquiring legal title.

Distinguished, *Stephens v. M'Cargo*, 9 Wheat. 510, 511, 6 L. 147, 148, and *Lindsey v. Miller*, 6 Pet. 677, 8 L. 542, where rights arose prior to issuance of patent; *Brush v. Ware*, 15 Pet. 106, 10 L. 677, where equitable right arose prior to issuance of patent, and patentee had notice thereof.

Miscellaneous.— Cited, *Galloway v. Finley*, 12 Pet. 298, 9 L. 1093, not in point; *Nisewanger v. Wallace*, 16 Ohio, 559, to what point not clear; *Kimmell v. Wheeler*, 22 Tex. 85, as to nature of right given holder of certificate permitting him to locate certain public lands.

7 Wheat. 218-248, 5 L. 438, *BROWN v. JACKSON*.

**Spanish land claims.**— Decision of commissioners under act of congress, providing indemnity to claimants to public lands, are conclusive between parties in cases within jurisdiction of commissioners, p. 244.

Cited and principle applied, *McConnell v. Wilcox*, 1 Scam. 351, and *Smiley v. Sampson*, 1 Neb. 70, to decision of register and receiver of land office. Cited generally, *Bruckner v. Lawrence*, 1 Doug. (Mich.) 37, as to conclusiveness of patent as evidence of title.

Miscellaneous.— Cited, *Sanford v. Cloud*, 17 Fla. 569, not in point.

7 Wheat. 248-283, 5 L. 446, *BLUNT v. SMITH*.

**Practice.**— Decision of court below, granting or refusing new trial, is not reviewable on writ of error, p. 272.

Cited and approved, *Pomeroy v. Bank*, 1 Wall. 598, 17 L. 640, "no exception lies to overruling motion for new trial;" *Ewing v. Howard*, 7 Wall. 502, 19 L. 295, motion is addressed to discretion of trial court. Cited as authority for like rule in State Supreme Court, *State v. Hunt*, 4 La. Ann. 439; also, *State v. Brette*, 6 La. Ann. 660; *Law v. Merrills*, 6 Wend. 278, and *Smith v. United States*, 1 Wash. Ter. 274. Cited generally, *Stafford v. Walker*, 12 Serg. & R. 196, in discussion of bill of exceptions.



Modified in *Welch v. County*, 29 W. Va. 68, 1 S. E. 340, holding rule, that matters of discretion are not subject to review, only applies to matters which are purely discretionary. Distinguished in *Goldsby v. Robertson*, 1 Blackf. 22, holding like rule does not obtain in State Supreme Court.

**Evidence.**—Official copies of papers belonging to the title of the parties taken from office where regularly kept, and duly authenticated, are admissible in evidence, p. 273.

**Ejectment.**—In Tennessee, courts of law permit parties in ejectment to go back to original entry, and connect the patent with it, p. 273.

Cited as an exception to general rule, *Arnold v. Grimes*, 2 G. Greene, 84.

Miscellaneous.—Cited generally, in note to *GrosLouis v. Northcut*, 3 Or. 399, application not clear.

7 Wheat. 283-355, 5 L. 454, THE SANTISSIMA TRINIDAD.

**International law.**—In general, the commission of a public ship is conclusive proof of her national character, not examinable by a foreign court, p. 336.

Principle applied in *State v. Crawford*, 28 Fla. 492, 10 So. 124, 14 L. R. A. 259, holding public seal proves itself.

Distinguished, *United States v. Bartlett*, 2 Ware (Dav.), 16, F. C. 14,532, holding opposite party is not concluded from proving falsity or illegality of ship's papers.

**International law.**—The political department having recognized the belligerency of Buenos Ayres in its struggle for independence from Spain, the judiciary is bound thereby, p. 137.

Cited and principle applied, *United States v. One Hundred Barrels*, 27 Fed. Cas. 293, holding the political department alone has power to decide the status of a State, or its inhabitants, as to a condition of hostility against the Federal government; *United States v. One Thousand Bales*, 27 Fed. Cas. 328, to same effect; *Thornburg v. Harris*, 3 Cold. 169, in determining whether a de facto government existed in the Confederate States.

Cited in general discussion, dissenting opinion, *Luther v. Borden*, 7 How. 57, 12 L. 605. Cited generally, as authority for rule, *United States v. Tropic Wind*, 28 Fed. Cas. 221. Cited, arguendo, *Mosely v. Tuthill*, 45 Ala. 650, 6 Am. Rep. 716; *Perkins v. Rogers*, 35 Ind. 156, 9 Am. Rep. 664, status of a country as to peace or war is determined by the political and not the judicial department of government. Cited, arguendo, *Wright v. Overall*, 2 Cold. 341.

**International law.**—Declaration by one government of determination to remain neutral between parties engaged in war, is equivalent

to recognizing them as belligerent nations, and entitles each to all the sovereign rights of war against the other, p. 337.

Cited and applied in *Prize Cases*, 2 Black, 669, 17 L. 477, to action of Great Britain with reference to civil war in United States; *Ford v. Surget*, 97 U. S. 613, 24 L. 1024, and it is not necessary that the independence of the revolting nation be recognized; *Dole v. Insurance Co.*, 2 Cliff. 427, F. C. 3,966, in determining whether crews of ships of one belligerent nation should be considered pirates; *Schooner Chapman*, 4 Sawy. 512, F. C. 2,602, holding a vessel representing Confederate States government cannot be considered as fitted out for the commission of acts of piracy; *Martin v. Hortin*, 1 Bush, 632, and *Smith v. Brazelton*, 1 Heisk. 58, 64, 2 Am. Rep. 684, 688, where principle is applied in determining whether Confederates were entitled to right of belligerents. Cited, *Miller v. United States*, 11 Wall. 307, 20 L. 145, without particular application; *Williams v. Bruffy*, 96 U. S. 190, 24 L. 720, in discussion of rights of belligerents. Cited generally, *The Hiawatha*, Blatchf. Pr. 10, F. C. 6,451, as to rights, in regard to neutral powers, of government engaged in war to subdue insurrection of its own subjects. Cited in *The Ambrose Light*, 25 Fed. 429, as to necessity of recognition by some established government, before insurgents are entitled to rights of belligerents; dissenting opinion, *Price v. Poynter*, 1 Bush, 391, the majority holding the capture of horses for use of Confederate army by branch of army was a lawful exercise of belligerent rights; note, 91 Am. Dec. 280.

**Evidence.**—Where a witness falsifies a fact, in respect to which he cannot be presumed liable to mistake, courts are bound to apply maxim, falsus in uno, falsus in omnibus, p. 339.

Cited with approval, *American Telephone Co. v. Peoples' Co.*, 22 Blatchf. 552, 22 Fed. 324, where witness testified falsely as to his pecuniary condition; *Campbell v. State*, 3 Kan. 498, holding refusal to instruct jury to this effect is error; *Gillet v. Wimer*, 23 Mo. 79, whenever testimony calls for such instruction, the court ought to give it; *Paulette v. Brown*, 40 Mo. 57, is to same effect; *Dell v. Oppenheimer*, 9 Neb. 457, 4 N. W. 53, where witness testified falsely as to rate of interest charged on loan made by him; *Stoffer v. State*, 15 Ohio St. 56, 86 Am. Dec. 477, holding, under such circumstances, court should instruct jury to reject entire testimony of witness so testifying. Approved generally, *Skipper v. State*, 59 Ga. 65; *Callanan v. Shaw*, 24 Iowa, 447, but maxim is applied only where witness willfully and knowingly gives false testimony; to same effect, *Deering v. Metcalf*, 74 N. Y. 506, where authorities are collected. Cited without particular application, *People v. Chapleau*, 121 N. Y. 276, 24 N. E. 472. See note, 81 Am. Dec. 270.

Modified, *Moore v. Jones*, 13 Ala. 304, application of rule should be made by jury; *Lehman v. Marshall*, 47 Ala. 377, province of determining credibility of a witness rests with jury; *State v. Williams*,



2 Jones (N. C.), 268, in common-law trial maxim is to be applied by jury, and is not rule by which judge may withdraw testimony from their consideration; to same effect, *Mead v. McGraw*, 19 Ohio St. 64. Cited, *State v. Sexton*, 10 S. Dak. 131, but held that maxim is inapplicable in absence of any motive or intent to deceive. Distinguished, *Buffalo County v. Van Sickle*, 16 Neb. 368, 20 N. W. 263, on ground that false statement of witness was not knowingly and willfully false; also in *Pease v. Smith*, 61 N. Y. 484, on same ground.

**International law.**—The sending of armed vessels, or of munitions of war, from a neutral country to a belligerent port, is not contrary to the law of the United States, nor to the law of nations, p. 340.

Cited with approval, in *The City of Mexico*, 24 Fed. 41, the sending of munitions of war from neutral port to port of belligerent is a commercial enterprise and is not a violation of neutrality laws; *The Carondelet*, 37 Fed. 802, to same effect; dissenting opinion, *Hart v. United States*, 84 Fed. 805, 55 U. S. App. 498, the majority holding one who furnished transportation for military expedition against Spanish government in Cuba, violated neutrality laws. Approved, *The Laurada*, 85 Fed. 769, collecting authorities. Cited, without particular application, *Briggs v. Light Boats*, 11 Allen, 185.

Denied, *The Meteor*, 17 Fed. Cas. 198, where it is stated the above rule was mere dictum. See *The Itata*, 56 Fed. 509, 15 U. S. App. 1, construing revised statutes, section 5283, abrogating the rule of the principal case.

**International law.**—Augmentation of force by belligerent in port of United States is breach of our neutrality, p. 344.

**Citizenship.**—Quære, whether citizen of United States, independent of legislation, can throw off his allegiance, p. 347.

Cited generally, *Shanks v. Dupont*, 3 Pet. 267, 7 L. 675, merely stating question is not decided; *Comitis v. Parkerson*, 56 Fed. 558, 22 L. R. A. 150, 151, and n., in discussion of general subject; *Beavers v. Smith*, 11 Ala. 29, where the question is again left open.

**Prize.**—Augmentation of force or illegal outfit, in neutral country, infects captures subsequently made during same cruise with character of torts and requires restitution to parties interested, p. 348.

**Prize.**—Captures by public ships as well as privateers, if made in violation of our neutrality, are subject to restitution, p. 350.

**International law.**—The exemption of the public property of one sovereign from local jurisdiction of another rests upon principles of public comity and convenience, and may be withdrawn on notice at any time, p. 353.

Cited, *Walley v. Schooner Liberty*, 12 La. 101, 32 Am. Dec. 115, application not clear.

Distinguished, *Oyster Steamers*, 31 Fed. 766, no considerations of comity between State and Federal governments shall prevent latter from enforcing laws of congress.

**International law.**—Exemption of foreign ships coming into our waters under license from local jurisdiction, does not extend to their prizes captured in violation of our neutrality, p. 354.

**Miscellaneous.**—Cited in *The Siren*, 7 Wall. 161, 19 L. 133, for what point is not clear; *Ford v. Surget*, 97 U. S. 611, 24 L. 1023, as to right of belligerent nation to establish blockade; *The Florida*, 101 U. S. 42, 25 L. 899, as involving a discussion of the rights of neutrals; *In re Fassett*, 142 U. S. 485, 35 L. 1089, 12 S. Ct. 298, and *The Pizarro*, 19 Fed. Cas. 788, as to jurisdiction of District Court in cases of marine tort. Cited, *Amy Warwick*, 2 Sprague, 133, F. C. 341, not in point; *The S. L. Davis*, 6 Blatchf. 139, F. C. 12,939, as containing discussion of principles of admiralty law; *United States v. One Hundred Packages*, 27 Fed. Cas. 286, not in point; *Ingersoll v. Campbell*, 46 Ala. 286, as to right of government to blockade its own ports. Erroneously cited, *Hill v. Boyland*, 40 Miss. 630.

7 Wheat. 356-452, 5 L. 472, *EVANS v. EATON*.

**Evidence.**—A person having an interest only in the question, and not in the event of the suit, is a competent witness, p. 425.

Principle applied in *Berk v. Norton*, 2 McLean, 425, F. C. 1,659, holding consignee of goods, who has delivered them over without payment of freight, is a competent witness in a suit by the master of the vessel against the owner of the goods; *Fuller v. Rounceville*, 31 N. H. 518, holding in action of trespass *de bonis*, the mortgagee is a competent witness for defendant; *Runey v. Thompson*, 1 Pinn. 507, in action of replevin if defendant pleads property in third person, such person is competent witness to sustain the plea.

**Depositions**, to be evidence in United States courts, must be taken according to laws of United States and rules of their courts, p. 426.

Cited in discussion of use of depositions as evidence, *Bowman v. Sanborn*, 25 N. H. 103.

**Appeal and error.**—Where appeal is taken on ground of error in charge to jury, the appellate court will examine the substance of the charge only, p. 427.

Rule applied, *Phoenix Ins. Co. v. Raddin*, 120 U. S. 193, 30 L. 648, 7 S. Ct. 504, bill of exceptions should contain only matter of law excepted to; *Oliver v. Phelps*, 20 N. J. L. 184, 195, 199, where plaintiff spread whole charge on record, and then assigned seventeen errors on different causes, all this without having called attention of court below to supposed errors. Referred to in *Carver v. Jackson*, 4 Pet. 81, 7 L. 789, where court disapproves of practice of



spreading the charge in extenso on record; *Bradstreet v. Bradstreet*, 64 Me. 210, and *Harriman v. Sanger*, 67 Me. 445, condemning practice of reporting whole charge in bill of exceptions; *Burt v. Insurance Co.*, 115 Mass. 16, bill of exceptions should set forth only the points of law raised at the trial; *Nutting v. Herbert*, 37 N. H. 355, application not clear. Approved generally, *Gibbs v. Cannon*, 9 S. & R. 202, 11 Am. Dec. 702; *Stafford v. Walker*, 12 S. & R. 196.

**Patent law.**—If same combination existed before in machines of the same nature up to a certain point, and party's invention consists in adding some new machinery, or some improved mode of operation to the old, the patent should be limited to such improvement, p. 431.

Cited generally, *Whitney v. Emmett*, 1 Bald. 312, 314, F. C. 17,585, as to distinction between patent on machine and patent on improvement. See note, 31 Am. Dec. 205.

**Patent law.**—If patent include more than patentee's invention it cannot be supported, p. 431.

Cited and principle followed in *Wyeth v. Stone*, 1 Story, 286, F. C. 18,107, where patentee claimed exclusive title to art of cutting ice by means of any power other than human; *Hovey v. Stevens*, 3 Wood. & M. 23, F. C. 6,746, where specifications did not state clearly what part of machine was new invention; *Stanley, etc., Co. v. Davis*, 22 Fed. Cas. 1054, rejecting patent claim because too broad and not definitely distinguishable.

**Patent law.**—An application for a patent must contain specifications of the invention in full, clear and distinct terms, so as to distinguish the same from all other things before known, p. 434.

Principle approved, *Hogg v. Emerson*, 6 How. 485, 12 L. 525, but where patent is sought for improvement to machine, applicant need not describe particularly and disclaim all the old parts; *Brooks v. Jenkins*, 3 McLean, 444, F. C. 1,953, where from specifications no one could tell what had been invented; *Webster Loom Co. v. Higgins*, 15 Blatchf. 455, F. C. 17,342, where patent was held invalid because of insufficiency of specifications; *Cross v. Huntly*, 13 Wend. 386, 387, holding, where patent does not describe improvement, so that it may be known in what improvement consists, the defect may be taken advantage of in action on note given for right to vend such improvement. Cited generally, *Brooks v. Fiske*, 15 How. 215, 14 L. 667, as to reason for rule. Approved without particular application, *Sawyer v. Miller*, 4 Woods, 474, 12 Fed. 727.

**Miscellaneous.**—Referred to generally in *Evans v. Hettich*, 7 Wheat. 468, 469, 470, 5 L. 500, an action for infringement of same

patent. Cited erroneously, *Garrard v. Reynolds*, 4 How. 127, 11 L. 905; also, *Smith v. Kernochen*, 7 How. 219, 12 L. 675, and *Green v. Neal*, 6 Pet. 297, 8 L. 405. Cited generally as bearing on questions in patent law, *Whitney v. Emmett*, 1 Bald. 315, 321, 322, F. C. 17,585. Cited, *Blanchard v. Sprague*, 2 Story, 171; S. C., 3 Sumn. 541, F. C. 1,518, as to constitutionality of grants of patents by congress. Cited erroneously, *In re Josephine*, 39 N. Y. 27.

7 Wheat. 453-470, 5 L. 496, *EVANS v. HETTICH*.

**Evidence.**—It is no objection to the competency of a witness in a patent cause that he is sued in another action for infringement of same patent, p. 468.

**Evidence.**—Where a deposition has once been read in evidence without opposition, it cannot be afterwards objected to as being irregularly taken, p. 470.

Cited and principle applied, *Locke v. Farley*, 41 Mich. 407, 1 N. W. 957, where irregular affidavit was introduced without objection; *Williams v. Thomas*, 3 N. Mex. 395, 9 Pac. 358, objection to evidence cannot be made for first time in appellate court. Approved, *arguendo*, *Indianapolis Water Co. v. American Co.*, 65 Fed. 536.

**Witnesses.**—Fact that witness is subject to fits of derangement is no objection either to his competency or credibility, if sane when giving the testimony, p. 470.

Cited and principle applied, *Campbell v. State*, 23 Ala. 74, where court excluded from jury such evidence; *Bell v. Rinner*, 16 Ohio St. 49, the credibility of a competent witness cannot be impeached by testimony of other witnesses that such witness is not possessed of ordinary intelligence; *Coleman v. Commonwealth*, 25 Gratt. 876, 18 Am. Rep. 713, fact that principal witness for State was deranged a few days prior and shortly subsequent to trial, is not sufficient ground for granting new trial. Approved generally, *State v. Hayward*, 62 Minn. 493, 65 N. W. 68, where distinction between insanity as a direct issue and as a collateral issue noted. Note, 28 Am. St. Rep. 942, 943.

Distinguished, *Holcomb v. Holcomb*, 28 Conn. 180, where evidence was introduced to show witness was insane at time transaction occurred about which he testified; *White v. State*, 52 Miss. 223, where witness was examined to ascertain whether he was compos mentis.

**Miscellaneous.**—Cited generally, *Whitney v. Emmett*, 1 Bald. 315, F. C. 17,585, as to extent of description required of article for which patent is sought; *Blanchard v. Sprague*, 2 Story, 171; 3 Sumn. 541, F. C. 1,518, as to power of congress to grant a patent.



## 7 Wheat. 471-489, 5 L. 501, THE GRAN PARA.

**Admiralty.**— Prizes made by armed vessels which have violated the statutes for preserving the neutrality of the United States, will be restored if brought into our ports, p. 486.

Cited to this point but without particular application of the rule in *The Elmira*, 16 Fed. 137.

**International law.**— Vessel manned and armed in United States port and sailing thence to belligerent port, with intent to cruise thence as privateer of another country, violates our neutrality laws, p. 488.

**Miscellaneous.**— Cited, *The Gran Para*, 10 Wheat. 498, 6 L. 375, another hearing in same cause. Erroneously cited, *Pelton v. Platner*, 13 Ohio, 217, 42 Am. Dec. 199, and *United States v. Cement*, 27 Fed. Cas. 297. Cited, *The Meteor*, 17 Fed. Cas. 199, for view of Supreme Court as to what constitutes a commercial adventure.

## 7 Wheat. 490-495, 5 L. 505, THE SANTA MARIA.

**Admiralty.**— Restitution will be required where captures are made in violation of neutrality laws, p. 495.

Cited generally, *The Schooner Tilton*, 5 Maçon, 471, F. C. 14,054, in discussion of jurisdiction and power of courts of admiralty.

## 7 Wheat. 496-519, 5 L. 507, THE ARROGANTE BARCELONES.

**Admiralty.**— Supreme Court will restore to former owners property captured in violation of neutrality laws where it is claimed by original wrongdoer, though it may have come back to his possession after regular condemnation as prize, p. 519.

Not cited.

## 7 Wheat. 520-522, 5 L. 513, THE MONTE ALLEGRE.

**Prize.**— When captures have been made in violation of our neutrality, restitution will be decreed, p. 521.

Cited, *The Monte Allegre*, 9 Wheat. 641, 6 L. 180, for fact that restitution in this case had been decreed.

## 7 Wheat. 522-529, 5 L. 513, CROCKET v. LEE.

**Equity pleading.**— The decree must conform to the allegations as well as the proofs, p. 525.

Cited and followed in *Land v. Cowan*, 19 Ala. 300, where remainderman complained of trespass on tenant for life without showing injury to his remainder; *Trapnall v. Byrd*, 22 Ark. 17, where decree was set aside because allegations did not sustain same; *St. Andrews Bay Co. v. Campbell*, 5 Fla. 565, where proof sustained decree but allegations did not; *Phelan v. Phelan*, 12 Fla.

453, where bill did not set forth *prima facie* cause for divorce; *Hyer v. Caro*, 17 Fla. 354, holding decree too broad which allowed complainant for sums which vessel might have earned, when prayer in bill asked only for account of "sums earned;" *West v. McCarthy*, 4 Blackf. 246, reversing decree founded on a finding of fraud when none was alleged in bill; *Potomac Mfg. Co. v. Evans*, 84 Va. 722, 6 S. E. 4, holding decree erroneous which ordered sale of trust property, when pleading showed suit was barred. Cited, *arguendo*, *Livingston v. Hayes*, 43 Mich. 134, 5 N. W. 82, and *Miller v. Finn*, 1 Neb. 296, and complainant cannot go to answer for facts he did not place in issue. Cited with approval, *Hawthorn v. Smith*, 3 Nev. 192, but holding, where complaint omits material allegations but these are admitted in answer, the answer will be held to aid complaint and sustain action. See note, 93 Am. Dec. 403.

**Pleading.**—Evidence will not be admitted to prove facts not put in issue by pleadings, p. 527.

Cited and rule applied, *Baker v. Nachtrieb*, 19 How. 130, 15 L. 531, holding a receipt and settlement will be held conclusive when validity of same is not impeached in pleading; *Jones v. Morehead*, 1 Wall. 165, 17 L. 664, where court refused evidence to disprove fact, which fact was not denied in answer; *Bradley v. Converse*, 4 Cliff. 373, F. C. 1,775, holding relief cannot be granted for matters not charged; *Conway v. Ellison*, 14 Ark. 363, where complainant sought to introduce evidence to show fraud, not having alleged same; *Robson v. Harwell*, 6 Ga. 599, recovery cannot be had on ground of fraud where fraud is not distinctly alleged in bill; *Helm v. Cantrell*, 59 Ill. 530, where evidence of admissions to show ratification was denied, when bill did not show such evidence would be relied on; *Singleton v. Scott*, 11 Iowa, 596, in case such evidence is admitted it should not be considered by the court even if there be no objection; *Le Baron v. Shepherd*, 21 Mich. 275, refusing evidence to show excuse for nonperformance of a condition, when no excuse was alleged; *Ferguson v. Ferguson*, 2 N. Y. 361, 362, holding facts tending to show breach of a condition happening subsequent to filing of suit are not admissible, and counsel may presume court will not consider such evidence; *Kelsey v. Western*, 2 N. Y. 506, applying principle to defendant's answer; *Wren v. Moncure*, 95 Va. 375, 28 S. E. 590, fraudulent representations not relied on in pleadings cannot be set up in evidence. Approved, *Wiggins Ferry Co. v. O. & M. Ry. Co.*, 142 U. S. 413, 35 L. 1062, 12 S. Ct. 193, but in case equitable claim is shown, the Supreme Court may remand case for amendment of pleadings; *McKinley v. Irvine*, 13 Ala. 694, in general citation. Approved, *Hauf v. Whittington*, 42 Ark. 494, without particular application; also, *Patton v. McClure*, Mart. & Y. 352.

Criticised in *Bradley Co. v. Eagle Co.*, 58 Fed. 721, 18 U. S. App.



455, so far as it permits this objection to be taken for first time in appellate court.

Miscellaneous.—Erroneously cited, *Willison v. Watkins*, 3 Pet. 54, 7 L. 600; *Burdsall v. Waggoner*, 4 Colo. 259.

7 Wheat. 530-533, 5 L. 515, *MACKER v. THOMAS*.

**Abatement.**—In real actions, death of ancestor before appearing abates suit, p. 531.

Cited as common-law rule, *Gould v. Carr*, 33 Fla. 537, 15 So. 264, 24 L. R. A. 136, and *Hoffman v. St. Clair*, 40 Mich. 352, where it is applied.

Modified in *Warren v. Furstenheim*, 35 Fed. 695, 1 L. R. A. 42, Federal courts will be governed by local law on subject. Distinguished, *Mellus v. Thompson*, 1 Cliff. 129, F. C. 9,405, on account of difference between rules in law and in equity.

**Trial.**—Exceptions to rulings of court are necessary when the error would not otherwise appear on the record, p. 532.

Approved, *Dunbar v. Hollinshead*, 10 Wis. 507, holding exceptions unnecessary to review proceedings on appeal from an order; *Dorman v. Richards*, 1 Fla. 296, and rule applied.

**Appeal and error.**—If, in real action, ancestor die before appearing and heirs are made parties by order and allow default to be taken, they may sue out writ of error and reverse judgment, p. 532.

7 Wheat. 534, 535, 5 L. 516, *COLUMBIA INS. CO. v. WHEEL-RIGHT*.

**Appeal and error.**—Writ of error lies from Supreme Court upon judgment of Circuit Court for District of Columbia, awarding peremptory mandamus, p. 535.

Cited and principle applied in *United States v. Addison*, 22 How. 184, 16 L. 306, to judgment of ouster from office; *Muhlenberg v. Dyer*, 65 Fed. 635, 31 U. S. App. 109, holding such judgment can be reviewed in Circuit Court of Appeals only on writ of error and not by appeal. Cited in *Holmes v. Jennison*, 14 Pet. 565, 566, 10 L. 592; *Decatur v. Paulding*, 14 Pet. 607, 10 L. 614, as to jurisdiction to issue writ to review decision of State court in habeas corpus proceedings. Cited, *arguendo*, *United States v. Insurance Co.*, 2 Cr. C. C. 273, F. C. 14,840; in dissenting opinion, *Hammond v. People*, 32 Ill. 465, majority holding writ of error did not lie at common law to review judgment awarding or denying peremptory mandamus. Approved, dissenting opinion, *Kendall v. United States*, 12 Pet. 640, 641, 9 L. 1227, but holding this judgment cannot be considered as authority for holding Circuit Court had jurisdiction to issue mandamus; *contra*, majority opinion p. 618, 9 L. 1218; note, 83 Am. Dec. 292.

Miscellaneous.—Cited in *Smith v. Whitney*, 116 U. S. 173, 29 L. 603, 6 S. Ct. 573; *South Carolina v. Seymour*, 153 U. S. 357, 358, 38 L. 744, 14 S. Ct. 873, and *Smith v. Adams*, 130 U. S. 176, 32 L. 898,

9 S. Ct. 569, as to amount in dispute necessary to give Supreme Court jurisdiction. Cited generally, *Dryden v. Swinburn*, 15 W. Va. 249, as to mode of ascertaining value of a salaried office.

7 Wheat. 535-551, 5 L. 516, *BLIGHT'S LESSEE v. ROCHESTER*.

**Aliens.**—British subjects born before, as well as after, the Revolution are incapable of inheriting or transmitting the inheritance of lands in this country, p. 544.

Cited as authority for holding aliens cannot take by descent, *Montgomery v. Dorion*, 7 N. H. 480. Rule applied, *Orser v. Hoag*, 3 Hill, 85, similar case. Cited, *arguendo*, *Inglis v. Snug Harbor*, 3 Pet. 122, 7 L. 626, and *Orser v. Hoag*, 3 Hill, 82, as to who are citizens and who aliens. Cited generally, *Pollard v. Kibbe*, 14 Pet. 413, 10 L. 519, apparently not in point; *Crane v. Reeder*, 21 Mich. 73, 4 Am. Rep. 441, as to power of aliens to inherit or transmit by inheritance.

**Aliens.**—Where a British subject came into the United States, subsequent to the treaty of 1783, and died, seized of land, before the treaty of 1794 went into effect, the title of his heirs was not protected by those treaties, p. 544.

Cited, *arguendo*, in construction of treaty of 1794, *Crane v. Reeder*, 21 Mich. 66, 4 Am. Rep. 438, and *Williams v. Wilson*, Mart. & Y. 253, 254.

Distinguished, *Brown v. Sprague*, 5 Den. 549, 550, where British subject came into the country and acquired land prior to treaty of 1783, and died in 1789.

Citizenship under some circumstances may be presumed, p. 546.

Cited approvingly, *Boyd v. Thayer*, 143 U. S. 181, 36 L. 116, 12 S. Ct. 389, holding jury may infer naturalization from evidence that person has necessary qualifications to become a citizen and has for a long time exercised the right of citizenship. Cited in *Dryden v. Swinburn*, 20 W. Va. 121, 125, where authorities are reviewed, holding citizenship will not be presumed when the records of the only court by which he could be adjudged a citizen show that he has not been so admitted.

**Presumptions.**—In favor of long possession, and strong apparent equity, much may be presumed, p. 546.

Cited and applied in *Sessions v. Reynolds*, 7 Smedes & M. 159, holding where release of title was thirty-five years old it will be presumed it was operative at time of its execution.

**Landlord and tenant.**—Lessee cannot deny his lessor's title, p. 547.

Cited and rule applied, *Rector v. Gibbon*, 111 U. S. 284, 28 L. 430, 4 S. Ct. 608, where assignee of lessee sought to deny lessor's title;



Hackett v. Marmet Co., 52 Fed. 273, 8 U. S. App. 149, the facts showing the relation of landlord and tenant existed; Ramires v. Kent Bartell, 2 Cal. 560, where tenant in action for rent denied landlord's title; McLean v. Spratt, 20 Fla. 518, where, in action for unlawful detainer, tenant attacked his landlord's title; Funk v. Kincaid, 5 Md. 409, where, in action of ejectment, brought by grantee of reversion, defendant attempted to deny right of his lessor to make lease; Outtoun v. Dulin, 72 Md. 539, 20 Atl. 135, lessee cannot defeat action for rent by showing lessor did not have title to all ground described in lease; Hagar v. Wilkoff, 2 Okl. 584, 588, 39 Pac. 282, 283, person who goes into possession of town lot on public lands as tenant of one who has improved lot by erecting a building thereon, will not be heard to assert a claim adverse to his landlord; Whaley v. Whaley, 1 Spears L. 232, 40 Am. Dec. 595, applying rule to tenant by sufferance; Greeno v. Munson, 9 Vt. 39, 31 Am. Dec. 606, applying principle to one entering into possession under contract to purchase, also, to same effect, Ripley v. Yale, 19 Vt. 163. Cited, arguendo, Bishop v. Gibbon, 158 U. S. 170, 39 L. 937, 15 S. Ct. 785. Cited generally, Bowman v. Wathen, 2 McLean, 399, F. C. 1,740, as to what denial by trustee of title of cestui que trust puts statute of limitations in operation; Hanford v. Fitch, 41 Conn. 501, as bearing on question as to what acts by tenant are sufficient to warrant jury in finding a surrender of the tenancy to the landlord and an ouster afterwards. Cited generally, Duke v. Harper, 6 Yerg. 285, 27 Am. Dec. 464, in discussion of what acts by tenant constitute ouster of landlord.

Distinguished, Willison v. Watkins, 3 Pet. 47, 7 L. 598, and Tillotson v. Kennedy, 5 Ala. 410, 39 Am. Dec. 331, if possession of tenant becomes adverse to landlord for period of statute of limitations, he may then deny landlord's title; Merrick v. Hutt, 15 Ark. 342, where one against whom rule was invoked was held not to occupy the position of a tenant; Wiggin v. Wiggin, 58 N. H. 237, where tenant had accepted lease under entire misapprehension of its purport.

**Vendor and vendee.**—Vendee of property has the right to fortify his title by the purchase of any other which may protect him in the quiet enjoyment of the premises, p. 548.

Cited and principle applied in Converse v. Ringer, 6 Tex. Civ. App. 59, 24 S. W. 708, holding one in possession without title may strengthen his title by buying in a tax title without abandoning his advantage from possession under statute of limitations. Affirmed in Neher v. Armijo, 54 Pac. 240, sustaining title of grantee of certain tenants in common against the other cotenant after lapse of statutory time.

**Vendor and vendee.**—A vendor has no continuing interest in the maintenance of his title, unless he be called on in consequence of some covenant or warranty in his deed, p. 548.

Cited without particular application, *Jones v. Madison County*, 72 Miss. 808, 18 So. 94. Quoted on this point, *arguendo*, in *Neher v. Armijo*, 54 Pac. 240.

**Estoppel.**—Vendee is not estopped from denying his vendor's title, especially when former did not receive possession from latter, p. 550.

Principle applied in *Society for Propagation, etc. v. Pawlet*, 4 Pet. 507, 7 L. 936, vendee derives title from vendor, but such title, although derivative, is adverse; *Bradstreet v. Huntington*, 5 Pet. 439, 8 L. 184, where vendee of tenant in common set up title to whole; *Hughes v. Clarksville*, 6 Pct. 384, 8 L. 436, where defendant was in possession under an agreement which was intended as a conveyance of title; *Boone v. Chiles*, 10 Pet. 224, 225, 226, 9 L. 405, 406, where plaintiff, vendor, sought to violate contract of purchase and eject vendee; *Clymer v. Dawkins*, 3 How. 690, 11 L. 786, where vendee of tenant in common claimed entire estate and possessed it in entirety for period of statute of limitations; *Robertson v. Pickrell*, 109 U. S. 614, 27 L. 1051, 3 S. Ct. 411, where defendant holding under deed of a life estate was not estopped from setting up a superior title; *Bybee v. O. & C. Ry. Co.*, 139 U. S. 682, 35 L. 309, 11 S. Ct. 645 (affirming S. C., 11 Sawy. 486, 26 Fed. 591), holding grantee, who had entered into deed under misapprehension of his legal rights, is not estopped from denying his grantors' title; *Elder v. McClaskey*, 70 Fed. 547, 37 U. S. App. 1, where vendee forfeited his title by purchase of pretended titles derived from his remote grantor; *San Francisco v. Lawton*, 18 Cal. 476, 79 Am. Dec. 191, holding, after execution of conveyance the grantee holds the property for himself, and there is no relation existing between him and grantor; *Wenzel v. Schultz*, 100 Cal. 255, 34 Pac. 698, and *Robinson v. Thornton*, 102 Cal. 683, 34 Pac. 122, grantee in fee may treat his grantor as an utter stranger to the title; *Green v. Dietrich*, 114 Ill. 643, 3 N. E. 803, where vendee having purchased outstanding superior title denied that of vendor; *King v. Carmichael*, 136 Ind. 27, 43 Am. St. Rep. 308, 35 N. E. 512, affirming that vendee's title is adverse to that of vendor, and collecting authorities; *Fox v. Widgery*, 4 Me. 218, holding, if disseizor takes release from disseizee of all his interest, no relations arise between them; *Sands v. Davis*, 40 Mich. 19, no tenurial relations exist between grantee of tenant in common who claimed in severalty, and other tenants; *Macklot v. Dubreuil*, 9 Mo. 484, 43 Am. Dec. 553, where vendee denied vendor's title and established his by adverse possession; *Vasquez v. Ewing*, 24 Mo. 39, 66 Am. Dec. 697, cotenant in possession is not estopped from denying title of his cotenant, when he came into possession through deed from another cotenant against whom he held judgment for possession; *Price v. Johnson*, 1 Ohio St. 399, purchaser under void decree for sale of lands in the Virginia military district, is not estopped from averring that the entry and survey are void; *Coakley v. Perry*, 3 Ohio St. 346, and



Gardner v. Green, 5 R. I. 110, and Whitmire v. Wright, 22 S. C. 452, 53 Am. Rep. 728, holding, in case of petition for dower, grantee of husband is not estopped; Hill v. Robertson, 1 Strob. 2, 3, vendee may produce any evidence of independent title; State v. Pacific Guano Co., 22 S. C. 81, applying rule where State is grantor; Moore v. Smead, 89 Wis. 565, where grantee showed his grantor's title had been divested by transfer to another; Neher v. Armijo, 54 Pac. 240, sustaining title of grantee of certain tenants in common against the remaining tenants in common, on ground of adverse possession. Cited without particular application in Willison v. Watkins, 3 Pet. 50, 7 L. 599. Approved in Watkins v. Holman, 16 Pet. 54, 10 L. 885, application not clear. Cited, arguendo, Zeller v. Eckert, 4 How. 296, 11 L. 982. Cited in Croxall v. Shererd, 5 Wall. 287, 18 L. 579, where defendant was bona fide purchaser from lessee, the case holding such a purchaser holds adversely to the whole world. Approved without particular application in Merryman v. Bourne, 9 Wall. 600, 19 L. 686. Cited, Grosholz v. Newman, 21 Wall. 488, 22 L. 472, as authority for holding the grantee of a grantee is not estopped from showing original grantor's deed, because his grantor had accepted mortgage on property from original grantor subsequent to acceptance of deed from same party. Cited to general subject without particular application, Flagg v. Mann, 2 Sumn. 545, F. C. 4,847, and, A. T. & S. F. Co. v. Starkweather, 21 Kan. 328. Cited in Ward v. Cochran, 71 Fed. 131, 36 U. S. App. 307, as authority for holding vendee in possession under parol contract of sale holds adversely to his vendor. Cited, arguendo, dissenting opinion, Stafford v. Watson, 41 Ark. 34, 36. Referred to in discussion, Logan v. Steel, 7 T. B. Mon. 104, 105, and in Casey v. Inloes, 1 Gill, 495, 39 Am. Dec. 671, as containing able exposition of doctrine. Cited, Warren v. Bowdran, 156 Mass. 284, 31 N. E. 302, as authority for holding person in possession, claiming ownership, may purchase outstanding title from third person, without impairing his own title by adverse possession; Morgan v. Lodge, 53 Miss. 677, as to right of defendant in ejectment to set up title in third person, when he and plaintiff claim title from common source; People v. Van Rensselaer, 9 N. Y. 343, and Trustees v. Jennings, 40 S. C. 183, 42 Am. St. Rep. 868, 18 S. E. 263, without particular application. Cited, arguendo, Rhett v. Jenkins, 25 S. C. 458; Gray v. Darby, Mart. & Y. 423; Ray v. Goodman, 1 Sneed, 592. Approved without particular application, Lawton v. Howe, 14 Wis. 247. See note, 22 Ind. 520.

Distinguished, Jackson v. Chew, 12 Wheat. 168, 6 L. 589, and McDonald v. Hannah, 59 Fed. 979, 15 U. S. App. 348, as not bearing on question for which cited; Burnett v. Caldwell, 9 Wall. 293, 19 L. 713, and Pyles v. Reeve, 4 Rich. L. 559, where vendee violated contract under which he obtained possession. In Mayor v. Hopkins, 13 La. 330, it is doubted whether doctrine will apply in contract of sale. Modification suggested, Ward v. McIntosh, 12 Ohio St. 239,

where grantee receives possession from grantor and relies on his grant for title for such possession; *Clark v. McClure*, 10 Gratt. 311, where vendee enters under executory contract which leaves title where it was, this case reviews authorities.

Miscellaneous.—Cited in *Moore v. Green*, 2 Chrt. 210, F. C. 9,763, not in point; *Dalles v. Missionary Society*, 6 Sawy. 145, 6 Fed. 374, and *Green v. Gill*, 47 Mich. 87, 10 N. W. 119, for what point is not clear. Erroneously cited, *Unger v. Mooney*, 63 Cal. 593, 49 Am. Rep. 105, and *Macklot v. Dubreuil*, 9 Mo. 491, 43 Am. Dec. 560. Cited, *Jones v. Porter*, 3 Penr. & W. 135, and *Brown v. Storm*, 4 Vt. 44, not in point; *McCnsker v. McEvey*, 10 R. I. 610, as to origin of doctrine of estoppel; dissenting opinion, *Ellege v. Cooke*, 5 Lea, 639, as to nature of possession of purchaser by title bond.

7 Wheat. 551-552, 5 L. 520, THE IRRESISTIBLE.

Statutes.—An offense against a temporary act cannot be punished after the expiration of the act, unless a particular provision be made by law for the purpose; held, that provision made in this case was not effective for that purpose, p. 552.

Cited and principle followed in *Assessors v. Osborn*, 9 Wall. 575, 19 L. 751, holding, where jurisdiction is conferred by statute, suits brought during the existence of the statute fall with its repeal; *Moore v. United States*, 85 Fed. 468, 56 U. S. App. 477, holding no prosecution could be had under law applying only to territories after territory has been admitted as a State, unless so provided by statute; dissenting opinion, *Jones v. State*, 1 Iowa, 402, holding the repealing act contained a proviso applying to offenses committed under the act; *Thayer v. Seavey*, 11 Me. 287, where principle is applied in case of repeal of statute; *Engle v. Shurts*, 1 Mich. 151, where statute imposing penalty for taking usurious interest was repealed before bill was filed in action under; *Peddle v. Hollinshead*, 9 Serg. & R. 283, where certain privileges as to stay of execution were affected; *Commonwealth v. Standard Oil Co.*, 191 Pa. St. 150, to action to enforce penalties; *Kenyon v. State*, 31 Tex. Cr. 14, 23 S. W. 191, holding, where party was convicted under statute repealed pending appeal, the prosecution should be dismissed.

7 Wheat. 553-556, 5 L. 553, HOLBROOK v. UNION BANK.

Corporations.—Construction of charter of local corporation.

No citations.

7 Wheat. 556-581, 5 L. 522, MARBURY v. BROOKS.

Fraudulent conveyances.—A debtor may prefer one creditor to another, p. 577.

Cited and principle applied, *Tompkins v. Wheeler*, 16 Pet. 118, where debtor made assignment in favor of certain creditors;



Huntley v. Kingman, 152 U. S. 532, 38 L. 542, 14 S. Ct. 690. and this may be done although fund for payment of other creditors be lessened; Ashby v. Steere, 2 Wood. & M. 357, F. C. 576, where debtor made conveyance several months before he went into bankruptcy; Gassett v. Wilson, 3 Fla. 260, where debtor after proceedings had been instituted against him by certain creditors made assignment of his property to certain other creditors in satisfaction of his debts to them; Thornton v. Davenport, 1 Scam. 298, 29 Am. Dec. 360, where debtor on day certain creditors obtained judgment against him, gave mortgage to other creditors; State of Maryland v. Bank of Md., 6 Gill & J. 219, 26 Am. Dec. 564, applying rule to assignment by corporation to trustee for benefit of creditors; McGuinnay v. Hitchcock, 8 Tex. 35, conveyance to preferred creditor. Cited without particular application, Emerson v. Senter, 118 U. S. 10, 30 L. 51, 6 S. Ct. 984; Halsey v. Whitney, 4 Mason, 213, F. C. 5,964, as common-law rule; Robinson v. Rapelye, 2 Stew. 100, as to right of debtor to control his property unrestrained; note, 1 Ind. 412. Cited, arguendo, dissenting opinion, Bank of Commerce v. Payne, 86 Ky. 479, 481, 8 S. W. 868, 869. Approved in general discussion of subject, McCall v. Hinkley, 4 Gill, 157, no particular application. Cited generally, Hollister v. Loud, 2 Mich. 313, as to effect on grant of fraudulent intent in grantor where grant is to bona fide purchaser without notice. Approved without application, Nevitt v. Bank, 6 Smedes & M. 579; note, 26 Am. Dec. 584.

Distinguished, Robins v. Embry, 1 Smedes & M. Ch. 258, 259, holding a banking corporation cannot make an assignment in favor of particular creditors to exclusion of others.

**Fraudulent conveyance.**—Where debtor makes conveyance to part of his creditors only, any unlawful consideration moving from preferred creditors avoids conveyance, p. 577.

Principle applied in Cleveland v. La Crosse Ry. Co., 5 Fed. Cas. 1035, where corporation conveyed to two of its directors.

**Fraudulent conveyance.**—It is no objection to the validity of a conveyance in trust for certain creditors that it was made by grantor with the hope and expectation that it would prevent a prosecution for felony connected with his transaction with his creditors, p. 578.

Cited and principle followed, School District v. Alderson, 6 Dak. Ter. 153, 41 N. W. 468, where it was sought by parol to invalidate a written agreement on ground of its having been made to compound a felony; Billings v. Parsons, 53 Pac. 732, sustaining an assignment for creditors assuming it made with intent to defeat a threatened attachment; Jones v. Cullen, 100 Tenn. 19, 42 S. W. 877, sustaining an assignment alleged to have been made to prevent prosecution for embezzlement.

**Consideration.**—An existing debt is good consideration for a conveyance from debtor to creditor, p. 578.

Principle applied in *Halsey v. Whitney*, 4 Mason, 215, 216, 217, F. C. 5,964, and *United States v. Bank of U. S.*, 8 Rob. (La.) 405, where debtor had made assignment of his property in trust for benefit of creditors. Cited without particular application, *Bank of U. S. v. Huth*, 4 B. Mon. 435.

**Conveyance for benefit of creditors.**—It is not necessary creditor should have notice of execution of deed, provided he afterwards assents, p. 579.

Principle applied, *Houston v. Nowland*, 7 Gill & J. 492, where conveyance was made to trustee for benefit of creditors; *Ingram v. Kirkpatrick*, 6 Ired. Eq. 473, 475, 51 Am. Dec. 434, 436, holding, where conveyance is made in trust for payment of debts and trustee accepts same, the relation of trustee and cestui que trust is established in favor of creditors, except as to those who do not assent; *Milling Co. v. Eaton*, 86 Tex. 406, 25 S. W. 615, 24 L. R. A. 381, by statute, a general assignment is valid without assent of creditors; *Skipwith v. Cunningham*, 8 Leigh, 286, 31 Am. Dec. 650, where creditor assented subsequently to the rendering of judgment against grantor in favor of other creditors; dissenting opinion, *Oakley v. Hibbard*, 1 Pinn. 681, the majority holding an assignment for benefit of creditors made by one not in failing circumstances, may be revoked after assignee has partly executed his trust, as to such creditors as had no notice of assignment. Cited in *Robinson v. Rapelye*, 2 Stew. 99, as to trustee being agent of assignor, and same case, p. 103, as to when assent of creditors will be presumed; *State of Md. v. Bank of Md.*, 6 Gill & J. 230, 26 Am. Dec. 573, without particular application.

Distinguished, *Townsend v. Harwell*, 18 Ala. 305, holding there is no presumption of assent by creditors where conveyance is made with intent on part of debtor to delay, hinder and defraud creditors; *Tompkins v. Bamberger*, 3 Lea, 580, where creditors knew nothing of conveyance until four years after it happened, and in meantime other creditors had acquired lien on property by legal proceedings.

**Trusts.**—Should trustee for creditors refuse to act, court of chancery may compel him or appoint another in his stead, p. 580.

Cited, with approval, in *Robinson v. Rapelye*, 2 Stew. 98, and *Dewoody v. Hubbard*, 1 Stew. & P. 11, where conveyance had been made to trustee for benefit of creditors; *Sutton v. Simon*, 91 Tex. 641, 45 S. W. 560, sustaining an innocent creditor's rights under a fraudulent assignment.

**Miscellaneous.**—Referred to in *Brooks v. Marbury*, 11 Wheat. 85, 6 L. 425, the same case on second appeal. Cited erroneously, *Adams v. Blodgett*, 2 Wood. & M. 238, F. C. 46. Cited, *arguendo*,



Ex parte Conway, 4 Ark. 351, as to power of debtor to make assignment to trustee for benefit of creditors. Cited, Mayhew v. Graham, 4 Gill, 361, and Brown v. Bonner, 8 Leigh, 7, 31 Am. Dec. 639, not in point. Cited generally, Cunningham v. Ward, 30 W. Va. 579, 5 S. E. 650, as to property bought with partnership funds but conveyed to partners as individuals being liable for partnership debts.

7 Wheat. 591-615, 5 L. 528, DORR v. PACIFIC INS. CO.

**Marine insurance.**—Certificate of survey is not legal evidence, because examination of surveyors themselves would be better, p. 611.

Cited in The Dawn, 1 Ware, 491, F. C. 3,665, as bearing on question whether report of surveyors is ever admissible as evidence.

**Marine insurance.**—Contract of, construed with reference to meaning of expression "regular survey" used therein, p. 612.

Cited generally, Potter v. Ocean Ins. Co., 3 Sumn. 42, 43, F. C. 11,334, as bearing on question who has jurisdiction to order survey in foreign port.

**Marine insurance.**—Under policy containing the following clause: "It is agreed that if the vessel, upon a regular survey, shall be declared unseaworthy, then the assurers shall not be bound to pay their subscription on policy," proof by regular survey of unsoundness at any subsequent period of voyage discharged underwriters, p. 615.

Cited in Griswold v. Insurance Co., 3 Cow. 118, as authority for holding a survey as set out in plea was good bar to action. Referred to in Janney v. Columbia Ins. Co., 10 Wheat. 416, 6 L. 355, no particular application.

Distinguished on ground question of construction was not raised at trial, Insurance Co. v. Mordecai, 22 How. 117, 16 L. 332.







# REPORTS

OF

## CASES

ARGUED AND ADJUDGED IN

THE

Supreme Court of the United States,

IN FEBRUARY TERM, 1823.

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BY HENRY WHEATON,

Counselor at law.

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VOL. VIII.





JUDGES  
OF THE  
SUPREME COURT OF THE UNITED STATES,  
DURING THE TIME OF THESE REPORTS.

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The Hon. JOHN MARSHALL, *Chief Justice.*  
The Hon. BUSHROD WASHINGTON, *Associate Justice.*  
The Hon. WILLIAM JOHNSON, *Associate Justice.*  
The Hon. BROCKHOLST LIVINGSTON, *Associate Justice.*  
The Hon. THOMAS TODD, *Associate Justice.*  
The Hon. GABRIEL DUVAL, *Associate Justice.*  
The Hon. JOSEPH STORY, *Associate Justice.*  
WILLIAM WIRT, Esq., *Attorney-General.*





## MEMORANDUM.

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On the 18th of March, a few days after the close of the present term, died the Honorable Broekholst Livingston, an Associate Justice of this court, in the sixty-sixth year of his age. He was appointed in 1806, being at that time a Judge of the Supreme Court of New York, and having before occupied an eminent rank at the bar of that state. He had served his country with distinguished military reputation during the war of the revolution, and subsequently filled several important civil stations at home and abroad. He was an accomplished classical scholar, and versed in the elegant languages and literature of the southern nations of Europe. At the bar he was an ingenious and learned advocate, fruitful in invention, and possessing a brilliant and persuasive elocution. On the bench, his candor and modesty were no less

distinguished than his learning, acuteness and discrimination. His genius and taste had directed his principal attention to the maritime and commercial law; and his extensive experience gave to his judgments in that branch of jurisprudence a peculiar value, which was enhanced by the gravity and beauty of his judicial eloquence. In private life, he was beloved for his amiable manners and general kindness of disposition, and admired for all those qualities which constitute the finished gentleman. He died with the deep regret of all who knew him; leaving behind him the character of an upright, enlightened and humane judge, a patriotic citizen, and a bright ornament of the profession. *Isque et oratorum in numero est habendus, et fuit reliquis rebus ornatus, atque elegans.*

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## RULE OF COURT.

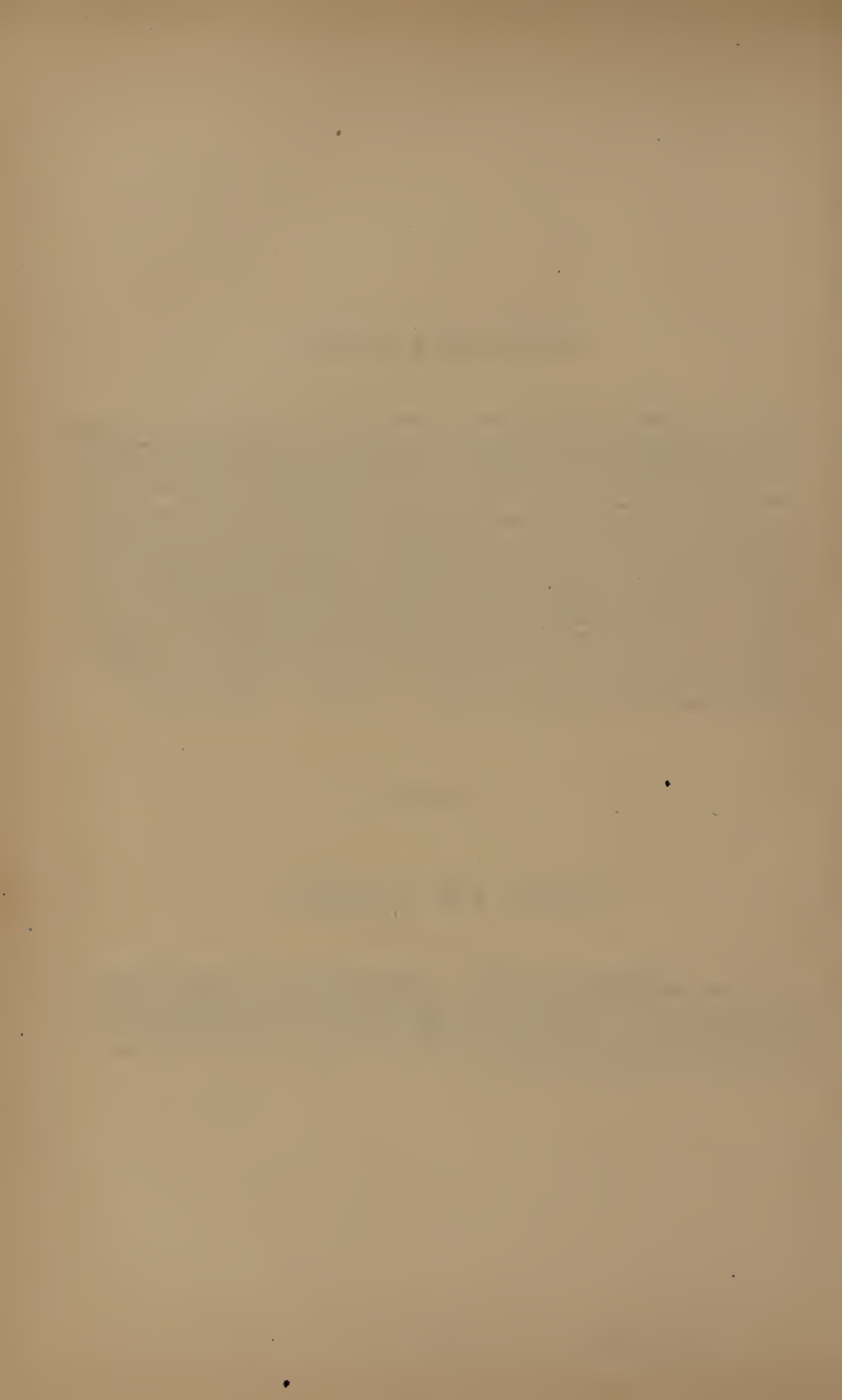
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### FEBRUARY TERM, 1823.

No cause will hereafter be heard until a complete record shall be filed, containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court.

MEMORANDUM.—Mr. Justice Todd was absent, from indisposition, during the whole of this term; and Mr. Justice Livingston was absent, from the same cause, from Monday, the 24th of February, until the end of the term.





# REPORTS OF THE DECISIONS

OF THE

## Supreme Court of the United States.

FEBRUARY TERM, 1823.

1\*] [\*CONSTITUTIONAL LAW.]

GREEN ET AL. v. BIDDLE.

The act of the state of Kentucky, of the 27th of February, 1797, concerning occupying claimants of land, whilst it was in force, was repugnant to the constitution of the United States, but it was repealed by a subsequent act of the 31st of January, 1812, to amend the said act; and the last-mentioned act is also repugnant to the constitution of the United States, as being in violation of the compact between the states of Virginia and Kentucky, contained in the act of the legislature of Virginia, of the 18th of December, 1789, and incorporated into the constitution of Kentucky.

By the common law, the statute law of Virginia, the principles of equity, and the civil law, the claimant of lands who succeeds in his suit is entitled to an account of mesne profits, received by the occupant from some period prior to the judgment of eviction, or decree.

At common law, whoever takes and holds possession of land to which another has a better title, whether he be a *bonæ fidei* or a *malæ fidei* possessor, is liable to the true owner for all the rents and profits which he has received; but the disseisor, if he be a *bonæ fidei* occupant, may recoup the value of the meliorations made by him against the claim of damages.

2\*] \*Equity allows an account of rents and profits in all cases, from the time of the title accrued (provided it does not exceed six years), unless under special circumstances, as where the defendant had no notice of the plaintiff's title, nor had the deeds in which the plaintiff's title appeared in his custody, or where there has been laches in the plaintiff in not asserting his title, or where his title appeared by deeds in a stranger's custody; in all which, and other similar cases, the account is confined to the time of filing the bill.

By the civil law, the exemption of the occupant from an account for rents and profits is strictly confined to the case of a *bonæ fidei* possessor, who not only supposes himself to be the true owner of the land, but who is ignorant that his title is contested

by some other person claiming a better right. And such a possessor is entitled only to the fruits or profits which were produced by his own industry, and not even to those, unless they were consumed.

Distinctions between these rules of the civil and common law, and of the court of chancery, and the provisions of the acts of Kentucky, concerning occupying claimants of land.

The invalidity of a state law, as impairing the obligation of contracts, does not depend upon the extent of the change which the law effects in the contract.

Any deviation from its terms, by postponing or accelerating the period of its performance, imposing conditions not expressed in the contract, or dispensing with the performance of those which are expressed, however minute or apparently immaterial in their effect upon the contract, impairs its obligation.

The compact of 1789, between Virginia and Kentucky, was valid under that provision of the constitution which declares that "no state shall, without the consent of Congress, enter into any agreement or compact with another state, or with a foreign power"—no particular mode, in which that consent must be given, having been prescribed by the constitution; and Congress having consented to the admission of Kentucky into the Union, as a sovereign state, upon the conditions mentioned in the compact.

The compact is not invalid upon the ground of its surrendering rights of sovereignty, which are unalienable.

This court has authority to declare a state law unconstitutional, upon the ground of its impairing the obligation of a compact between different states of the Union.

The prohibition of the constitution embraces all contracts, executed or executory, between private individuals, or a state and individuals, or corporations, or between the states themselves.

THIS was a writ of right, brought in the Circuit \*Court of Kentucky, by the de- [\*3 mandants, Green and others, who were the heirs of John Green, deceased, against the tenant

NOTE.—*Mesne Profits*.—The plaintiff can recover mesne profits, in the nature of damages, only from the time of the ouster laid in the complaint in ejectment. *Hylton v. Brown*, 2 Wash. C. C. 165.

May be recovered of the landlord who is in possession by his tenant, and who aids in withholding possession, or actually defends, though he does not appear on the record as defendant. *Chirac v. Reinicker*, 11 Wheat. 280; *Hunter v. Britts*, 3 Camp. N. P. R. 455.

Defendant may set-off the value of his improvements. But they should be first deducted from the profits received before the date of the demise alleged. *Hylton v. Brown*, 2 Wash. C. C. 165.

Where, after a recovery at law from a *bona fide* possessor for a valuable consideration without notice, plaintiff seeks to recover the rents and profits, the defendant will be allowed to deduct therefrom for beneficial improvements made by him on the estate and recoup them from the rents and profits.

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*Krause v. Means*, 12 Kansas, 335; 1 Sawy. 15; *Bright v. Boyd*, 1 Story, C. C. 478; *Coulter's case*, 5 Coke, 30; *Jackson v. Loomis*, 4 Cow. 108; *Millingham v. Long*, 47 Ga. 540.

The confession of entry by the defendant in ejectment is sufficient to enable plaintiff to recover; *aliter*, when the judgment in ejectment was recovered by default. Then there must be proof that defendant has had possession. *Lessee of Brown v. Galloway*, 1 Pet. C. C. 291; *Stewart v. Railroad Co.*, 33 N. J. L. 115.

In ejectment plaintiff may recover mesne profits, if he has previously notified defendant of his intention to proceed for them, and thus prevented any surprise. *Lessee of Batten v. Bigelow*, 1 Pet. C. C. 452. In the statutory action of ejectment in Pennsylvania, mesne profits may be recovered. *Dawson v. McGill*, 4 Wheat. 230.

The legal right of action for mesne profits, which accrued during the pendency of the action, is lost



Richard Biddle, to recover certain lands in the state of Kentucky, in his possession. The cause was brought before this court upon a division of opinion of the judges of the court below, on the following questions:

1. Whether the acts of the legislature of the state of Kentucky, of the 27th of February, 1797, and of the 31st of January, 1812, concerning occupying claimants of land, are constitutional or not; the demandants and the tenant both claiming title to the land in controversy under patents from the state of Virginia, prior to the erection of the District of Kentucky into a state.

2. Whether the question of improvements ought to be settled under the above act of 1797, the suit having been brought before the passage of the act of 1812, although judgment for the demandant was not rendered until after the passage of the last-mentioned act.

The ground upon which the unconstitutionality of the above acts was asserted, was, that they impaired the obligation of the compact between the states of Virginia and Kentucky, contained in an act of the legislature of the former state, passed the 18th of December, 1789, which declares "that all private rights and interests of lands within the said district" (of Kentucky) "derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state." This compact was 4\*] \*ratified by the convention which framed the constitution of Kentucky, and incorporated into that constitution as one of its fundamental articles.

The most material provisions in the act of 1797, which were supposed to impair the obligation of the compact of 1789, and therefore void, are the following:

1. It provides that the occupant of land, from which he is evicted by better title, shall, in all cases, be excused from the payment of rents and profits accrued prior to actual notice of the adverse title, provided his possession in its inception was peaceable, and he shows a plain and connected title, in law or equity, deduced from some record.

2. That the successful claimant is liable to a judgment against him for all valuable and last-

ing improvements made on the land prior to actual notice of the adverse title, after deducting from the amount the damages which the land has sustained by waste or deterioration of the soil by cultivation.

3. As to improvements made, and rents and profits accrued, after notice of the adverse title, the amount of the one shall be deducted from that of the other, and the balance added to, or subtracted from, the estimated value of the improvements made before such notice, as the nature of the case may require. But it is provided, by a subsequent clause, that in no case shall the successful claimant be obliged to pay for improvements made after notice, more than what is equal to the rents and profits.

4. If the improvements exceed the value of the \*land in its unimproved state, the [\*5 claimant shall be allowed the privilege of conveying the land to the occupant, and receiving in return the assessed value of it without the improvements, and thus to protect himself against a judgment and execution for the value of the improvements. If he declines doing this, he shall recover possession of his land, but shall then pay the estimated value of the improvements, and also lose the rents and profits accrued before notice of the claim. But to entitle him to claim the value of the land as above mentioned, he must give bond and security to warrant the title.

The act of 1812 contains the following provisions:

1. That the peaceable occupant of land, who supposes it to belong to him in virtue of some legal or equitable title founded on a record, shall be paid by the successful claimant for his improvements.

2. That the claimant may avoid the payment of the value of such improvements, at his election, by relinquishing the land to the occupant, and be paid its estimated value in its unimproved state.

Thus, if the claimant elect to pay for the value of the improvements, he is to give bond and security to pay the same, with interest, at different installments. If he fail to do this, or if the value of the improvements exceeds three-fourths of the unimproved land, an election is given to the occupant to have a judgment entered against the claimant for the assessed value

by the defendant's death after the recovery in ejectment had, and the action will not lie against his personal representatives. Although such legal right of action for the mesne profits, which accrued during the pendency of an action of ejectment, survives, where plaintiff dies after recovery had in the action, and the action for them is properly brought in the name of his heir at common law. *Mears v. Pres. Church*, 3 Penn. 93; *Harper v. Whittaker*, 5 Watts, 474; *Bard v. Nevin*, 9 Watts, 328.

Defendant who quits the premises during suit is not liable for mesne profits afterwards accrued. *Mitchell v. Findley*, 10 Penn. 198.

After judgment in ejectment plaintiff can only recover for what accrued within six years before the commencement of the action; for those accruing previously the statute of limitations is a bar. *Hill v. Meyers*, 46 Penn. 15.

The common law action for mesne profits may be brought in Maryland; and although the action cannot be brought before a recovery in ejectment, it may be brought pending a writ of error, but execution therefor will be stayed until the writ of error is determined. *Mitchell v. Mitchell*, 1 Md. 59; see *Mitchell v. Mitchell*, 10 Md. 234.

In Kentucky, by the Civil Code, sec. 111, the plaintiff may unite claims for the recovery of real property, "and the rents, profits, and damages for withholding the same;" and if a claim for rents issues, and profits be set up in the action for the recovery of the land, it is a bar to a separate suit for the rents. *Walker v. Mitchell*, 18 B. Mon. 541.

In North Carolina the record of recovery in ejectment is conclusive evidence of title at the date of the demise in an action for the mesne profits, but not evidence that defendant's possession commenced before the action of ejectment was commenced, but is conclusive of his possession at commencement of the ejectment, and *prima facie* evidence that his possession continued till the judgment and execution. *Poston v. Jones*, 2 Dev. & Batt. L. R. 294. See *Doe v. Roe*, 30 Ga. 553.

A judgment in ejectment is conclusive against the defendant, his landlord or tenant, claiming under him, for all profits since the date of the demise stated in the declaration in ejectment; and the right to mesne profits is a necessary consequence of a recovery in ejectment. *Doe v. Whitcomb*, 8 Bing. 46; *City of Apalachicola v. Ap. L. Co.*, 9 Fla. 340; *Doe v. Harlow*, 12 Ad. & Ell. 42; *Shipley v. Alexander*, 3 Har. & J. 84; 1 Barb. 158; 11 Ired. 301;

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of the improvements, or to take the land, giving bond and security to \*pay the value of the land, if unimproved, by installments, with interest.

But if the claimant is not willing to pay for the improvements, and they should exceed three-fourths of the value of the unimproved land, the occupant is obliged to give bond and security to pay the assessed value of the land, with interest; which if he fail to do, judgment is to be entered against him for such value, the claimant releasing his right to the land, and giving bond and security to warrant the title.

If the value of the improvements does not exceed three-fourths of the value of the unimproved land, then the occupant is not bound (as he is in the former case) to give bond and security to pay the value of the land; but he may claim a judgment for the value of his improvements, or take the land, giving bond and security, as before mentioned, to pay the estimated value of the land.

3. The exemption of the occupant from the payment of the rents and profits, extends to all such as accrued during his occupancy before judgment rendered against him in the first instance; but such as accrue after such judgment, for a term not exceeding five years, as also waste and damage committed by the occupant after suit brought, are to be deducted from the value of the improvements, or the court may render judgment for them against the occupant.

4. The amount of such rents and profits, damages and waste, and also the value of the improvements, and of the land without the improvements, \*are to be ascertained by commissioners to be appointed by the court, and who act under oath.

The cause was argued at February term, 1821, by *Mr. Talbot* and *Mr. B. Hardin* for the demandants, no counsel appearing for the tenant.

They contended that the acts of the state legislature in question were inconsistent with the true meaning and spirit of the compact of 1789, their avowed scope and object being to change the existing condition of the parties litigant, respecting the security of private rights and interests of land, within the territory of Ken-

tucky, derived from the laws of Virginia prior to the separation. These acts do not merely attempt to alter the mode of prosecuting remedies for the recovery of rights and interests thus derived (which possibly they might do), but essentially affect the right and interest in the land recovered. They seek to accomplish this by diminishing or destroying the value of the interest in controversy, by compelling the successful claimant and rightful owner of the land to pay the one-half, and in some instances the entire value of the land recovered; not the actual value of the amelioration of the land while held by the occupying claimant, but the expense and labor of making the improvements.

Both the acts are framed in the same spirit and with the same object; both are adapted to change the relative condition of the parties, to the great prejudice of the rightful owner. The principal object in view in the act of 1797 was to exempt the occupant from his liability for waste committed by him, or rents and profits received by him, prior \*to the commence- [\*8 ment of the suit for the land, although he may, when he first took possession, have had full notice of the plaintiff's title, and consequently be a *malæ fidei* possessor. The act of 1812, purporting to be in amendment of the former act, with the avowed purpose of still further protecting the interests of the occupant, completely exempts him from all liability for waste committed, or for rents and profits received, before the judgment or decree in the suit. In no possible case can the right owner recover more than five years' rent, although the litigation may, and frequently does, last a much longer period, whilst he is subjected to the payment for all improvements made at any period of the suit, down to the time of final judgment, to be set-off against the amount of his claim for rents and profits, abridged and limited as it is by this act.

The object of the compact was plainly to secure to all persons deriving titles under the then existing laws of Virginia, the entire and perpetual enjoyment of their rights of property against any future legislative acts of the state of Kentucky, which it was foreseen might be passed under the influence of local feelings and interests. The compact did not merely intend

*Jackson v. Stone*, 13 John. 447; *Lamson v. Ross*, 65 N. Y. 411.

The action for mesne profits cannot be maintained until there is a recovery of the land by the plaintiff in ejectment, and as a general rule the right to the mesne profits follows such recovery. *Burton v. Austin*, 4 Vt. 105; *Smith v. Benson*, 9 Vt. 138; *Baron v. Abeel*, 3 John. 481; *Van Allen v. Rogers*, 1 John. Cas. 281; *Holmes v. Davis*, 19 N. Y. 488; *S. C.* 21 Barb. 265; *Benson v. Blathford*, 2 John. 369; *Trabue v. Kellar*, 3 A. K. Marsh. 517; *Goodtitle v. Tombs*, 3 Wils. 118; *Bennit v. Bullock*, 35 Penn. 367; *Haven v. Adams*, 8 Allen, 368; *Jackson v. Peer*, 4 Cow. 147; *Dewey v. Osborn*, 4 Cow. 329; *Aslin v. Parkins*, 2 Burr. 665; *Denn v. Chubb*, Cox, 466; *Jackson v. Stone*, 13 John. 447; *West v. Hughes*, 1 Har. & J. 574; *Chamier v. Lignon*, 5 Maule & S. 64; 2 Chit. 410; *Holdfast v. Shepard*, 9 Ired. 222; *Benson v. Matsdorf*, 2 John. 369; *Jackson v. Randall*, 11 John. 405; *Whittington v. Christian*, 2 Rand. 353; *Poston v. Jones*, 2 Dev. & Batt. 294.

A tenant in common may recover his proportionate part of mesne profits after recovery in ejectment. *Clark v. Huber*, 20 Cal. 196; *Goodtitle v. Tombs*, 3 Wils. 118; *Cutting v. Derby*, 2 Wm. Black. 1077; *Camp v. Homesley*, 11 Ired. 211; *Langeudyeck Wheat*. 8.

*v. Burbans*, 11 John. 461; *Myers v. Myers*, 46 Cal. 535.

Recovery for rents and profits can only be had for six years, where defendant pleads the statute of limitations. *Jackson v. Wood*, 24 Wend. 443; *Ainslie v. Mayor*, 1 Barb. 168; *Hill v. Meyers*, 46 Penn. 15; *Blodgett v. Hitt*, 29 Wis. 169; *Prendergast v. McCaslin*, 2 Ind. 87; *N. Orleans v. Gaines*, 15 Wall. 624.

Recovery of nominal damages in ejectment is no bar to a subsequent action for mesne profits. *Van Alen v. Rogers*, 1 John. Cas. 281; *Jackson v. Wood*, 24 Wend. 443; *Grout v. Cooper*, 9 Hun. 326.

To entitle defendant to an allowance for improvements as against the mesne profits, it is usually held essential that he shall have held under color of title, and have made such improvements in good faith, and that they be permanent and valuable to the inheritance. *Lunquest v. Ten Eyck*, 40 Iowa, 213; *Carpentier v. Small*, 35 Cal. 346; *Whitney v. Richardson*, 31 Vt. 300; *Roe v. Malcom*, 39 Ga. 328; *Learned v. Corley*, 43 Miss. 687; *Lee v. Bouman*, 55 Mo. 400; *Shroyer v. Nickell*, 55 Mo. 264; *Ringhouse v. Keener*, 63 Ill. 230.

Recovery may be apportioned among defendants, according to their interests. *Woodhall v. Rosenthal*, 61 N. Y. 382.



to secure the determination of the titles to land by those laws, but also the actual enjoyment of the rights and interests thus established. It did not intend to give the true owner a right to recover, and then to couple that right with such onerous conditions as to make it worthless; to compel him to repurchase his own land, by indemnifying the occupant (often a *malæ fidei* possessor), not for his expenses and labor in improving the value, but frequently in the deterioration of the land, to the great injury of the owner. The "rights and interests" of which the compact speaks, were not only to be rendered valid and secure by preserving the modes and forms of proceeding for the assertion of those rights, but by preserving the existing provisions of law and rules of equity, under which the practical object and end of a suit are to be attained; the possession and enjoyment of the land, unburthened with any unjust conditions extorted by fraud and violence. Its letter and spirit both forbid the interpretation by which laws are made to exempt the occupant from his liability to account for the mesne profits, upon the pre-existing principles of law and equity, and by which that exemption is extended to every period of time, from his first taking possession down to his being actually ejected, without any regard to the circumstances by which the original character of his possession may be entirely changed by notice of a better title, of which he might have been originally ignorant. And is not the loss or injury resulting from the diminution of the value or amount recovered and actually received by the true owner, by taking one-half the value of the land to pay for the estimated value or cost of the pretended ameliorations, of the same extent as if, upon a recovery of an entire tract of land, the judgment was to be declared satisfied by delivering possession of a moiety only? Do, then, the rights and interests of land, as they were derived from the laws of Virginia, **10\***] remain valid and secure under these acts of the legislature of Kentucky? If, by validity and security be meant injury, forfeiture and destruction, then, indeed, the terms of the compact are amply satisfied. But if an entire and complete protection of these rights and interests, as to their value, use and enjoyment by the true owner was intended, then the laws in question (the avowed object and intention, as well as the practical operation of which, is to better the condition of the occupant at the expense of the true and lawful owner, by compelling the latter, after he has recovered a formal judgment establishing the validity of his title, to purchase the execution of that judgment by the performance of conditions which the laws existing in 1789 did not require) are a gross violation of the compact, and consequently unconstitutional and void. If, in short, that which cannot be done directly, ought not to be permitted to be done indirectly and circuitously, the legislature of Kentucky were no more authorized to enact rules or regulations, by the operation of which the land recovered by the real owner is encumbered with a lien, to the amount of half, or any other proportion of its value, for the benefit of the occupant, and to indemnify him for his fault or misfortune in claiming under a defective title, than they would have been to produce the same effect,

and to equalize the condition of the parties, by dividing the specific land between them.

*Mr. Justice STORY* delivered the opinion of the court:

\*The first question certified from the **[\*11]** Circuit Court of Kentucky, in this cause, is, whether the acts of Kentucky, of the 27th of February, 1797, and of the 31st of January, 1812, concerning occupying claimants of land, are unconstitutional.

This question depends principally upon the construction of the seventh article of the compact made between Virginia and Kentucky, upon the separation of the latter from the former state, that compact being a part of the constitution of Kentucky. The seventh article declares "that all private rights and interests of lands within the said district, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state."

We should have been glad, in the consideration of this subject, to have had the benefit of an argument on behalf of the tenant; but as no counsel has appeared for him, and the cause has been for some time before the court, it is necessary to pronounce the decision, which, upon deliberation, we have formed.

As far as we can understand the construction of the seventh article of the compact contended for by those who assert the constitutionality of the laws in question, it is that it was intended to secure to claimants of lands their rights and interests therein by preserving a determination of their titles by the laws under which they were acquired. If this be the true and only import of the article, it is a mere nullity; for, by the general principles of law, and from the necessity of the case, titles to *\*real estate* **[\*12]** can be determined only by the laws of the state under which they are acquired. Titles to land cannot be acquired or transferred in any other mode than that prescribed by the laws of the territory where it is situate. Every government has, and from the nature of sovereignty must have, the exclusive right of regulating the descent, distribution and grants of the domain within its own boundaries; and this right must remain until it yields it up by compact or conquest. When once a title to lands is asserted under the laws of a territory, the validity of that title can be judged of by no other rule than those laws furnish in which it had its origin; for no title can be acquired contrary to those laws; and a title good by those laws cannot be disregarded but by a departure from the first principles of justice. If the article meant, therefore, what has been supposed, it meant only to provide for the affirmation of that which is the universal rule in the courts of civilized nations, professing to be governed by the dictates of law.

Besides, the titles to lands can, in no just sense, in compacts of this sort, be supposed to be separated from the rights and interests in those lands. It would be almost a mockery to suppose that Virginia could feel any solicitude as to the recognition of the abstract validity of titles, when they would draw after them no beneficial enjoyment of the property. Of what value is that title which communicates no right

or interest in the land itself? or how can that be said to be any title at all which cannot be **13\***] asserted in a court of justice \*by the owner, to defend or obtain possession of his property?

The language of the seventh article cannot, in our judgment, be so construed. The word *title* does not occur in it. It declares, in the most explicit terms, that all private rights and interests of lands derived from the laws of Virginia, shall remain valid and secure under the laws of Kentucky, and shall be determined by the laws then existing in Virginia. It plainly imports, therefore, that these rights and interests, as to their nature and extent, shall be exclusively determined by the laws of Virginia, and that their security and validity shall not be in any way impaired by the laws of Kentucky. Whatever law, therefore, of Kentucky, does narrow these rights and diminish these interests, is a violation of the compact, and is consequently unconstitutional.

The only question, therefore, is whether the acts of 1797 and 1812 have this effect. It is undeniable that no acts of a similar character were in existence in Virginia at the time when the compact was made, and therefore no aid can be derived from the actual legislation of Virginia to support them. The act of 1797 provides that persons evicted from lands to which they can show a plain and connected title in law or equity, without actual notice of an adverse title, shall be exempt from all suits for rents or profits prior to actual notice of such adverse title. It also provides that commissioners shall be appointed by the court pronouncing the judgment of eviction, to assess the value of all lasting and valuable improvements **14\***] made on the land prior to such notice, and they are to return the assessment thereof, after subtracting all damages to the land by waste, &c., to the court; and judgment is to be entered for the assessment in favor of the person evicted, if the balance be for him, against the successful party, upon which judgment execution shall immediately issue, unless such party shall give bond for the payment of the same, with five per cent. interest, in twelve months from the date thereof. And if the balance be in favor of the successful party, a like judgment and proceedings are to be had in his favor. The act further provides that the commissioners shall also estimate the value of the lands, exclusive of the improvements; and if the value of the improvements shall exceed the value of the lands, the successful claimant may transfer his title to the other party and have a judgment in his favor against such party for such estimated value of the lands, &c. There are other provisions not material to be stated.

The act of the 31st of January, 1812, provides that if any person hath seated or improved, or shall thereafter seat or improve any lands, supposing them to be his own by reason of a claim in law or equity, the foundation of such claim being of public record, but which lands shall be proved to belong to another, the charge and value of such seating and improving shall be paid by the right owner to such seater or improver or his assignee, or occupant so claiming. If the right owner is not willing to disburse so much, an estimate is to be made of the value of

the lands, exclusive of the seating \*and **15** improvements, and also of the value of such seating and improvements. If the value of the seating and improving exceeds three-fourths of the value of the lands if unimproved, then the valuation of the land is to be paid by the seater or improver; if not exceeding three-fourths, then the valuation of the seating and improving is to be paid by the right owner of the land. The act further provides that no action shall be maintained for rents or profits against the occupier, for any time elapsed before the judgment or decree in the suit. The act then provides for the appointment of commissioners to make the valuations, and for the giving of bonds, &c., for the amount of the valuations, by the party who is to pay the same; and in default thereof, provides that judgment shall be given against the party for the amount; or if the right owner fails to give bond, &c., the other party may, at his election, give bond, &c., and take the land. And the act then proceeds to declare that the occupant shall not be evicted or dispossessed by a writ of possession, until the report of the commissioners is made and judgment rendered, or bonds executed in pursuance of the act.

From this summary of the principal provisions of the acts of 1797 and 1812, it is apparent that they materially impair the rights and interests of the rightful owner in the land itself. They are parts of a system, the object of which is to compel the rightful owner to relinquish his lands, or pay for all lasting improvements made upon them, without his consent or default; and in many cases \*those improve- **16** ments may greatly exceed the original cost and value of the lands in his hands. No judgment can be executed, and no possession obtained for the lands, unless upon the terms of complying with the requisitions of the acts. They, therefore, in effect, create a direct and permanent lien upon the lands for the value of all lasting improvements made upon them; without the payment of which, the possession and enjoyment of the lands cannot be acquired. It requires no reasoning to show that such laws necessarily diminish the beneficial interests of the rightful owner in the lands. Under the laws of Virginia no such burthen was imposed on the owner. He had a right to sue for, recover and enjoy them, without any such deductions or payments.

The seventh article of the compact meant to secure all private rights and interests derived from the laws of Virginia, as valid and secure under the laws of Kentucky, as they were under the then existing laws of Virginia. To make those rights and interests so valid and secure, it is essential to preserve the beneficial proprietary interest of the rightful owner in the same state in which they were, by the laws of Virginia, at the time of the separation. If the legislature of Kentucky had declared by law that no person should recover lands in this predicament, unless upon payment, by the owner, of a moiety, or of the whole of their value, it would be obvious that the former rights and interests of the owner would be completely extinguished *pro tanto*. If it had further provided that he should be compelled to sell the same at \*one-half or one-third of their **17** value, or compelled to sell, without his own



consent, at a price to be fixed by others, it would hardly be doubted that such laws were a violation of the compact. These cases may seem strong; but they differ not in the nature, but in the degree only of the wrong inflicted on the innocent owner. He is no more bound by the laws of Virginia to pay for improvements which he has not authorized, which he may not want, or which he may deem useless, than he is to pay a sum to a stranger for the liberty of possessing and using his own property according to the rights and interests secured to him by those laws. It is no answer that the acts of Kentucky, now in question, are regulations of the remedy, and not of the right to lands. If those acts so change the nature and extent of existing remedies, as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests.

It is the unanimous opinion of the court that the acts of 1797 and 1812 are a violation of the seventh article of the compact with Virginia, and therefore are unconstitutional. This opinion renders it unnecessary to give any opinion on the second question certified to us from the Circuit Court.<sup>1</sup>

Mr. Clay (as *amicus curiæ*) moved for a rehearing in the cause, upon the ground that it **18\***involved \*the rights and claims of numerous occupants of land in Kentucky, who had been allowed by the laws of that state, in consequence of the confusion of the land titles arising out of the vicious system of location under the land law of Virginia, an indemnity for their expenses and labor bestowed upon lands of which they had been the *bonæ fidei* possessors and improvers, and which were reclaimed by the true owners. He stated that the rights and interests of those claimants would be irrevocably determined by this decision of the court, the tenant in the present cause having permitted it to be brought to a hearing without appearing by his counsel, and without any argument on that side of the question. He therefore moved, that the certificate to the Circuit Court, of the opinion of this court upon the questions stated, should be withheld, and the cause continued to the next term for argument.

*Motion granted.*

Mr. Montgomery, for the demandant, made three points:

1st. That this court is invested with the power of questioning the validity of the legislative acts of Kentucky, under which the tenant claims, both by the national constitution and the state constitution of Kentucky.

2d. That the acts of Kentucky, so far as they respect the present controversy, are null and void.

3d. That the act of 1812 cannot be applied to the case consistently with the provisions of the constitution of Kentucky and of the United States.

**19\*** \*1. He denied that this court was bound by the exposition given by the state courts, to that part of the state constitution

now drawn in question, even in a case of which the national judiciary had cognizance merely from the character of the parties litigant, as being citizens of different states; and still less where the subject-matter in controversy was connected with that provision of the United States constitution, which secured the inviolability of contracts against state legislative acts. Such a doctrine would furnish an effectual recipe for sanctioning injustice by the forms of law, by giving to local decisions a much more extensive effect than had ever been before attributed to them. Unquestionably, the adjudications of the state courts, where they have become a settled rule of property, are in general to be regarded as conclusive evidence of the local law; but where the interpretation of the fundamental law of the state is involved, and especially where that interpretation depends upon the constitution of the Union (which is the supreme law), the state courts must necessarily be controlled by the superintending authority of this court. This depends upon a principle peculiar to our constitutions, and which distinguishes them from every free and limited government which has been hitherto known in the world. In England, the legislative power of Parliament is not only supreme, but it is absolute; and (so far as depends upon written rules) despotic and uncontrollable by any other authority whatever.<sup>2</sup> But various \*limitations upon the legislative power [**\*20** are contained in the constitution of Kentucky; and that of the United States contains other restraints upon the legislative power of the several states, and gives to the national judiciary the authority of enforcing them, especially in controversies arising between citizens of different states, as the present case does.

2. He stated that the second point would be maintained by establishing two propositions: First, that the legislative acts in question are repugnant to the terms of the compact of 1789, between the states of Virginia and Kentucky, which is made a fundamental article of the constitution of Kentucky. Second, that the acts are repugnant to that constitution, in depriving the demandant of the trial by jury.

The terms used in the compact, "rights and interests of land," import something more than a mere formal title. A right of property necessarily includes the right to recover the possession, to enter, to enjoy the rents and profits, and to continue to possess undisturbed by others.<sup>3</sup>

He who has a right to land, and is in possession, has a right to be maintained in that possession, and in the use of the land and its fruits; and he who has a right to land, but is out of possession, has a right to recover the possession or seizin. These are the qualities and incidents of a right to land at common law, none of which had been taken away by the statute at the time the compact was made. As \*to the word "interest," it might have [**\*21** been inserted *ex abundanti cautela*, to protect rights which, at the time of the compact, were not yet carried into grant. The term *interest*, as applied to land, according to many authori-

2.—1 Bl. Comm. 160-162.

3.—Jao. Law Dic. tit. Right, 536; Co. Litt., s. 445, 447; 8 Rep., Altham's case; Plowd., 478.

1.—Present, Mr. Chief Justice Marshall, and Justices Johnson, Livingston, Todd, Duvall and Story.

ties, may be something different from a right to land in fee-simple; yet it cannot be doubted that he who has a fee-simple has an interest in the land. A term for years is an interest, and so is the right both of mortgagee and mortgagee. It is then quite clear that the term "rights and interests of land" means a great deal more than the mere use and possession of the evidence of title.

What, then, were the pre-existing rules of law and equity, with reference to which the compact of 1789 is to be construed? By the common law then in force in Virginia, and by the statute of 1785, the remedy by writ of right was given to him who had the fee; and if the demandant recovered his seizin, he might also recover damages, to be assessed by the recognitors of assize, for the tenant's withholding possession of the tenement demanded.<sup>1</sup> In cases where an ejectment was brought, the party might have his separate action for the mesne profits, which could only be restrained in its operation by the statute of limitations of five years. As to the system of positive equity, which had been established at the period referred to, and which it was supposed was not infringed by the legislative acts now in question, it will be found that the cases where the **22\*** court of chancery has interfered, may be reduced to the following classes: (1) Where the party came into equity in order to disembarass his legal title of difficulties resulting from the defect of evidence at law, and also prayed a decree for the mesne profits. (2) Where the title was merely equitable, chancery has decreed both as to the title and for the mesne profits. (3) So also in cases of dower, the title as well as the mesne profits have been decreed. (4) In cases where infants are interested, the title and mesne profits has both been determined. In all these cases, the plaintiff sought relief, as well touching the title, as for an account of the mesne profits; and the claimant has therefore been allowed for valuable and lasting improvements *bona fide* made. In the first and second classes, the account for mesne profits has been taken from the time of bringing the suit only, because the plaintiff had improperly lain by with his title. But where that fact does not appear, the account is always carried back to the time the title accrued.<sup>2</sup> There is no case where a bill has been filed by the occupant claiming the value of his improvements against the right owner. The cases where it has been allowed, are where the title and an account of rents and profits constituted the manner of the complainant's bill, and where the defendant resisted the relief sought, by setting up some color of title in himself, with a claim **23\*** for the improvements. This went upon the favorite maxim of the court of chancery, that he who will have equity must do equity. But though no case, where the occupant was the plaintiff, is to be found before 1789, yet it is admitted there are certain maxims and principles of equity, which, combined with the peculiar state of land titles in Kentucky, would authorize a court of equity to relieve. Yet it is

quite evident that a party coming with his bill for relief, after a recovery had against him at law, must have stood upon a very different ground than the complainants in the cases above referred to. His application must have been to the extraordinary powers of the court; he must have come in under the rule that he who will have equity must do equity; he would not have been permitted to gain by the loss of the other party.<sup>3</sup> Upon a bill brought after a recovery in a real action, the account would have been carried back to the time of his first taking possession; complete equity would have been done by making a full estimate of the value of the rents and waste on one side, and of the improvements on the other; the want of notice of the defendant's title could not have been considered as important, since he would stand upon his judgment at law; but the decree would be for the balance of the account thus taken. After a recovery of mesne profits, in the action of trespass, following a re-**24**covery in ejectment, if the occupant had not pleaded the statute of limitations, he might have brought his bill and the matter would have been adjusted in the same mode; but if he had pleaded the statute, and thus deprived the true owner of a part of his indemnity, he could not stand before the court as a party willing to do equity, and consequently could not have equity. But even supposing that a bill would be retained in such a case, most certainly the same rule of limitations which deprived the proprietor of a part of his damages, would also be applied to the improvements made before the time of limitation. Admitting, too, that with respect to questions between the owner of the title as complainant, claiming relief, as well touching the title as for the rents and profits, and the other party, all the cases cannot be reconciled, yet there is a very decided preponderance in favor of the doctrine now maintained; and, with respect to a naked claim for improvements, there is no contradiction whatever.

As to the terms "valid and secure," which are used in the compact, with reference to the rights and interests of land derived from the laws of Virginia, they must import the permanent validity and security of whatever is included in, or incident to, the complete enjoyment of those rights and interests. This validity and security is impaired by the acts of the state legislature now in question. By the common law connected with the statute of Virginia, before cited, the demandant, in a writ of right, was entitled to recover, together **25**with his seizin, such damages as the jury might think him entitled to for the detention of the land, and for the waste committed upon it, extending back to the time when the occupant entered upon the land. But by the act of 1797, s. 1, he is to recover no damages for the use of the land before actual notice, nor even subsequent to that notice, unless the suit is brought within a year. By the third section of the act of 1812, his damages for the detention are not to commence until the final judgment or decree in the court of original jurisdiction. Under the first

1.—1 Virg. Rev. Cod. 33.

2.—2 Vern. 724; 1 Atk. 524-526; 2 Atk. 88, 283; 3 Atk. 130, 134; 2 P. Wms. 645, 646; 1 Madd. Chan. 73, 75; 1 Wash. 329.

Wheat. 8.

3.—Locupletiores neminem fieri cum alterius detrimento et injuria jure naturæ æquum est. L. Jure Naturæ, 206; De Div. Reg. Jur. Antiq.



act, his right to damages is greatly diminished; under the second, it is almost annihilated. But suppose the respective rights of the parties are tested by the settled doctrines of positive equity; the tenant, in the present case, seeking equity from a party who had a clear legal right, would have been compelled to do complete equity. He would have received an equitable allowance for his improvements, if *bona fide* made; but the judgment of the demandant would not have been disturbed; the value of the improvements would have been compared with the amount of his damages, and a decree rendered according to the result of that comparison. In the case of a recovery by ejectment, followed by the action of trespass for mesne profits, which was the undoubted right of the owner of the land as the law stood in 1789, the right of the plaintiff is diminished by the acts now in question. Under the old law, he could not be restricted from inquiring into the damages sustained from 26\*] the time the defendant entered upon the land down to the time of suit brought, unless the defendant pleaded the statute of limitations. But if the occupant insisted on that defense, he could have no remedy in equity. The act of 1812 also makes the giving a bond for the value of the improvements a condition to the recovery of possession, thus depriving the true owner of his pre-existent absolute right to the appropriate writ of execution.

It is clear, then, that the rights of the proprietor of the land are impaired by the statutes in question; they are neither determined by the same laws, nor by the same principles of equity incorporated into new laws.

Nor can these statutes be supported on the principles of abstract justice. It is not only a maxim of the court of chancery, but of every wise legislator, that equality is equity. So, also, one ought not to gain by the loss of another who was in no fault. From these two maxims, the corollary may be drawn, that where the respective capitals of two individuals are equal, and their occupations, skill and industry are the same, their condition in the social state (so far as it depends upon legislative regulations) ought to be precisely the same. Not that one may not benefit by turns of good fortune, without sharing his gains with the other, but that the law should not take from the one, to give to the other, rendering the one richer to make the other poorer, without some fault of the latter. Here the counsel illustrated the application of these principles by putting a variety of cases which might occur under the 27\*] statutes, to show the extreme injustice and inequality of their operation.

Nor does the fourth article of the compact of 1789 warrant the passage of the acts under consideration. It merely gives to Kentucky the power of requiring lands to be improved and cultivated after six years. That this article does not apply to the present case may be shown by several considerations. (1) The acts in question do not, by their terms, purport to be in execution of such a power. (2) A power to require the owners of land to improve and cultivate for the general welfare, is one thing; and a power to take away the property of one citizen and give it to another, is a very different thing. (3) A law requiring improvement and cultivation, and declaring a forfeiture for non-

compliance, would only be applied to unoccupied lands; whereas the lands to which alone the acts are applied are actually improved and cultivated. The true owner is prevented by the acts of him who has usurped the possession from personal compliance.

It may be contended that there are certain ancient statutes of Virginia, recognizing the same obnoxious principles with the recent acts of Kentucky. But the only statute at all partaking of this character was that (called) of the 13th of Charles II., but in fact passed immediately after the restoration. This statute was entirely retrospective in its operation, and was intended to apply to a peculiar state of things existing during the civil wars and the commonwealth, as distinctly appears both by the preamble and the enacting clauses. It contained, however, no provision for depriving the true owner of the rents, &c., and was actually repealed in 1748.

As to the second particular proposition under this general head, the constitution of Kentucky expressly declares (art. 10, s. 6) that "The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate." The law of Virginia prescribed this mode of trial as to writs of right with all its details, and, amongst others, that the damages of the demandant for the detention of the land should be assessed by the jury. An arbitrary tribunal of commissioners is substituted for this ancient mode of trial by the acts, the validity of which is now drawn in question. Thus is not only the amount of damages to which the demandant was entitled, under the old law, diminished to a pittance, but even that is to be liquidated by a tribunal far more unfavorable to him than a jury.

3. The third general point would follow as a corollary from the proof of the two following propositions, or either of them: (1) That the act of 1812 is repugnant both to the United States constitution and that of Kentucky, as being retrospective in its operation upon vested rights, and as impairing the obligation of contracts. (2) That it is repugnant to the constitution of Kentucky, in determining, by the legislative department, a matter which is exclusively cognizable by the judicial.

And first, the state constitution provides (art. 10, s. 18) that "No *ex post facto* law, nor law impairing contracts, shall be made;" 29\*] and the national constitution declares (art. 1, s. 13) that "No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The terms of the prohibition are very similar, and the substance is absolutely the same. In the case at bar, the injury to the demandant was committed long before the passage of the act of 1812, which has interposed and violently deprived him of his remedy, even *pendente lite*. Considering the two prohibitions against *ex post facto* laws, and against laws impairing the obligation of contracts, together, they will be found to afford a complete protection to vested rights of property, and to apply precisely to the present case. All rights of action are founded either upon contracts or upon torts; they are either *ex contractu* or *ex delictu*. The framers of our constitutions, by the prohibitions against impairing the obligation of contracts, intended to pro-

fect all rights dependent upon contract from being diminished or destroyed; and they could not certainly have intended to leave injuries to property arising *ex delictu* wholly unredressed, or to leave the remedy to the caprice of the state legislatures. Doubtless the more generally received opinion is that this prohibition of *ex post facto* laws is to be restricted to criminal matters. But there are great authorities to the contrary. The commentator on the laws of England, in laying down the maxim of political philosophy, that *ex post facto* laws ought not to be passed, does indeed illustrate his position by a criminal case; and probably some have **30\*** been misled \*by taking the example for the rule.<sup>1</sup> Dr. Paley, however, lays down the rule without any qualification whatever.<sup>2</sup>

But supposing this first proposition to be questionable, there certainly can be no doubt as to the second. By the constitution of Kentucky, it is declared that "The powers of government shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy, to wit, those which are legislative to one; those which are executive to another; and those which are judicial to another." And by the second section of the same article, that "No person, or collection of persons, shall exercise any power properly belonging to either of the others, excepting in the instances hereinafter expressly directed or permitted." Now, it cannot be denied that a particular controversy, arising out of facts, which, by an existing law, give the parties a right to certain remedies in the courts, is a matter exclusively of judicial cognizance. But here the legislative department has adjudicated upon it by interfering with these remedies, after a *lis pendens*, so as to take away the property of one and give it to another party. It is an adjudication discharging the tenant from a just claim which the demandant had against him under the former law, without any equivalent or indemnity to the latter. That this adjudication has been clothed with the forms of public and general legislation, and includes every case of the same class, can make no difference.<sup>3</sup> \*This is an example of that very sort of legislation which Dr. Paley reprobates and calls double; it being the exercise both of judicial and legislative power. Such legislative acts do not discriminate between different cases, according to their peculiar circumstances, as the judicial authority would do. Thus the act of 1812 confounds together the case of the person lying in wait with his title, to take an unfair advantage of the compact, and that of the rightful owner, who has constantly and openly pursued his claim; cases of infancy and of full age; of fair and fraudulent settlement; in short, all circumstances and qualities are indistinguishably blended in one sweeping act of retrospective injustice.

Mr. Bibb, contra, contended, that the substantial effect of the acts of 1797 and 1812, went merely to allow the grantee from the commonwealth, who, under faith in his grant, has made valuable and lasting improvements, the amount of those improvements; and to exempt him from accounting for rents and profits down to

the time when he begins to be a *mala fidei* possessor by resisting the better title of the true owner. That the acts did not apply even to cases of disputed boundaries, but only to cases of conflicting titles; nor to cases of fraud, or of lauds previously cultivated and improved. He entered into a detail of the provisions of the laws, of the practice under them, and of the exposition they had received from the courts, and contended.

1st. That the principle of the act of 1812 is a \*principle of natural equity and justice, [**32** as to permanent improvements by a *bonæ fidei* possessor.

2d. That the principle of postponing the account of rents and profits is the true chancery rule, and such as is familiarly applied in the practice of courts of equity.

3d. That the laws are not repugnant to the compact of 1789.

1. The circumstances under which the country, where this momentous question arises, was settled, are to be considered. The manner in which it was colonized, and in which the titles to land were first acquired, and the consequent confusion of conflicting claims and litigation, are, unfortunately, but too well known to the court. Under these difficult circumstances, all that the local legislature has done is to assert the principle of natural justice and artificial equity, that he who takes possession of vacant lands, under a *prima facie* legal title, and makes valuable and lasting improvements, shall be considered as a *bonæ fidei* possessor. Such is the well-established rule of the court of chancery as to improvements which must pass with the freehold to the party asserting his paramount title. It is applied where a vendee, under an agreement for a sale, takes possession, so, also, where a mortgagee is in possession, the court never permits a redemption without paying for permanent improvements. If, then, the party has a right, in similar cases, to an indemnity, is it any objection that the statute has defined a rule declaring what requisites shall be indispensable? \*What better [**33** evidence of *bona fides* can there be than a grant under the great seal?

There is a great variety of claims, consisting of different grades or classes, complicating the titles to lands in Kentucky, and depending not merely on legal doubts, but on questions of evidence of great difficulty.<sup>3</sup> What is the opposing claim, which is of such validity as, *prima facie*, to convert the occupant into a *mala fidei* possessor? The local tribunals have laid down the only safe practical rule, which is that the positive decision of a court of record shall alone be sufficient. All grants are by record, and the patent can only be repealed by matter of record. There must be a *scire facias* to repeal the patent; and in the case of escheat, a regular inquisition is indispensable. Until the grant of the commonwealth is annulled, a person claiming and holding under it cannot be considered as a *mala fidei* possessor. The validity of the laws in question has been confirmed by innumerable decisions; and they have been always strictly confined in their operation to cases of conflicting titles under grants, and have

1.—1 Bl. Comm. 46.

2.—Paley's Mor. and Pol. Phil. 444.

Wheat. 8.

3.—1 Bibb's Rep., Preface.



never been extended to protect a *malæ fidei* possession.<sup>1</sup>

2. The general principle of equity is settled by a series of decisions, both in England and in this country. A leading case on this subject is that of the *Duke of Bolton v. Deane*.<sup>2</sup> There the **34\*** doctrine was established that if the lessor suffers the lessee to hold over, equity will not compel the tenant to account for mesne profits, unless the lessor was hindered from entering by fraud or some extraordinary accident. The same principle is laid down as to mesne profits, in several other adjudged cases.<sup>3</sup> And wherever there has been any default or laches on the part of the true owner in asserting his title, the account is restrained to the filing of the bill.<sup>4</sup> So, where a man suffers another to build on his ground, without setting up a right till afterwards, a court of equity will compel the owner to permit the builder to enjoy it quietly.<sup>5</sup> The same principle has been recognized by our own courts, and is also to be found among the maxims of the Roman law.<sup>6</sup>

3. As to the compact of 1789, between Virginia and Kentucky, it is a treaty for good faith; a mere recognition of the principles of natural law and morality. A change of sovereignty does not usually make any change in proprietary interests in the soil; and the compact is merely declaratory of that principle of public law. The Louisiana treaty contains stipulations for the protection of the property of the inhabitants, but it has never been construed to limit the sovereign rights of the United States over the domain of that province. **35\*** Neither did the compact of 1789 intend to limit the sovereignty of Kentucky. It is merely a stipulation for the conservation of titles in their integrity; for fair and impartial legislation upon the rights of property which were originally derived from the laws of Virginia. It could not have meant to prevent the modification of remedies in the courts, and generally what is called the *lex fori*. According to the doctrine contended for on the other side, the legislature of Kentucky could not even extend the time for entering surveys, than which nothing could be more absurd and extravagant.

But the true principles by which the compact is to be interpreted have already been settled by this court. In *Bodley v. Taylor* it is laid down that if the same measure of justice be meted to the citizens of each state; if laws be neither made nor expounded, for the purpose of depriving those who are meant to be protected by the compact of their rights, no violation of the compact can be said to exist.<sup>7</sup> This case also determines the principle that the decisions of the local courts are to be followed; and the inconveniences which would flow from shaking the system of land titles established by the uniform series of their adjudications, is in-

sisted on as a reason for adhering to the rules of property thus established.<sup>8</sup> So, also, this court has solemnly sanctioned the act of Kentucky, giving further time for surveys; as well as the statute of limitations of that **36** state, and the act concerning champerty and maintenance.<sup>9</sup>

The system of legislation now in question does but follow the maxims laid down by Montesquieu, that the laws should encourage industry; that the more climate and other circumstances, tend to discourage the cultivation of the earth, the more should the legislator excite agriculture; and that those laws which tend to monopolize the lands, and take from individuals the proprietary spirit, augment the effect of those unfavorable circumstances.<sup>10</sup> Here, though it is acknowledged that the titles are to be decided according to the laws of Virginia, existing at the epoch of the compact, a new proprietary interest has grown up since, not foreseen nor provided for. The possessor in good faith has covered the face of the country with his own property, the fruits of his toil and industry, which it is not just that the owner of the unimproved land should take from him without an indemnity.

Again, how can this court interfere, after the settled decisions of the local courts has confirmed the validity of these laws, and thus disturb the rules of property which have been firmly established; and that, too, in a case where the parties on both sides, really interested in the controversy, are citizens of the same state? The subject is not within the jurisdiction of the court, either as to the character of the parties really interested, or **37** as to the subject-matter of the controversy. The jurisdiction originally given by the constitution has been defined and limited by the judiciary act, and is not co-extensive with what might have been granted by Congress under the constitution.<sup>11</sup> The states may, with the consent of Congress, make compacts or agreements with each other; but they cannot make a treaty, even with the consent of Congress. The judicial power, then, does not extend to such compacts, considering them as treaties, nor does that clause of the constitution which prohibits the states from making any law impairing the obligation of contracts, apply to the present case. That prohibition can only be fairly construed to extend to contracts between private individuals, or at most between a state and individuals. An agreement or compact between two different states, in their sovereign capacities, and respecting their sovereign rights, can never, by the utmost latitude of construction, be brought within the grasp of a prohibition which was evidently intended merely for the protection of private rights, growing out of private contracts, or out of a grant from the state, vesting a proprietary interest in the grantee. The only

1.—1 Marsh. Kentucky Rep. 443; 2 Marsh. 214; 3 Bibb's Rep. 298; 4 Bibb's Rep. 461; 1 Marsh. 246, 247.

2.—Finch's Pree. in Ch. 516.

3.—3 Eq. Cas. Abr. 588, tit. Mesne Profits; 1 Atk. 526.

4.—Dormer v. Forteseue, 3 P. Wms. 136.

5.—East Ind. Company v. Vineent, 2 Atk. 83.

6.—Southall v. M'Kean, 1 Wash. 336; 2 Domat's.

Civ. Law, 432, Straban's Translation; Kaimes' Eq. 189; 1st Ed. 270.

7.—5 Cranch's Rep. 223.

8.—1b. 234.

9.—2 Wheat. Rep. 324; 1 Wheat. Rep. 292.

10.—Esprit des Loix, b. 14, c. 6, 8, 9, 11.

11.—United States v. Bevens, 3 Wheat. Rep. 336, 387, 390; United States v. Wiltberger, 5 Wheat. Rep. 93.



remaining question, then, is whether this court can declare a state law void, as being repugnant to the constitution of the state, contrary to the uniform decisions of the state courts, who are the rightful exclusive expounders of **38\***] their own local law? It is \*conceived that this point is irrevocably settled by the decisions of this court.<sup>1</sup> But even supposing this to be a mistaken inference, it is quite clear, from the uniform language and conduct of the court, that it will not declare an act, whether of the state or national legislature, to be void, as being repugnant to the fundamental law, unless in a very clear case. Besides, there is the less necessity for the interference of the court in the present case, as the compact itself provides a tribunal for the adjustment of any disputes which may arise under it; and that stipulation, if it does not entirely exclude the jurisdiction of any other tribunal in all cases arising under it, will at least furnish a motive for great caution on the part of the national judiciary in a case where, if citizens of Kentucky alone are interested, they ought to be bound by the decisions of their own courts; and if the rights of citizens of Virginia are involved, it depends upon the pleasure of that state to create the tribunal by which they are to be determined.

*Mr. Clay*, on the same side, stated that the great question in the cause was, what is that paramount rule with which these laws are to be compared, and if found repugnant, to be declared void by this court. If the jurisdiction now to be exercised arises under that clause of the national constitution prohibiting the individual states from making any law impairing the obligation of contracts, then the court may **39\***] draw to its cognizance \*the subject-matter in controversy. But if otherwise, then it can only acquire jurisdiction by the character of the parties litigant, as being citizens of different states, and so entitled to the protection of the federal forum.

The first inquiry then would be, whether there was any subsisting compact between the states of Virginia and Kentucky, upon which the jurisdiction of the court could fasten.

If there be a compact, it must be between parties capable of making it; upon a subject on which they might constitutionally stipulate; and made in a form warranted by the constitution.

Waiving the question as to the parties, he would contend,

1st. That the supposed compact had not been constitutionally made; and,

2d. That if the compact is to be interpreted as restraining the state of Kentucky from passing the laws in question, the restraint itself would be unconstitutional and void.

1. Both by the original articles of confederation, and the existing national constitution, the states are prohibited from treating or contracting with each other without the consent of Congress. The terms of the prohibition in the constitution are very strong: "No state shall, without the consent of Congress, enter into any agreement or compact with another state, or a foreign power." It extends to all agreements or compacts, no matter what is the subject of

them. It is immaterial, therefore, whether that subject be harmless or dangerous to the Union. There is here no \*room for interpreta- [**\*40** tion. "Any agreement or compact" are the words, and all contracts between the states, without the consent of Congress, are interdicted. To make, therefore, the supposed compact binding, it must have been entered into with that consent. It is not now insisted (though perhaps it might be), that this consent must precede the compact. All that will be asked is (what cannot be denied) that it must either precede or follow the compact.

In the present case there is no pretense for alleging a subsequent express assent. Was there, then, a prior one? The act of Virginia did not even profess to ask the consent of Congress to the compact. All that it demanded was that Congress should consent to the admission of the proposed state into the Union, &c., and Congress has not even responded to all that was asked. What it has assented to can only be ascertained by resorting to the language it has thought fit to use. The act of February 4, 1791 (by which alone the will of Congress on this subject is signified), merely declares the consent of that body to the erecting of the district of Kentucky into a separate and independent state, and its reception into the Union upon a certain day. Beyond what was asked of it, Congress has not gone; as to the rest of the matters connected with these, it was altogether passive. There was, then, no compact. It was a mere negotiation; for the people of Kentucky did not meet in convention until 1792, when it is supposed that their assent to the compact was given.

\*But it may be said that though Con- [**\*41** gress did not expressly consent, yet it acquiesced in the compact, which is equivalent. This is what is denied. The consent of Congress being required, it must be evidenced by some positive act. Congress is a collective body, or, rather, it consists of three bodies, each of which participates in the exercise of the legislative power of the nation. The forms and ceremonies of passing laws must be observed. The doctrine of acquiescence cannot apply to the exercise of such a sovereign power. Did the House of Representatives; did the Senate; did the President, acquiesce? How do you ascertain it? Their silence cannot be interpreted into acquiescence. It was not necessary for them to interpose in order to prevent that which, without their consent, would be a mere nullity. If they had actually interposed by an express prohibition, in the most solemn form, it could not make the compact more void than it was before. Being a nullity from an inherent defect in its original formation, it could not be made more so by any extraneous act. Never having existed, its existence could not be destroyed by any conceivable power whatever. Indeed, to set up the doctrine, that Congress can tacitly acquiesce in agreements unconstitutional made between the states, would be of most dangerous and fatal consequences. It would sanction whatever agreements the several states might choose to make with each other, and introduce chaos into the confederacy, by engagements between its different members, inconsistent with \*each other, and con- [**\*42** flicting with the duties they all owe to the

1.—*Calder v. Bull*, 3 Dall. Rep. 386.  
Wheat. 8.



Union. All the analogies of the constitution are against such a doctrine. Various prohibitions of the exercise of different powers by the States, without the consent of Congress, are contained in the constitution. Thus they are prohibited, without that consent, from laying imposts or duties on imports or exports, except such as are necessary for executing the inspection laws; or any tonnage duty; and from keeping troops or ships in time of peace; and from engaging in war, unless actually invaded, or in such imminent danger as will not admit of delay. These prohibitions are all connected in the same clause with the prohibition against their making contracts with each other. Yet, surely, it cannot be pretended that in all these cases the consent of Congress can be inferred from its silence. It is true that the consent of Congress to such acts has not always been asked by the states. But it was their duty to have asked it, and the acts are mere nullities unless the consent be obtained.

2. If the supposed compact is to be interpreted to restrain the state of Kentucky from passing the laws in question, such restraint would be unconstitutional.

It is incontestable that there are some attributes of sovereignty of which a state cannot be deprived, even with the concurrence of Congress and the state itself. The true theory of our government is that of perfect equality among the members of the Union. Whatever sovereign power one has, each and all have. A **43\*** state may \*refuse to allow another state to be carved out of its territory; but if it consents to the formation of a new state, such new state becomes invested with all the sovereign attributes of every old one. Congress may refuse to admit a new state; but if it admits it, the state stands in the Union, freed and liberated from every condition which would degrade it below its compeers. Whatever one state can do, all can do. The pressure of the whole on all the parts is equal, and all the parts are equal to each other. This implied prohibition extends to every compact, in every form, by which a state attempts to deprive itself of its sovereign faculties. The sovereignty of a state cannot exist without a territorial domain upon which it is to act: and there can be no other restrictions upon its action within its own territory, but what is to be found in its own constitution, or in the national constitution. Of all the attributes of sovereignty, none is more indisputable than that of its action upon its own territory. If that territory happens to be in a waste and wilderness state, it may pass laws to reclaim it; to encourage its population; to promote cultivation; to increase production. That any of the old states can pass such laws, is incontestable; and if they may rightfully do it, then Kentucky may do the same.

If, then, there be no compact constitutionally made, and could have been none, with the power of restricting the state legislature from passing the laws in question, there is no fundamental rule with the violation of which they stand chargeable.

**44\*** But it may be said that this rule is incorporated into the state constitution.

To this it is answered that the incorporation of the supposed compact into the state constitution did not make it a compact, if otherwise

it wanted the requisite sanctions under the federal constitution. If it were inserted upon the mistaken supposition of its being a binding contract, does the insertion produce any effect? Is it not to be considered as the insertion of that which, being before void, remains null, notwithstanding the insertion? That it is not made a compact by the insertion, is clear; for the prohibition upon the states, to contract or agree without the consent of Congress, is a prohibition to contract or agree in any form, constitutional or otherwise.

But, although it has not the properties of a compact, it may possibly be contended that it is nevertheless a part of the constitution of Kentucky, and, therefore, binding upon the legislature of the state. The convention of Kentucky proceeded upon the notion that it was a compact. If in that they were mistaken, ought it to be treated in a character which was never intended? Can it be treated in that character? There are reciprocal provisions in it. Supposing it to be no compact, those stipulations on the part of Virginia, which formed the consideration of stipulations on the part of Kentucky, would not be binding on Virginia. It would, therefore, be most unjust to hold Kentucky bound for grants, the equivalents for which she cannot enforce. If one party is not bound the other ought to be deemed free; and \*the incorporation of the compact [**45**] into the constitution of Kentucky ought to be considered as proceeding upon the erroneous supposition. It was the compact, emphatically, that was made a part of the constitution. If there were no compact, nothing was inserted; or it was the will of one party, expressed in the most solemn form, to which there was wanting the will of the other, or the federal sanction to make it a compact. If, notwithstanding the freedom of Virginia from any obligations, Kentucky is to be regarded as bound by her separate constitutional act, then the question is, what did she intend by that act? Who is to expound it? Are we to look for the meaning of the constitution of a state within the state itself, or are we to look abroad for foreign interpreters? It need not be denied, that in case of an appeal to the federal tribunals, by citizens of other states, against the acts of local legislation, upon the ground of repugnance to the state constitutions, they may pronounce on that repugnancy. But it must be a clear case of repugnancy to justify them in annulling the state law. And after all the departments of a state government had united in giving an exposition to its constitution, which had been uniformly acted on for a series of years and become a rule of property, this court would solemnly pause before it overturned such a construction. This court, in *Bodley v. Taylor*,<sup>1</sup> determined that it would follow the decisions of one department only (the judiciary) in respect to \*the [**46**] laws of Virginia, although it intimated strong doubts of their correctness. The ground on which this determination justly proceeds is a regard to the peace of society, a respect for the rights of property, and the prevention of those disorders which would flow from opposite and conflicting rules.

The convention, by inserting the declaration

1.—5 Cranch's Rep. 223.



in the constitution that the compact was to be considered as a part of it, could not have intended to prevent the passage of the laws for the benefit of the occupying claimants, because the first of those laws preceded the formation of the last constitution. The state court of last resort has affirmed the consistency of the law with the compact; and, consequently, its consistency with the constitution.<sup>1</sup> Thus we have the deliberate adoption of that system by the legislative authority, almost contemporaneously with the date of the compact; the formation of the present constitution, without disapproving of that system; and an adherence to it by the legislative authority for a long series of years, during which it has reviewed it, expressly adhered to its principle, and given it a more expansive effect.

3. If the compact is to be treated as one made with all necessary solemnities, the jurisdiction of this court cannot attach until the party charged with a violation of it has refused to constitute the tribunal of the compact.

The eighth article of the compact provides **47\***] for "a special tribunal. That provision is as much a part of the compact as any other. It is admitted that rights which existed prior to and independent of the compact, cannot be affected by the decisions of that tribunal. But whatever rights spring out of the compact, originate with it, and are liable to be affected by it. They rest, coupled with all the conditions which the enactment that gave them birth had imposed upon them. If the party complained of for violating the compact had refused to co-operate in the constitution of the tribunal of the compact, then the jurisdiction of this court might attach under that branch of the distribution of judicial power which gives it cognizance of controversies between the states (if Congress had made provision for giving effect to that part of the constitution), or perhaps the court might, in such case, exercise jurisdiction as between the individuals interested. If there be cause of complaint, it is by Virginia against Kentucky. But Virginia has never (until recently) complained; she has acquiesced; and Kentucky, as far from refusing to create the tribunal of the compact, has offered to refer to it this very matter.

It will probably be contended that this provision is like the ordinary stipulation in policies of insurance, and other contracts for referring to arbitration, which has never been held to exclude the jurisdiction of the ordinary courts of the land. But the ground on which the courts of Westminster have assumed jurisdiction **48\***] in such cases is "that of their transcendent authority."<sup>2</sup> If it were *res integra*, there would certainly be great reason to contend that in these cases the *forum domesticum* stipulated for by the parties ought to have exclusive jurisdiction. But, be this as it may, there is this plain distinction, that the courts of Westminster Hall have a general jurisdiction over the realm, whilst this court is one of limited jurisdiction, having special cognizance of a few classes of cases only. So far as that jurisdiction results from the will of the states, who are parties to the compact, it must be taken with the restric-

tions which that will imposes. The parties, in effect say: "We make such a contract; if we differ about its interpretation, or execution, we will constitute a special tribunal to decide that difference." Congress might indeed give you jurisdiction over the compact, by providing a mode in which your constitutional jurisdiction over controversies between the states shall be exercised. But all jurisdiction over sovereign states (however derived), is limited by the very nature of things. Suppose this were a foreign treaty, and provided for a reference to the arbitration of a foreign sovereign, would you take jurisdiction in that case?

Supposing, however, that the court should feel itself compelled to take cognizance of the present cause, as being a private controversy between citizens of different states, it will exercise its power with the most deliberate caution. This court is invested with the most important trust that was ever possessed by any tribunal [**49\*** for the benefit of mankind. The political problem is to be solved in America, whether written constitutions of government can exist. They certainly cannot exist without a depositary somewhere of the power to pronounce upon the conformity of the acts of the delegated authority to the fundamental law. This court is that depositary, and I know not of any better. But the success of this experiment, so interesting to all that is dear to the interests of human nature, depends upon the prudence with which this high trust is executed.

4. The compact, supposing it to be valid and binding, does not prohibit the passage of these laws.

The mode by which private individuals could acquire a part of the public domain in Virginia, as prescribed by the act of 1748, was by a survey, accompanied with certain specified improvements.<sup>3</sup> If not settled within three years, the grant was forfeited, without any formal proceeding to repeal the patent. In 1779 commenced the calamitous system under which Kentucky now suffers. In order to raise a revenue and provide for the defense of the frontier, the previous survey was dispensed with, and hence the conflicting claims which now cover the whole surface of the country. At the period of the separation of the two states, the titles acquired under the law of 1779 were incomplete and in every stage of progression, from the entry to the patent. Virginia was about [**50\*** to part with the sovereignty; that is, with the power of consummating the titles and fulfilling her engagements. If she made no provision; if she obtained no guarantee for the complete execution of her engagements; if she exposed those who had acquired the right to, or interests in, land from her, to the uncontrolled action of the new sovereignty, she might justly be reproached with infidelity to her engagements. Faithful to these, the stipulation in question was inserted. The object, and the only object of it, was to notify the new state that it must not abuse its power to the detriment of persons claiming under Virginia, and to proclaim to those persons her parental attention to their interests. It was to announce to them, and to the new state, that their titles were to remain valid and secure under the new sovereign. It was a

1.—4 Bibb's Rep. 52.

2.—2 Marsh. Ins. 679.

Wheat. 8.

3.—Leigh's Rev. Virg. Laws, 333.



devolution upon the new sovereign of all the duties toward them of the old sovereign, and nothing more. It was to bind the new state as far as Virginia was bound, but to leave it as free as she would have been had there been no separation. Virginia could have had no imaginable motive to prevent the new state from exercising all the accustomed rights of sovereignty. On the contrary, she displayed a solicitude for the admission of a new state into the Union, making it a condition of its independence. In conformity with this view is the language of the third article. It provides, "that all private rights and interests of lands, within the said district, derived from the laws of Virginia, prior to such separation, shall 51\*] \*remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state." If the reason for using the terms "rights and interests" be attended to, it will be seen that it is a guarantee for the security of the title, and nothing but the title. It is no restriction upon the new sovereignty as to any public policy which it might think fit to adopt. All the parts of the compact are to be taken together, and one article may serve to expound another, where there is ambiguity. What it meant by the third, may be ascertained by the fourth condition. That is a clear recognition of the right of the new state to enforce cultivation or improvement by forfeiture or other penalty. It expressly recognizes the right to exercise that power forthwith as to citizens; and as to non-residents, merely leaves a reasonable time (six years) to enable them to settle and improve. It admits the right of the state to effect the object by forfeiture or other penalty. If the parties to the compact had intended, by a provision for the security of the title, to exclude the legislative authority from acting at all upon the subject, would they have left that subject exposed to the most formidable action of the sovereign power, by forfeiture or other penalty?

The courts of Kentucky, the people of Kentucky, the legislature of Kentucky, have all proceeded upon the principle of the perfect validity of the titles derived from the laws of Virginia. Everybody is interested in the preservation of those titles. The legislative 52\*] system of Kentucky \*does not begin to act until the system of Virginia has had its complete effect. After the decision upon the title, and after it has been pronounced valid; after the terms of the compact are completely fulfilled, the laws of Kentucky commence their operation. When they do operate, it is not upon the title but upon the subject. It is not on account of any defect in the title that they operate at all. They spring from those considerations of policy which a sovereign state has a right to weigh and give effect to. The title is admitted; but from other causes *dehors* the title, the owner of it is not compelled to pay for the title, nor for the land which he had a right to only in its native state; but he is compelled (on grounds of public policy) to pay for something which is not inherent in the title, which does not naturally belong to the land. If this be not according to the true interpretation of the compact, then the erection of Kentucky into an independent state was a solemn mockery. It was a grant

of the sovereignty without a capacity to exercise it, and a transfer of the sovereign power of Virginia to the new state with a prohibition to the exercise of any sovereign power. If the compact restrains her from legislating on the subject to this extent, it goes a great deal farther and exempts the subject entirely from her legislative jurisdiction. She could not tax the lands of non-residents; nor subject the land to the payment of debts in any novel manner; nor make a new law of descents; nor establish a ferry; nor lay out a road; nor build a town. In short, she can exert no sovereign power \*whatever over the [\*53 subject. For if those considerations of public policy, which led her to adopt the system of compensation to the *bona fidei* occupant, cannot prevail, neither could similar considerations in any other case prevail to authorize her legislative interference. The Virginia code of 1789 must immutably govern the territory.

But it may be said that the words of the third article must mean something more than a mere security of the title, according to the laws under which it is derived; otherwise the insertion of the article was utterly useless, since it would create no obligation other than what would exist without it. The answer to this is, that the necessity of such a stipulation grew out of the very extraordinary state of land titles in Kentucky. Even, however, if this reason had not existed, instances might be cited, without number, of similar precautions in international pacts and treaties. Such are, among others, the cession by Virginia of her western territory to Congress, which contains a confirmation to the settlers of Kaskias, Vincennes, &c., of their possessions and titles; the Louisiana treaty, and the Florida treaty, all of which contain similar confirmations.

It may, however, be urged that the rights and interests in land, as derived from the laws of Virginia, cannot be valid and secure if these acts have their effect; that there would be a nominal compliance with the compact, but a real violation of it.

If the laws operated on the title; if they obstructed or defeated it, the argument would indeed \*have weight. It would, how- [\*54 ever, at the same time, be equally applicable to a case of forfeiture for non-settlement or non-cultivation; for in that case, too, it might be said that you admit the title, but forfeit the land. So, in all other cases where the state exercises its right of eminent domain, it might be said that the title was acknowledged, but the land taken away. The ground on which the laws repose is not that of any inherent taint or defect in the title. It is one of policy, founded on the peculiar condition of the country; the multitude of dormant claims to the same land; the non-assertion of their titles by adverse claimants, and the necessity of encouraging improvement. The decisions of this court conform to these principles of interpretation. In *Wilson v. Mason*,<sup>1</sup> the court says: "It must be considered as providing for the preservation of titles, not for the tribunals which should decide on those titles." The laws are of univer-

1.—1 Cranch's Rep. 45, 91.

sal and impartial application. They apply as well between citizens of the state as between them and non-residents. Such an application of them was considered by the court, in *Taylor v. Bodley*,<sup>1</sup> as a conclusive test of their validity.

5. If the compact limited the action of the new sovereignty to the situation of the Virginia laws respecting real property, in all cases whatever, at the period of the separation, still it is insisted that the principle on which the occupying claimant laws are founded, had been [\*55\*] recognized by that state, and was then in force, and that Kentucky had a right to constitute the tribunals which should execute it and to direct its application. That the whole subject of remedy devolved on the new state is too clear a proposition to be contested. It might refuse to establish courts of justice at all. It might adopt the civil law or the Napoleon code. It might abolish the court of chancery. In *Wilson v. Mason*,<sup>2</sup> this doctrine was substantially held. The principle of the acts in question was first adopted by a law of the colony of Virginia, enacted in 1643.<sup>3</sup> It seems that this law never was repealed; and by it even the occupant, without color of title, was exempted from the payment of rents on eviction. But on general principles of law and equity, such as they have been recognized in every system of jurisprudence which has prevailed among civilized nations, the meliorations by a *bonæ fidei* possessor are to be paid for on eviction by the true owner; and such possessor is also exempt from responsibility for rents and profits.<sup>4</sup> The whole law of prescription proceeds by the same analogy. *Southall v. McKean*<sup>5</sup> is an adjudication on that principle, posterior to the separation, in a case occurring prior to it. *Lovther v. The Commonwealth*<sup>6</sup> proceeded on the same ground; and the case of a party claiming under the state is much stronger than if he claimed under a private individual. The principle, then, being [\*56\*] in existence in the parent state, it was competent to the new state to modify it and direct its application. The cases are numerous where a principle originally applied by courts of equity is adopted by the legislature, and, being incorporated into a statute, is enforced by the courts of law as a legal rule. Such are the cases of set-off, of penal bonds, and the remedy of creditors against devisees.

6. At all events, the laws are not wholly repugnant to the compact in their application to every species of action or suit; and the court will discriminate between the void and the valid provisions. The two laws provide, in substance:

(1) That there shall be no allowance of rents and profits prior to notice. (2) A definition of what shall be considered as notice. By the act of 1797 it is the commencement of a suit, or the delivery of a certified copy of the record on which the party claims, and the bringing a suit within a year. By the act of 1812 it is the rendering a judgment or decree. (3) That the occupant shall be paid for all valuable and lasting improvements, subject, by the act of

1797, to the restriction that the value of such improvements after notice shall not exceed the amount of the rents and profits after notice. (4) That the occupant shall be chargeable with all waste or damage committed on the land. (5) That he shall hold possession until the balance due to him is secured or paid. (6) That a sworn board of commissioners shall liquidate the account between the parties. (7) The right of election given by the act of 1812.

\*Are all, and if not all, which of these principles contrary to the compact? Is the repugnancy in the principles adopted, or the mode of executing them? As to what is that notice which shall convert a *bonæ fidei* into a *malæ fidei* possession, it is so uncertain in itself that it cannot be denied that the legislature has a right to establish a rule of positive institution on that subject. As to the remedy, it may certainly change the form of action, and the proceedings in any action; or convert an equitable into a legal right, with its appropriate legal remedy. Or it may forfeit the whole property, for non-cultivation or non-improvement.

This court is not a mere court of justice, applying ordinary laws. It is a political tribunal, and may look to political considerations and consequences. If there be doubt, ought the settled policy of a state, and its rules of property to be disturbed? The protection of property should extend as well to one subject as to another; to that which results from improvements, made under the faith of titles emanating from the government, as to a proprietary interest in the soil, derived from the same source. It extends to literary property, the fruit of mental labor. Here is a confusion of the proprietary interest in the land, with the accession to its value, from the industry of man fairly bestowed upon it. The wisdom of the legislator is tasked to separate the two and do exact justice to the claimants of each. The laws now in question are founded upon that great law of nature which secures the right resulting from occupation and bodily labor. The laws [\*58] of society are but modifications of that superior law. If there be doubt respecting their validity, considerations of convenience and utility ought to prevail in a case where the settled order of a great people would be disturbed. Conquerors themselves respect the religion, the laws, the property of the vanquished; and surely this court will respect those rules of property which had their origin in early colonial times, which were adopted by the parent state, and have been so long acquiesced in and confirmed by inveterate habit and usage among the people where they prevail.

*Mr. B. Hardin*, for the demandant, in reply, stated that the cause divided itself into the following questions:

1. What were the laws of Virginia respecting a compensation for ameliorations by a *bonæ fidei* possessor (for no other could be entitled), and his accountability for rents and profits at the time the compact was made?

2. Whether the consent of Congress was given to the compact in the manner required by the constitution of the United States.

1.—5 Cranch's Rep. 223.

2.—1 Cranch's Rep. 45, 91.

3.—1 Henn. Dig. LL. Virg. Pref. 15.

Wheat. 8. U. S., Book 5.

4.—Kaines' Prin. Eq. 26-23, 139.

5.—1 Wash. Rep. 336.

6.—1 Hen. & Mun. Rep. 201.



3. What is the true exposition of the compact?

4. The exposition of the legislative acts of Kentucky of 1797 and 1812, and an examination of the question, how far they depart from the laws of Virginia on the same subject-matter existing in 1789.

5. Whether this court has jurisdiction over the cause, and power to declare the acts of Kentucky null and void, as being repugnant to **59\*** the compact and the constitution of the United States; and whether it will exercise that jurisdiction and power in the present case.

1. The laws of Virginia, respecting this matter, in force at the time of the compact, could only consist of such parts of the common law of England as had been adopted in that state; of the system of equity, and the principles of the civil law applicable to the question; or of the then existing local statutes respecting it.

The rule of the common law, as to the action for mesne profits, is well ascertained to be that the plaintiff is entitled to the mesne profits from the time of the demise laid in the declaration in ejectment, and that the tenant cannot set-off his improvements made upon the land.<sup>1</sup> At law, then, the occupant was not entitled to compensation for his meliorations; and in equity, the universal rule is that the rents and profits are to be accounted for; though under some circumstances, the *bonæ fidei* occupant will be allowed to deduct the value of his improvements, *i. e.*, of the increased value of the land.<sup>2</sup> But, both by the chancery rule, and that of the civil law, the *bona fides* of his possession ceases the moment he has notice of the adverse better title. In the case cited on the other side, of *Southall v. M'Kean*,<sup>3</sup> the Court of Appeals of Virginia did not mean to impugn the rule uniformly applied by the English Court **60\*** of Chancery. It went on the \*ordinary ground that he who will have equity must do equity; and that if a party purchases land, with notice of another's equitable title, but that other lies by and neglects to assert his right for a long time, during which valuable improvements are made, the purchaser ought not, in equity, to lose these improvements. Still less does the case of *Lowther v. The Commonwealth*<sup>4</sup> impugn the rule. It decides nothing more than that where land is sold with warranty, and the vendee is evicted, he shall recover of the vendor, not the value of the land at the time of eviction, but the purchase moneys, with interest.

2. The consent of Congress was given to the compact between Virginia and Kentucky, in the manner required by the constitution of the United States. No particular form of words is necessary to signify this assent. Congress had the compact before them, and have agreed to the agreement for the formation of the new state and its admission into the Union. The state courts have repeatedly and constantly recognized the validity of the compact;<sup>5</sup> and if this court were now to determine it to be void,

Kentucky would be compelled to recede the whole country south of Green River, which was one of the equivalents she received for the stipulations on her part. The compact is also recognized as valid and binding by the sovereign authority of the people of Kentucky, being \*incorporated into the state constitution [**61** and thus made a part of their fundamental law.

3. As to the interpretation of the compact (supposing it valid), if that on the other side be correct, the compact is merely declaratory of the public law as applicable to the case. It is a well-established principle that changes of sovereignty work no change in the rights of property in the soil; and this applies even to such rights acquired by governments *de facto*, established by violence, against legal right. The stipulations inserted in the treaties and other public pacts, referred to on the other side, are merely in affirmation of this principle of universal law. Such is the stipulation in the third article of the Louisiana treaty, that "the inhabitants of the ceded territory shall be maintained and protected in the free enjoyment of their liberty, property, and the religion they profess." Such a general provision must be considered as merely declaratory of what the high contracting parties understood and admitted to be the law of nations, as to the effect of a change of sovereignty on proprietary interests of private individuals. But how much broader and stronger is the provision in the compact, that "all rights and interests of land derived from the laws of this state (*i. e.*, Virginia) shall remain valid and secure, and shall be determined by the laws now existing in this state." It must surely have been meant to protect, not merely the naked title, but the beneficial enjoyment of the interest in the land. The public law of the world, and the constitution of the United States, would have been \*sufficient to protect the [**62** mere naked title.<sup>6</sup> "All private rights and interests," legal and equitable, were to "remain valid and secure." The term *valid* is applicable to *rights*, and the term *secure* to *interests*, and both to each. But the provision does not stop here. These "rights and interests" are to be "determined by the laws now existing in this state." Most certainly this was not intended to prevent Kentucky from making general regulations on the subject of real property, and the remedies applicable to it, so far as they make a part of the *lex fori*. But she stipulates that she will not affect injuriously "private rights and interests" of land derived under the laws of Virginia, *i. e.*, the beneficial proprietary interest in land. The MS. case of *Brown v. M'Murray* shows that this exposition has been given to the compact by the Court of Appeals of Kentucky. So; also, the Circuit Court in that district has determined that the act of Assembly of Kentucky, 1814<sup>7</sup>, which alters the statute of limitations of 1808, as to real actions,<sup>8</sup> by taking away the proviso in favor of non-residents, is void, as being repugnant to the compact,

1.—1 Runnington's Eject. 437, 438.

2.—1 Madd. Chanc. 73, 74.

3.—1 Wash. Rep. 336.

4.—1 Hen. & Mun. Rep. 201.

5.—1 Marshall's Kentucky Rep. 199; *Brown v.*

*M'Murray*, MS. decision of the Court of Appeals of Kentucky.

6.—*Fletcher v. Peck*, 6 Cranch's Rep. 143, per Mr. Justice Johnson.

7.—5 Littel, LL., of Kentucky, 91.

8.—4 Littel, LL., of Kentucky, 56.



not merely as an alteration of the remedy, but as rendering invalid and insecure the rights and interests of land derived under the laws of Virginia.

As to the objections made on the other side to our interpretation of the compact, that it **63\*** impugns \*the right to the pursuit of happiness, which is inherent in every society of men, and is incompatible with these unalienable rights of sovereignty and of self-government, which every independent state must possess, the answer is obvious; that no people has a right to pursue its own happiness to the injury of others, for whose protection solemn compacts, like the present, have been made. It is a trite maxim, that man gives up a part of his natural liberty when he enters into civil society, as the price of the blessings of that state; and it may be said, with truth, that liberty is well exchanged for the advantages which flow from law and justice. The sovereignty of Kentucky will not be impaired by a faithful observance of this compact in its true spirit. It does not prevent her from making any general regulations of police and revenue, which any other state may make; but it does prevent her from confiscating the property of individuals under the pretext of a mere modification of the law as to improvements made by occupying claimants. There can be no doubt that sovereign states may make pacts with each other, limiting and restraining their rights of sovereignty as to proprietary interests in the soil. Such conventions are not inconsistent with the eminent domain which the law of nations attributes to them. Here the sole object of the compact is perpetually to secure the vested rights of private individuals from violation by legislative acts. It is in furtherance of the most sacred duty which society owes to its members. And even if it stipulated a special restraint upon the legisla- **64\*** tive \*power, in respect to the public revenue, it would not be the less obligatory. All the new states, on their admission into the Union, uniformly bind themselves not to tax the lands of the United States. Various other restraints upon their sovereign powers have been voluntarily consented to by the states; such, for example, as that contained in the act for the admission of Louisiana into the Union, which provides that all the legislative proceedings shall be conducted in the English language.

But this compact, so far from interfering with the revenue of Kentucky, plainly recognizes her right to tax the lands; and if it did not, it is clear that she might exercise the right, since she could not exist nor support her civil government without a revenue. The means involve the end; and therefore she may not only tax, but sell the lands to enforce payment. Nor is there anything in the compact interfering with the legislative authority of the state, to regulate the course of descents, or the liability of real estates for the payment of debts. An alteration of the law of descents does not affect the right, title or interest in land, as derived from the laws in force at the epoch of the compact, unless, indeed, the new law of descents be retrospective in its operation. Nor is it denied that the remedies in the courts of law and equity, the *lex fori* may be

modified as the wisdom of the legislature shall deem expedient. The forms of action, real and possessory, may be changed; the remedy, whether legal or equitable, may be adapted to the purposes of justice; \*the period of limi- **65** tation, and the mode of execution, all these may be modified and altered according to the fluctuating wants of society, provided they do not have an unjust retrospective operation upon vested rights. All these changes in the civil legislation of the state may be made, and the titles to land, as acquired under the laws of Virginia, will still remain unimpaired

4. A fair exposition of the legislative acts of 1797 and 1812 will show that they operate to invalidate the rights and interests of land derived under the laws of Virginia.

And first, as to the law of 1812. It was intended for the protection of any person "peaceably seating or improving any vacant land, supposing it to be his own in law or equity." The land not being occupied by the true owner it is not necessary (under this law) that the party occupying it should *bona fide* and honestly believe it to be his own property; but only that he should believe it to be so from the circumstance of his "having a connected title." The law supplies him with his ground of belief, or rather it substitutes a fact in the place of his belief. The state courts, whose peculiar province it is to interpret the local law, have expressly determined that the words, "supposing them to be his own," &c., are satisfied if the party had that foundation for his supposition. No matter how much *mala fides* there may be, if the possession was vacant and he can deduce a connected paper title. This interpretation goes far beyond the ancient chancery rule, and therefore the statute goes beyond the \*principle of that rule. Be- **66** sides, the rule of equity only pays the occupant for the increased value of the land; not for "improvements" (in the sense which local usage has given to that word, as indicating any fixtures annexed to the freehold), but only for actual ameliorations in the value of the land. The statute, on the contrary, compensates him for accessions to the property which are really deteriorations instead of ameliorations of its value to the real owner. The terms used by the legislature—"the charge and value of seating and improving"—shows evidently that it meant to transcend the rule of equity, which, according to Lord Kaimes, goes to make compensation for ameliorations only. The whole discussion in the legislature turned on these emphatic words, "charge and value;" and various amendments were proposed to strike them out of the bill, and to proceed on the true chancery principle of taking a fair account between the parties, of rents and profits on the one side, and the actual amelioration of the property on the other.

5. The law in question is both a violation of the compact and the national and state constitutions; and the court will declare it void.

It is void by its retrospective operation, in giving compensation for work and labor antecedent to the epoch of the compact of 1789, and even back to the first settlement of the country; and that, too, whether this work and labor bestowed upon the land actually deteriorated or ameliorated its value. It may be admitted that



it is not an *ex post facto* law in the sense of the **67\***] constitutional prohibition,\*as that is only applied to penal matters. But, upon general principles, all retrospective laws, whether civil or criminal, are unjust, and contrary to the fundamental maxims of universal jurisprudence. The nature of the social state, and of civil government itself, prescribe some limits to the legislative power, independent of the express provisions of a written constitution.<sup>1</sup> What is a retrospective law has been well defined by one of the learned judges of this court, and it is a definition which admits of an accurate and practical application. "Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions already past, must be deemed retrospective."<sup>2</sup> There is something in the very nature of all just legislation which prevents its being retrospective. It necessarily deals with future, and not with past transactions.<sup>3</sup>

The statute now in question is retrospective in releasing rights of action already vested. By the pre-existing local law, the successful claimant was entitled to recover the mesne profits even in a real action. But this act deprives him of this right as to rents and profits previously acquired, and even antecedent to the compact itself; and repeals the saving clause in the former act as to infants, &c. It is, in effect, a law releasing A from the right of action which B has against him.

**68\***] \*But even considered as a prospective enactment, the law operates unjustly and oppressively, because the lawful owner is compelled to pay, not merely for the actual ameliorations in the land; not its increased value only; but the expense incurred by the occupant in making pretended improvements, whether they are merely useful or fanciful, and matter of taste and ornament only dictated by his whim and caprice. He is not even liable for waste, unless committed after suit brought; and may destroy the timber, constituting, perhaps, the sole value of the land, without being called to any account.

If the law be partly constitutional, and partly not, the whole must fall; and there can be no doubt that the character of the parties, as being citizens of different states, gives the court cognizance of the cause, and jurisdiction to pronounce the law a nullity. If you have jurisdiction, you must decide according to law. But you cannot so decide without looking to see whether the acts of the state legislature are repugnant to the state constitution. This repugnancy has been frequently made the ground of decision in the federal courts, where the character of the parties gave them jurisdiction of the cause.<sup>4</sup>

But the acts are clearly void, as being repugnant to the constitution of the United States. They are laws impairing the obligation of contracts within the spirit of all the decisions of

this court, according to which it is immaterial whether the\*sovereign states of the Union [**69** are parties to the contract, or whether it is made between private individuals.<sup>5</sup> The special tribunal provided by the compact cannot oust the transcendent jurisdiction of this court. Even according to the maxims of private jurisprudence, an agreement to submit to arbitration cannot be pleaded in bar, without an award actually made; and this must apply in a case where the agreement, though made by the high contracting parties, was intended exclusively for the benefit of private individuals, and for the protection of private rights.

*Mr. Justice WASHINGTON* delivered the opinion of the court: In the examination of the first question stated by the court below, we are naturally led to the following inquiries: 1st. Are the rights and interests of lands lying in Kentucky, derived from the laws of Virginia prior to the separation of Kentucky from that state, as valid and secure under the above acts as they were under the laws of Virginia on the 18th of December, 1789? If they were not, then,

2d. Is the Circuit Court, in which this cause is depending, authorized to declare those acts, so far as they are repugnant to the laws of Virginia existing at the above period, unconstitutional?

The material provisions of the act of 1797 are as follow:

\*1st. That the occupant of land, from [**70** which he is evicted by better title, is, in all cases, excused from the payment of rents and profits accrued prior to actual notice of the adverse title, provided his possession in its inception was peaceable, and he shows a plain and connected title, in law or equity, deduced from some record.

2d. That the claimant is liable to a judgment against him for all valuable and lasting improvements made on the land prior to actual notice of the adverse title, after deducting from the amount the damages which the land has sustained by waste or deterioration of the soil by cultivation.

3d. As to improvements made, and rents and profits accrued, after notice of the adverse title, the amount of the one was to be deducted from that of the other, and the balance was to be added to, or subtracted from, the estimated value of the improvements made before such notice, as the nature of the case should require. But it was provided by a subsequent clause that in no case should the successful claimant be obliged to pay for improvements made after notice, more than what should be equal to the rents and profits.

4th. If the improvements exceed the value of the land in its unimproved state, the claimant was allowed the privilege of conveying the land to the occupant, and receiving in return the assessed value of it without the improvements, and thus to protect himself against a judgment and execution for the value of the

1.—Fletcher v. Peck, 6 Cranch's Rep. 135.

2.—Per Mr. Justice Story; Society, &c., v. Wheeler, 2 Gallis. Rep. 139.

3.—4 Wheat. Rep. 578; Note a.

4.—Society, &c., v. Wheeler, 2 Gallis. Rep. 105.

5.—Fletcher v. Peck, 6 Cranch's Rep. 87; New Jersey v. Wilson, 7 Cranch's Rep. 164; Terret v. Taylor, 9 Cranch's Rep. 48; Dartmouth College v. Woodward, 4 Wheat. Rep. 518.

improvements. If he should decline doing this, **71\*** he might recover possession of his land, but then he must pay the estimated value of the improvements, and lose also the rents and profits accrued before notice of the claim. But to entitle him to claim the value of the land, as above mentioned, he must give bond and security to warrant the title.

The act of 1812 contains the following provisions: 1. That the peaceable occupant of land, who supposes it to belong to him, in virtue of some legal or equitable title, founded on a record, is to be paid by the successful claimant for his improvements. 2. But the claimant may avoid the payment of the value of such improvements, if he please, by relinquishing his land to the occupant, and be paid its estimated value in its unimproved state; thus,

If he elect to pay for the value of the improvements, he is to give bond and security to pay the same, with interest, at different installments. If he fail to do this, or if the value of the improvements exceed three-fourths the value of the unimproved land, an election is given to the occupant to have a judgment entered against the claimant for the assessed value of the improvements, or to take the land, giving bond and security to pay the assessed value of the land, if unimproved, with interest, and by installments.

But if the claimant is not willing to pay for the improvements, and they should exceed three-fourths the value of the unimproved land, the occupant is obliged to give bond and security to pay the assessed value of the land, with interest, which, if he fail to do, judgment **72\*** is to be entered against him for such value; the claimant releasing his right to the land and giving bond and security to warrant the title.

If the value of the improvements does not exceed three-fourths that of the land, then the occupant is not bound (as he is in the former case) to give bond and security to pay the value of the land, but he may claim a judgment for the value of his improvements, or take the land, giving bond and security, as before mentioned, to pay the estimated value of the land.

3. The exemption of the occupant from the payment of the rents and profits, extends to all such as accrued during his occupancy, before judgment rendered against him in the first instance. But such as accrue after such judgment, for a term not exceeding five years, as also waste and damages committed by the occupant after suit brought, are to be deducted from the value of the improvements; or the court may render judgment for them against the occupant.

4. The amount of such rents and profits, damages and waste; also the value of the improvements, and of the land, clear of the improvements, are to be ascertained by commissioners, to be appointed by the court, and who act on oath.

These laws differ from each other only in degree; in principle they are the same. They agree in depriving the rightful owner of the land of the rents and profits received by the occupant up to a certain period, the first act fixing it to the time of actual notice of the adverse claim, and the latter act to the time of the judgment rendered against the occupant.

They also agree in compelling the successful claimant to pay, to a certain extent, the assessed value of the improvements made on the land by the occupant.

They differ in the following particulars:

1. By the former act, the improvements to be paid for must be valuable and lasting. By the latter, they need not be either.

2. By the former, the successful claimant was entitled to a deduction from the value of the improvements for all damages sustained by the land, by waste or deterioration of the soil by cultivation, during the occupancy of the defendant. By the latter, he is entitled to such a deduction only for the damages and waste committed after suit brought.

3. By the former, the claimant was bound to pay for such improvements only as were made before notice of the adverse title; if those made afterwards should exceed the rents and profits which afterwards accrued, then he was not liable beyond the rents and profits for the value of such improvements. By the latter, he is liable for the value of all improvements made up to the time of the judgment, deducting only the rents and profits accrued and the damage and waste committed after suit brought.

4. By the former, the claimant might, if he pleased, protect himself against a judgment for the value of the improvements, by surrendering the land to his adversary, and giving bond and security to warrant the title. But he was not bound to do so, nor was his giving bond and security to pay the value of the improvements a prerequisite to his obtaining possession of his land, nor was the judgment against him made a lien on the land.

By the latter act, the claimant is bound to give such bond, at the peril of losing his land; for if he fail to give it, the occupant is at liberty to keep the land, upon giving bond and security to pay the estimated value of it unimproved; and even this he may avoid where the value of the improvements exceeds three-fourths that of the land, unless the claimant will convey to the occupant his right to the land; for upon this condition alone is judgment to be rendered against the occupant for the assessed value of the land.

The only remaining provision of these acts, which is all important, and is not comprised in the above view of them, is the mode pointed out for estimating the value of the land in its unimproved state, of the improvements, and of the rents and profits; and this is the same, or nearly so, in both; so that it may be safely affirmed that every part of the act of 1797 is within the purview of the act of 1812; and, consequently, the former act was repealed by the repealing clause contained in the latter.

In pursuing the first head of inquiry, therefore, to which this case gives rise, the court will confine its observations to the act of 1812, and compare its provisions with the law of Virginia, as it existed on the 18th of December, 1789.

The common law of England was, at that period, as it still is, the law of that state; **75\*** and we are informed, by the highest authority, that a right to land, by that law, includes the right to enter on it when the possession is withheld from the right owner; to recover the possession by suit; to retain the possession, and to



receive the issues and profits arising from it. (*Altham's case*, 8 Co., 299.) In *Liford's case* (11 Co., 46), it is laid down that the regress of the disseisee reverts the property in him in the fruits or profits of the land, as well those that were produced by the industry of the occupant as those which were the natural production of the land, not only against the disseisor himself, but against his feoffee, lessee, or disseisor; "for," says the book, "the act of my disseisor may alter my action, but cannot take away my action, property or right; so that after the regress, the disseisee may seize these fruits, though removed from the land, and the only remedy of the disseisor, in such case, is to recoup their value against the claim of damages." The doctrine laid down in this case, that the disseisee can maintain trespass only against the disseisor for the rents and profits, is, with great reason, overruled in the case of *Holcomb v. Rowlyns* (Cro Eliz., 540). (See also Bull, N. P., 87.)

Nothing, in short, can be more clear, upon principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it, when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which **76\*** clogs his recovery of such possession \*and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist and be acknowledged; but it is impaired, and rendered insecure, according to the nature and extent of such restrictions.

A right to land essentially implies a right to the profits accruing from it, since, without the latter, the former can be of no value. Thus, a devise of the profits of land, or even a grant of them, will pass a right to the land itself. (*Shep. Touch.*, 93, Co. Litt., 4, b.) "For what," says Lord Coke, in this page, "is the land, but the profits thereof."

Thus stood the common law in Virginia at the period before mentioned; and it is not pretended that there was any statute of that state less favorable to the rights of those who derived title under her than the common law. On the contrary, the act respecting writs of right declares, in express terms, that "if the demandant recover his seisin, he may recover damages to be assessed by the recognitors of assize, for the tenant's withholding possession of the tenement demanded;" which damages could be nothing else but the rents and profits of the land. (2 Vol. Last Revisal, p. 463.) This provision of the act was rendered necessary on account of the intended repeal of all the British statutes, and the denial of damages by the common **77\*** law in all real actions, except in assize, which was considered as a mixed action. (Co. Litt., 257.) But in trespass *quare clausum fregit*, damages were always given at common law. (10 Co., 116.) And that the successful claimant of land in Virginia, who recovers in ejectment, was at all times entitled to recover rents and profits in an action of trespass, was

not, and could not, be questioned by the counsel for the tenant in this case.

If, then, such was the common and statute law of Virginia, in 1789, it only remains to inquire whether any principle of equity was recognized by the courts of that state, which exempted the occupant of land from the payment of rents and profits to the real owner, who has successfully established his right to the land, either in a court of law or of equity. No decision of the courts of that state was cited, or is recollected, which in the remotest degree sanctions such a principle.

The case of *Southall v. M'Kean*, which was much relied upon by the counsel for the tenant, relates altogether to the subjects of improvements, and decides no more than this: that if the equitable owner of land, who is conscious of his right to it, will stand by and see another occupy and improve the property, without asserting his right to it, he shall not, in equity, enrich himself by the loss of another, which it was in his power to have prevented, but must be satisfied to recover the value of the land, independent of the improvements. The acquiescence of the owner in the adverse possession of a person who he found engaged in making valuable improvements on the \*property, **[78]** was little short of a fraud, and justified the occupant in the conclusion, that the equitable claim which the owner asserted had been abandoned. How different is the principle of this case from that which governs the same subject by the act under consideration. By this, the principle is applicable to all cases, whether at law or in equity; whether the claimant knew or did not know of his rights and of the improvements which were making on the land, and even after he had asserted his right by suit.

The rule of the English Court of Chancery, as laid down in 1 Madd. Chanc., 72, is fully supported by the authorities to which he refers. It is, that equity allows an account of rents and profits in all cases, from the time of the title accrued, provided that do not exceed six years, unless under special circumstances; as where the defendant had no notice of the plaintiff's title, nor had the deeds and writings in his custody, in which the plaintiff's title appeared; or where there has been laches in the plaintiff in not asserting his title; or where the plaintiff's title appeared by deeds in a stranger's custody; in all which cases, and others similar to them in principle, the account is confined to the time of filing the bill. The language of Lord Hardwicke, in *Dormer v. Fortescue* (3 Atk., 128), which was the case of an infant plaintiff, is remarkably strong. "Nothing," he observes, "can be clearer, both in law and equity, and from natural justice, than that the plaintiff is entitled to the rents and profits from the time when his title accrued." His lordship afterwards adds, that "where the title **[79]** of the plaintiff is purely equitable, that court allows the account of rents and profits from the time the title accrued, unless under special circumstances, such as have been referred to."

Nor is it understood by the court that the principles of the act under consideration can be vindicated by the doctrines of the civil law, admitting, which we do not, that those doctrines were recognized by the laws of Virginia, or by the decisions of her courts.



The exemption of the occupant, by that law, from an account for profits, is strictly confined to the case of a *bonæ fidei* possessor, who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is contested by some other person claiming a better right to it. Most unquestionably, this character cannot be maintained, for a moment, after the occupant has notice of an adverse claim, especially if that be followed up by a suit to recover the possession. After this he becomes a *malæ fidei* possessor and holds at his peril, and is liable to restore all the mesne profits, together with the land. (Just., Lib. 2, tit. 1, s. 35.)

There is another material difference between the civil law and the provisions of this act, altogether favorable to the right of the successful claimant. By the former, the occupant is entitled only to those fruits or profits of the land which were produced by his own industry, and not even to those unless they were consumed; if they were realized, and contributed to enrich **80\*** the occupant, \*he is accountable for them to the real owner, as he is for all the natural fruits of the land. (See Just., the sect. before quoted; Lord Kaimies, B. 2, c. 1, p. 411, *et seq.*) Puffendorf, indeed (B. 4, c. 7, s. 3), lays it down in broad and general terms, that fruits of industry, as well as those of nature, belong to him who is master of the thing from which they flow.

By the act in question, the occupant is not accountable for profits, from whatever source they may have been drawn or however they may have been employed, which were received by him prior to the judgment of eviction.

But even these doctrines of the civil law, so much more favorable to the rights of the true owner of the land than the act under consideration, are not recognized by the common law of England. Whoever takes and holds the possession of land to which another has a better title, whether by disseisin or under a grant from the disseisor, is liable to the true owner for the profits which he has received, of whatever nature they may be, and whether consumed by him or not; and the owner may even seize them, although removed from the land, as has already been shown by *Lilford's* case.

We are not aware of any common law case which recognizes the distinction between a *bonæ fidei* possessor and one who holds *malæ fidei*, in relation to the subject of rents and profits; and we understand *Lilford's* case as fully proving that the right of the true owner to the mesne profits is equally valid against both. How far **81\*** this distinction \*is noticed in a court of equity has already been shown.

Upon the whole, then, we take it to be perfectly clear, that, according to the common law, the statute law of Virginia, the principles of equity, and even those of the civil law, the successful claimant of land is entitled to an account of the mesne profits received by the occupant from some period prior to the judgment of eviction, or decrec. In a real action, as this is, no restriction whatever is imposed by the law of Virginia upon the recognitors, in assessing the damages for the demandant, except that they should be commensurate with the withholding of the possession.

If this act of Kentucky renders the rights of claimants to lands, under Virginia, less valid

and secure than they were under the laws of Virginia, by depriving them of the fruits of their land during its occupation by another, its provisions, in regard to the value of the improvements put upon the land by the occupant, can, with still less reason, be vindicated. It is not alleged by any person that such a claim was ever sanctioned by any law of Virginia, or by her courts of justice. The case of *Southall v. M'Kean* has already been noticed and commented upon. It is laid down, we admit, in *Coulter's* case (5 Co., 30), that the disseisor, upon a recovery against him, may recoup the damages to the value of all that he has expended in amending the houses. (See, also, Bro. tit. Damages, pl. 82, who cites 24 Edw. III., 50.) If any common law decision has ever gone beyond the principle here laid down, we have not \*been fortunate enough to meet with it. [**82** The doctrine of *Coulter's* case is not dissimilar in principle from that which Lord Kaimies considers to be the law of nature. His words are: "It is a maxim suggested by nature, that reparations and meliorations bestowed upon a house, or on land, ought to be defrayed out of the rents. By this maxim we sustain no claim against the proprietor for meliorations, if the expense exceed not the rents levied by the *bonæ fidei* possessor." He cites Papinian, L. 48, *de rei vindicatione*.

Taking it for granted that the rule, as laid down in *Coulter's* case, would be recognized as good law by the courts of Virginia, let us see in what respects it differs from the act of Kentucky. That rule is, that meliorations of the property (which necessarily mean valuable and lasting improvements), made at the expense of the occupant of the land, shall be set-off against the legal claim of the proprietor for profits which have accrued to the occupant during his possession. But, by the act, the occupant is entitled to the value of the improvements to whatever extent they may exceed that of the profits; not on the ground of set-off against the profits, but as a substantive demand. For the account for improvements is carried down to the day of the judgment, although the occupant was for a great part of the time a *malæ fidei* possessor, against whom no more can be offset, but the rents and profits accrued after suit brought. Thus it may happen that the occupant, who may have enriched himself to any amount, by the natural, as well as the industrial \*products of land, to which he [**83** had no legal title (as by the sale of timber, coal, ore, or the like), is accountable for no part of those profits but such as accrued after suit brought; and on the other hand, may demand full remuneration for all the improvements made upon the land, although they were placed there by means of those very profits, in violation of that maxim of equity, and of natural law, *nemo debet locupletari aliena jactura*.

If the principle which this law asserts has a precedent to warrant it, we can truly say that we have not met with it. But we feel the fullest confidence in saying that it is not to be found in the laws of Virginia, or in the decisions of her courts.

But the act goes further than merely giving to the occupant a substantive claim against the owner of the land for the value of the improvements, beyond that of the profits received since



the suit brought. It creates a binding lien on the land for the value of the improvements, and transfers the right of the successful claimant in the land to the occupant, who appears, judicially, to have no title to it, unless the former will give security to pay such value within a stipulated period. In other words, the claimant is permitted to purchase his own land, by paying to the occupant whatever sum the commissioners may estimate the improvements at, whether valuable and lasting, or worthless and unserviceable to the owner, although they were made with the money justly and legally belonging to the owner; and upon these terms only can he recover possession of his land.

If the law of Virginia has been correctly stated, <sup>84\*</sup> need it be asked whether the right and interest of such a claimant is as valid and secure under this act as it was under the laws of Virginia, by which, and by which alone, they were to be determined? We think this can hardly be asserted. If the article of the compact, applicable to this case, meant anything, the claimant of land under Virginia had a right to appear in a Kentucky court as he might have done in a Virginia court if the separation had not taken place, and to demand a trial of his right by the same principles of law which would have governed his case in the latter state. What those principles are have already been shown.

If the act in question does not render the right of the true owner less valid and secure than it was under the laws of Virginia, then an act declaring that no occupant should be evicted but upon the terms of his being paid the value, or double the value of the land, by the successful claimant, would not be chargeable with that consequence, since it cannot be denied but that the principle of both laws would be the same.

The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating, the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however, minute or apparently immaterial in their effect upon the contract of <sup>85\*</sup> the parties, impairs its obligation. \*Upon this principle it is, that if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, although the change was for his advantage.

2. The only remaining question is, whether this act of 1812 is repugnant to the constitution of the United States, and can be declared void by this court, or by the circuit court from which this case comes by adjournment?

But, previous to the investigation of this question, it will be proper to relieve the case from some preliminary objections to the validity and construction of the compact itself.

1st. It was contended by the counsel for the tenant that the compact was invalid *in toto*, because it was not made in conformity with the provisions of the constitution of the United States; and, if not invalid to that extent, still,

2d. The clause of it applicable to the point in

controversy was so, inasmuch as it surrenders, according to the construction given to it by the opposite counsel, rights of sovereignty which are unalienable.

1. The first objection is founded upon the allegation that the compact was made without the consent of Congress, contrary to the tenth section of the first article, which declares that "no state shall, without the consent of Congress, enter into any agreement or compact with another state, or with a foreign power." Let it be observed, in the first place, that the constitution makes no provision respecting the mode or form in which the consent <sup>of</sup> <sup>[\*86]</sup> Congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon according to the ordinary rules of law and of right reason. The only question in cases which involve that point is, has Congress, by some positive act in relation to such agreement, signified the consent of that body to its validity? Now, how stands the present case? The compact was entered into between Virginia and the people of Kentucky, upon the express condition that the general government should, prior to a certain day, assent to the erection of the district of Kentucky into an independent state, and agree that the proposed state should immediately, after a certain day, or at some convenient time future thereto, be admitted into the federal Union. On the 28th of July, 1790, the convention of that district assembled, under the provisions of the law of Virginia, and declared its assent to the terms and conditions prescribed by the proposed compact; and that the same was accepted as a solemn compact, and that the said district should become a separate state on the 1st of June, 1792. These resolutions, accompanied by a memorial from the convention, being communicated by the President of the United States to Congress, a report was made by a committee to whom the subject was referred, setting forth the agreement of Virginia, that Kentucky should be erected into a state upon certain terms and conditions, and the acceptance by Kentucky upon the terms and conditions so prescribed; and, on the 4th of February, 1791, Congress passed an act which, after referring to <sup>the compact,</sup> <sup>[\*87]</sup> and the acceptance of it by Kentucky, declares the consent of that body to the erecting of the said district into a separate and independent state, upon a certain day, and receiving her into the Union.

Now, it is perfectly clear, that although Congress might have refused their consent to the proposed separation, yet they had no authority to declare Kentucky a separate and independent state without the assent of Virginia, or upon terms variant from those which Virginia had prescribed. But Congress, after recognizing the conditions upon which alone Virginia agreed to the separation, expressed, by a solemn act, the consent of that body to the separation. The terms and conditions, then, on which alone the separation could take place, or the act of Congress become a valid one, were necessarily assented to; not by a mere tacit acquiescence, but by an express declaration of the legislative mind, resulting from the manifest construction of the act itself. To deny this is to deny the validity of the act of

Wheat. 8.



Congress, without which Kentucky could not have become an independent state; and then it would follow that she is at this moment a part of the state of Virginia, and all her laws are acts of usurpation. The counsel who urged this argument would not, we are persuaded, consent to this conclusion; and yet it would seem to be inevitable if the premises insisted upon be true.

2. The next objection, which is to the validity of the particular clause of the compact involved in this controversy, rests upon a principle, the correctness of which remains to be proved. It is practically opposed by the theory of all limited governments, and especially of those which constitute this Union. The powers of legislation granted to the government of the United States, as well as to the several state governments, by their respective constitutions, are all limited. The article of the constitution of the United States, involved in this very case, is one, amongst many others, of the restrictions alluded to. If it be answered that these limitations were imposed by the people in their sovereign character, it may be asked, was not the acceptance of the compact the act of the people of Kentucky in their sovereign character? If, then, the principle contended for be a sound one, we can only say that it is one of a most alarming nature, but which, it is believed, cannot be seriously entertained by any American statesman or jurist.

Various objections were made to the literal construction of the compact, one only of which we deem it necessary particularly to notice. That was, that if it be so construed as to deny to the legislature of Kentucky the right to pass the act in question, it will follow that that state cannot pass laws to affect lands, the title to which was derived under Virginia, although the same should be wanted for public use. If such a consequence grows necessarily out of this provision of the compact, still we can perceive no reason why the assent to it by the people of Kentucky should not be binding on the legislature of that state. Nor can we perceive why the admission of the conclusion involved in the argument should invalidate an express article of the compact in relation to a quite different subject. The agreement, that the rights of claimants under Virginia should remain as valid and secure as they were under the laws of that state, contains a plain, intelligible proposition, about the meaning of which it is impossible there can be two opinions. Can the government of Kentucky fly from this agreement, acceded to by the people in their sovereign capacity, because it involves a principle which might be inconvenient, or even pernicious to the state, in some other respect? The court cannot perceive how this proposition could be maintained.

But the fact is that the consequence drawn by counsel from a literal construction of this article of the compact, cannot be fairly deduced from the premises, because, by the common law of Virginia, if not by the universal law of all free governments, private property may be taken for public use, upon making to the individual a just compensation. The admission of this principle never has been imagined by any person as rendering his right to property less

valid and secure than it would be were it excluded; and, consequently, it would be an unnatural and forced construction of this article of the compact to say that it included such a case.

We pass over the other observations of counsel upon the construction of this article with the following remark: that where the words of a law, treaty or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest upon his own understanding of a law, until a judicial construction of those instruments had been obtained.

We now come to the consideration of the question whether this court has authority to declare the act in question unconstitutional and void, upon the ground that it impairs the obligation of the compact? This is denied for the following reasons: It is insisted, in the first place, that this court has no such authority, where the objection to the validity of the law is founded upon its opposition to the constitution of Kentucky, as it was, in part, in this case. It will be a sufficient answer to this observation, that our opinion is founded exclusively upon the constitution of the United States.

2d. It was objected that Virginia and Kentucky, having fixed upon a tribunal to determine the meaning of the compact, the jurisdiction of this court is excluded. If this be so, it must be admitted that all controversies which involve a construction of the compact are equally excluded from the jurisdiction of the state courts of Virginia and Kentucky. How, then, are those controversies, which we were informed by the counsel on both sides crowded the federal and state courts of Kentucky, to be settled? The answer, we presume, would be, by commissioners, to be appointed by those states. But none such have been appointed; what then? Suppose either of those states, Virginia, for example, should refuse to appoint commissioners? Are the occupants of lands, to which they have no title, to retain their possessions until this tribunal is appointed, and to enrich themselves, in the meantime, by the profits of them, not only to the injury of non-residents, but of the citizens of Kentucky? The supposition of such a state of things is too monstrous to be for a moment entertained. The best feelings of our nature revolt against a construction which leads to it.

But how happens it that the questions submitted to this court have been entertained, and decided, by the courts of Kentucky, for twenty-five years, as we were informed by the counsel? Have these courts, cautious and learned as they must be acknowledged to be, committed the crime of usurping a jurisdiction which did not belong to them? We should feel very unwilling to come to such a conclusion.

The answer, in a few words, to the whole of the argument, is to be found in the explicit language of that provision of the compact which respects the tribunal of the commissioners. It is to be appointed in no case but where a complaint, or dispute shall arise, not between



individuals, but between the commonwealth of Virginia and the state of Kentucky, in their high sovereign characters.

Having thus endeavored to clear the question of these preliminary objections, we have only to add, by way of conclusion, that the **92\*** duty, not less *\*than* the power of this court, as well as of every other court in the Union, to declare a law unconstitutional which impairs the obligation of contracts, whoever may be the parties to them, is too clearly enjoined by the constitution itself, and too firmly established by the decisions of this and other courts, to be now shaken; and that those decisions entirely cover the present case.

A slight effort to prove that a compact between two states is not a case within the meaning of the constitution, which speaks of contracts, was made by the counsel for the tenant, but was not much pressed. If we attend to the definition of a contract, which is the agreement of two or more parties, to do, or not to do, certain acts, it must be obvious that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous; and in *Fletcher v. Peck* the Chief Justice defines a contract to be a compact between two or more parties. The principles laid down in that case are, that the constitution of the United States embraces all contracts, executed or executory, whether between individuals, or between a state and individuals; and that a state has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals. Kentucky, therefore, being a party to the compact which guaranteed to claimants of land lying in that state, under titles derived from Virginia, their rights as they existed under the laws of Virginia, was incompetent to violate **93\*** that contract, by passing *\*any* law which rendered those rights less valid and secure.

It was said by the counsel for the tenant, that the validity of the above laws of Kentucky have been maintained by an unvarying series of decisions of the courts of that state, and by the opinions and declarations of the other branches of her government. Not having had an opportunity of examining the reported cases of the Kentucky courts, we do not feel ourselves at liberty to admit or deny the first part of this assertion. We may be permitted, however, to observe that the principles decided by the Court of Appeals of that state, in the cases of *Haye's heirs v. M' Murray*, a manuscript report of which was handed to the court when this cause was argued, are in strict conformity with this opinion. As to the other branches of the government of that state, we need only observe that whilst the legislature has maintained the opinion, most honestly, we believe, that the acts of 1797 and 1812 were consistent with the compact, the objections of the Governor to the validity of the latter act and the reasons assigned by him in their support, taken in connection with the above case, incline us strongly to suspect that a great diversity of opinion prevails in that state upon the question we have been examining. However this may be, we hold ourselves answerable to God, our consciences and our country, to decide this question according to the dictates of our best judgment,

be the consequences of the decision what they may. If we have ventured to entertain a wish as to the result of the investigation which *\*we* have laboriously given to the case, [**94\*** it was that it might be favorable to the validity of the laws; our feelings being always on that side of the question, unless the objections to them are fairly and clearly made out.

The above is the opinion of a majority of the court.

The opinion given upon the first question proposed by the Circuit Court, renders it unnecessary to notice the second question.

*Mr. Justice JOHNSON.* Whoever will candidly weigh the intrinsic difficulties which this case presents, must acknowledge that the questions certified to this court are among those on which any two minds may differ, without incurring the imputation of willful, or precipitate error.

We are fortunate, in this instance, in being placed aloof from that unavoidable jealousy which awaits decisions founded on appeals from the exercise of state jurisdiction. This suit was originally instituted in the Circuit Court of the United States; and the duty now imposed upon us is, to decide, according to the best judgment we can form, on the law of Kentucky. We sit, and adjudicate, in the present instance, in the capacity of judges of that state. I am bound to decide according to those principles which ought to govern the courts of that state when adjudicating between its own citizens.

The first of the two questions certified to this court is, whether the laws, well known by the *\*description* of the occupying claimant [**95\*** laws of Kentucky, are constitutional.

The laws known by that denomination are the acts passed the 27th of February, 1797, and the 31st of January, 1812. The general purport of the former is to give to a defendant in ejectment, compensation for actual improvements innocently made upon the lands of another. The practical effect of the latter is to give him compensation for all the labor and expense bestowed upon it, whether productive of improvement or not.

The two acts differ as to the time from which damages and rents are to be estimated, but concur,

1st. In enjoining on the courts the substitution of commissioners, for a jury, in assessing damages.

2d. In converting the plaintiff's right to a judgment, after having established his right to land, from an absolute, into a conditional right; and,

3d. Under some circumstances, in requiring that judgment should be given for the defendant, and that the plaintiff, in lieu of land, should recover an assessed sum of money, or, rather, bonds to pay that sum, *i. e.*, another right of action, if anything.

The second question certified is, on which of these two acts the court shall give judgment, and seems to have arisen out of an argument insisted on at the trial, that as the suit was instituted prior to the passage of the last act, it ought to be adjudicated under the first act, notwithstanding that the act of 1812 was in force when judgment was given.



**96\*]** \*As the language of the first question is sufficiently general to embrace all questions that may arise, either under the state, or United States constitution, much of the argument before this court turned upon the inquiry, whether the rights of the parties were affected by that article of the United States constitution which makes provision against the violation of contracts.

The general question I shall decline passing an opinion upon. I consider such an inquiry as a work of supererogation, until the benefit of that provision in the constitution shall be claimed in an appeal from the decision of a court of the state. There is, however, one view of this point, presented by one of the gentlemen who appeared on behalf of the state, which cannot pass unnoticed. It was contended that the constitution of Kentucky, in recognizing the compact with Virginia, recognizes it only as a compact; and, therefore, that it acquires no more force under that constitution than it had before; and that but for the constitution of Kentucky, questions arising under it were of mere diplomatic cognizance, and were not, by the constitution, transmuted into subjects of judicial cognizance.

I am constrained to entertain a different view of this subject; and, without passing an opinion on the legal effect of the compact, in its separate existence, upon individual rights, I must adopt the opinion that when the people of Kentucky declared that "the compact with the state of Virginia, subject to such alterations as may be made therein, agreeably to the mode **97\*]** prescribed by the \*said compact, shall be considered as part of this constitution," they enacted it as a law for themselves, in all those parts in which it was previously obligatory on them as a contract; and made it a fundamental law, one which could only be repealed in the mode prescribed for altering that constitution. Had it been enacted in the ordinary form of legislation, notwithstanding the absurdity insisted on of enacting laws obligatory on Virginia, it is certain that the maxim *utile per inutile non vitiatur*, would have been applied to it, and it would have been enforced as a law of Kentucky in every court of justice sitting in judgment upon Kentucky rights. How much more so, when the people thought proper to give it the force and solemnity of a fundamental law.

I therefore consider the article of the compact which has relation to this question, as operating on the rights and interests of the parties, with the force of a fundamental law of the state; and, certainly, it can, then, need no support from viewing it as a contract, unless it be that the constitution may be repealed by one of the parties, but the contract cannot. While the constitution continues unrepealed, it is putting a fifth wheel to the carriage to invoke the contract into this cause. It can only eventuate in crowding our docket with appeals from the state courts.

I consider, therefore, the following extract from the compact, as an enacted law of Kentucky: "That all private rights and interests of lands within (Kentucky), derived from the laws of Virginia prior to (their) separation, **98\*]** shall remain valid \*and secure under the laws of the proposed state, and shall be deter-

mined by the laws (existing in Virginia at the time of the separation)." The alterations here made in the phraseology are such as necessarily result from the adaptation of it to a legislative form. The occupying claimant laws, therefore, must conform to this constitutional provision, or be void; for a legislature, constituted under that constitution, can exercise no powers inconsistent with the instrument which created it. The will of the people has decreed otherwise, and the interests of the individual cannot be affected by the exercise of powers which the people have forbidden their legislature to exercise.

To constitute the sovereign and independent state of Kentucky was, unquestionably, the leading object of the act of Virginia of the 18th of December, 1789. To exercise unlimited legislative power over the territory within her own limits, is one of the essential attributes of that sovereignty; and every restraint in the exercise of this power, I consider as a restriction on the intended grant, and subject to a rigorous construction. On general principles, private property would have remained unaffected by the transfer of sovereignty; but thenceforth would have continued subject, both as to right and remedy, to the legislative power of the state newly created. The argument for the plaintiff is, that the provision now under consideration goes beyond the recognition or enforcement of this principle, and restrains the state of Kentucky from any legislative act that can in any way impair, or encumber, or vary the beneficiary interests \*which the grant- [**99**ees of land acquired under the laws of Virginia. Or, in other words, that it creates a peculiar tenure on the lands granted by Virginia, which exempts them from that extent of legislative action to which the residue of the state is unquestionably subjected. It must mean this, if it means anything. For, supposing all the grantees of lands, under the laws of Virginia, in actual possession of their respective premises, unless the lands thus reduced into possession be still under the supposed protection of this compact, neither could they have been at any time previous. The words of the compact, if they carry the immunity contended for beyond the period of separation, are equally operative to continue it ever after.

But where would this land us? If the state of Kentucky had, by law, enacted that the dower of a widow should extend to a life estate in one-half of her husband's land, would the widow of a Virginian, whose husband died the day after, have lost the benefit of this law, because the laws of Virginia had given the wife an inchoate right in but one-third? This would be cutting deep, indeed, into the sovereign powers of Kentucky, and would be establishing the anomaly of a territory over which no government could legislate; not Virginia, for she had parted with the sovereignty; not Kentucky, for the laws of Virginia were irrevocably fastened upon two-thirds of her territory.

But it is contended that the clause of the compact under consideration must have meant more \*than what is implied in every [**100**cession of territory, or it was nugatory to have inserted it.

I confess I cannot discover the force of this



argument. In the present case it admits of two answers; the one is found in the very peculiar nature of the land titles created by Virginia, and then floating over the state of Kentucky. Land they were not, and yet all the attributes of real estate were extended to them, and intended by the compact to be preserved to them under the dominion of the new state. There was, then, something more than the ordinary rights of individuals in the ceded territory to be perpetuated, and enough to justify the insertion of such a provision as a necessary measure. But there is another answer to be found in the ordinary practice of nations in their treaties, in which, from abundant caution, or, perhaps, diplomatic parade, many stipulations are inserted for the preservation of rights which no civilian would suppose could be affected by a change of sovereignty. Witness the frequent stipulations for the restoration of wrecked goods, or goods piratically taken; witness, also, the third article of the treaty ceding Louisiana, and the sixth article of that ceding Florida, both of which are intended to secure to the inhabitants of the ceded territory, rights which, under our civil institutions, could not be withheld from them.

But let us now reverse the picture, and inquire whether this stipulation of the compact, or of the constitution, prescribed no limits to the legislative power of Kentucky over the ceded territory. Had the state of Kentucky, immediately **101\***] after it was organized, \*passed a law declaring that wherever a plaintiff in ejectment, or in a writ of right, shall have established his right in law to recover, the jury shall value the premises claimed, and, instead of judgment for the land, and the writ of possession, the plaintiff shall have his judgment for the value so assessed, and the ordinary process of law to recover a sum of money on judgment; who is there who would not have felt that this was a mere mockery of the compact, a violation of the first principles of private right and of faith in contracts? Yet such a law is, in degree, not in principle, variant from the occupying claimant laws under consideration, and the same latitude of legislative power which will justify the one, would justify the other.

But, again, on the other hand (and I acknowledge that I am groping my way through a labyrinth, trying to lay hold of sensible objects to guide me), who can doubt that where private property had been wanted for national purposes, the legislature of Kentucky might have compelled the individual to convey it for a value tendered, notwithstanding it was held under a grant from Virginia, and notwithstanding such a violation of private right had been even constitutionally forbidden by the state of Virginia? Or who can doubt the power of Kentucky to regulate the course of descents, the forms of conveying, the power of devising, the nature and extent of liens, within her territorial limits? For example: By the civil law, the workman who erects an edifice acquires a lien on both the building and the land it stands **102\***] upon, \*for payment of his bill. Why should not the state of Kentucky have adopted this wise and just principle into her jurisprudence? Or why not have extended it to the case of the laborer who clears a field? Yet, in principle, the occupying claimant laws, at least

that of 1797, was really intended to engraft this very provision into the Kentucky code, as to the innocent improver of another man's property. It was thought, and justly thought, that as the state of Virginia had pursued a course of legislation in settling the country which had introduced such a state of confusion in the titles to landed property, as rendered it impossible for her to guaranty any specific tract to the individual, it was but fair and right that some security should be held out to him for the labor and expense bestowed in improving the country; and that where the successful claimant recovered his land, enhanced in value by the labors of another, it was but right that he should make compensation for the enhanced value. To secure this benefit to the occupying claimant, to give a lien upon the land for his indemnity, and avoid the necessity of a suit in equity, were in fact, the sole objects of the act of 1797. The misfortune of this system appears to have been that to curtail litigation, by providing the means of closing this account current of rights and liabilities in a court of law, and in a single suit, so as to obviate the necessity of going into equity; or of an action for mesne profits on the one side, and an action for compensation on the other, appears to have absorbed the attention of the legislature. The consequence of \*which is, that a course **[\*103** of proceeding, quite inconsistent with the simplicity of the common law process, and a curious debit and credit of land, damages and mesne profits on the one hand, and of *quantum meruit* on the other, has been adopted, exhibiting an anomaly well calculated to alarm the precise notions of the common law.

But suppose that instead of imposing this complex mode of coming at the end proposed, the legislature of Kentucky had passed a law simply declaring that the innocent improver of lands, without notice, should have his action to recover indemnity for his improvements, and a lien on the premises so improved, in preference to all other creditors. I can see no principle on which such a law could be declared unconstitutional, nor anything that is to prevent the party from enforcing it in any court having competent jurisdiction.

But the inconsistency which strikes everyone in considering the laws as they now stand is, that one party should have a verdict, and another, finally, the judgment. That, *eodem flatu*, the plaintiff should be declared entitled to recover land, and yet not entitled to recover land.

After thus mooting the difficulties of this case, I am led to the opinion that if we depart from the restricted construction of the article under consideration, we are left to float on a sea of uncertainty as to the extent of the legislative power of Kentucky over the territory held under Virginia grants; that if obliged to elect between the assumed exercise, and the utter extinction of the power of Kentucky over the subject, I would \*adopt the former; **[\*104** that every question between those extremes is one of expediency or diplomacy, rather than of judicial cognizance, and not to be decided before this tribunal. If compelled to decide on the constitutionality of these laws, strictly speaking, I would say that they in no wise impugn the force of the laws of Virginia, under which the titles of landholders are derived, but



operate to enforce a right acquired subsequently, and capable of existing consistently with those acquired under the laws of Virginia. I cannot admit that it was ever the intention of the framers of this constitution, or of the parties to this compact, or of the United States, in sanctioning that compact, that Kentucky should be forever chained down to a state of hopeless imbecility—embarrassed with a thousand minute discriminations drawn from the common law, refinements on mesne profits, set-offs, &c., appropriate to a state of society, and a state of property, having no analogy whatever to the actual state of things in Kentucky—and yet no power on earth existing to repeal or to alter, or to effect those accommodations to the ever varying state of human things, which the necessities or improvements of society may require. If anything more was intended than the preservation of that very peculiar and complex system of land laws then operating over this country, under the laws of Virginia, it would not have extended beyond the maintenance of those great leading principles of the fundamental laws of that state, which, as far as they limited the legislative power of the state of Virginia over **105\***] the rights of \*individuals, became, also, blended with the law of the land, then about to pass under a new sovereignty. And if it be admitted, that the state of Kentucky might in any one instance, have legislated as far as the state of Virginia might have legislated on the same subject, I acknowledge that I cannot perceive where the line is to be drawn so as to exclude the powers asserted under, at least, the first of the laws now under consideration. But it appears to me that this cause ought to be decided upon another view of the subject.

The practice of the courts of the United States, that is, the remedy of parties therein, is subject to no other power than that of Congress. By the act of 1789, the practice of the respective state courts was adopted into the courts of the United States, with power to the respective courts, and to the Supreme Court, to make all necessary alterations. Whatever changes the practice of the respective states may have undergone since that time, that of the United States courts has continued uniform, except so far as the respective courts have thought it advisable to adopt the changes introduced by the state legislatures.

The District of Kentucky was established while it was yet a part of Virginia. (Judiciary Act, September, 24, 1789.) The practice of the state of Virginia, therefore, was made the practice of the United States courts in Kentucky. Now, according to the practice of Virginia, the plaintiff, here, upon making out his title, ought to have had a verdict and judgment in the usual form. Nor can I recognize the right of the **106\***] state of Kentucky \*to compel him, or to compel the courts of the United States, to pass through this subsequent process before a board of commissioners, and, afterwards, to purchase his judgment in the mode prescribed by the state laws. I do not deny the right of the state to give the lien, and to give the action for improvements; but I do deny the right to lay the courts of the United States under an obligation to withhold from a plaintiff the judgment to which, under the established practice of that court, he had entitled himself.

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It may be argued, that the courts of the United States, in Kentucky, have long acquiesced in a compliance with these laws, and thereby have adopted this course of proceeding into their own practice. This, I admit, is correct reasoning; for the court possessed the power of making rules of practice, and such rules may be adopted by habit, as well as by framing a literal rule. But the facts, with regard to the Circuit Court here, could only sustain the argument as to the occupying claimant law of 1797, since that of 1812 appears to have been early resisted. Here, however, I am led to an inquiry which will equally affect the validity of both laws, viewed as rules of practice, as affecting a fundamental right, incident to remedies in our courts of law.

It is, obviously, a leading object of these laws, to substitute a trial by a board of commissioners, for the trial by jury, as to mesne profits, damages, and a *quantum meruit*. Without examining how far the legislative power of Kentucky is adequate \*to this change [**107**] in its own courts, I am perfectly satisfied that it cannot be introduced by state authority into the courts of the United States. And I go farther. The judges of these courts have not power to make the change; for the constitution has too sedulously guarded the trial by jury (seventh article of amendments), and the judiciary act of the United States both recognizes the separation between common law and equity proceedings, and forbids that any court should blend and confound them.

These considerations lead me to the conclusion that the defendant is not entitled to judgment under either of the acts under consideration, even admitting them to be constitutional; but if, under either, certainly under that alone which has been adopted into the practice of the United States courts in Kentucky.

**CERTIFICATE.**—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Kentucky, on certain questions upon which the opinions of the judges of the said Circuit Court were opposed, and which were certified to this court for their decision by the judges of the said Circuit Court, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the act of the said state of Kentucky, of the 27th of February, 1797, concerning occupying claimants of land, whilst it was in force, was repugnant to the constitution of the United \*States, but [**108**] that the same was repealed by the act of the 31st of January, 1812, to amend the said act; and that the act last mentioned is also repugnant to the constitution of the United States. .

The opinion given on the first question submitted to this court by the said Circuit Court, renders it unnecessary to notice the second question.

*All which is ordered to be certified to the said Circuit Court.*

Cited—4 Pet. 101; 5 Pet. 47, 465; 11 Pet. 582; 12 Pet. 69; 14 Pet. 414; 1 How. 316, 327; 6 How. 327, 332; 7 How. 66; 12 How. 156; 13 How. 566; 15 How. 319; 18 How. 432, 433; 20 How. 538; 23 How. 235; 4 Wall. 550; 552; 17 Wall. 292; 6 Otto, 604; 1 Sawy. 26; Hemp. 325; 3 Wood. & M. 482, 512; 12 Bank. Reg. 520; 4 Blatchf. 411; 1 Story, 493, 494, 496; 3 Woods, 363.



[PRIZE. CONCLUSIVENESS OF SENTENCE.]

## LA NEREYDA.

THE SPANISH CONSUL, *Libellant*.

*Quære*, Whether a regular sentence of condemnation in a court of the captor, or his ally, the captured property having been carried *infra præsidia*, will preclude the courts of this country from restoring it to the original owners, where the capture was made in violation of our laws, treaties and neutral obligations.

Whoever claims under such a condemnation, must show that he is a *bonæ fidei* purchaser for a valuable consideration, unaffected with any participation in the violation of our neutrality by the captors.

Whoever sets up a title under any condemnation, as prize, is bound to produce the libel, or other equivalent proceeding, under which the condemnation was pronounced, as well as the sentence of condemnation itself.

Where an order for farther proof is made, and the party disobeys, or neglects to comply with its injunctions, courts of prize generally consider such disobedience, or neglect, as fatal to his claim.

Upon such an order, it is almost the invariable practice for the claimant (besides other testimony) to make proof by his own oath of his proprietary interest, and to explain the other circumstances of 109\* the transaction; and the absence of such proof and explanation always leads to considerable doubts.

*Quære*, Whether a condemnation in the court of an ally, of property carried into his ports by a cogeligerent, is valid.

## APPEAL from the Circuit Court of Maryland.

This was an allegation filed by the Spanish consul against the brig Nereyda, a public vessel of war belonging to the King of Spain, stating that the vessel had been captured by the privateer Irresistible, John O. Daniels, master, in violation of the laws, treaties and neutral obligations of the United States. The claim given in by Henry Child, as agent in behalf of the claimant, Antonio Julio Francesche, set up a title in him acquired under a sale in pursuance of a sentence of condemnation, as prize to the captors, pronounced by the Vice-Admiralty Court at Juan Griego, in the Island of Margarita, in Venezuela. The capture was made under an alleged commission from Jose Artega, chief of the Oriental Republic of Rio de la Plata, and the prize carried into Juan Griego, as to a port of an ally in the war, for adjudication. The capturing vessel was built, owned, armed and equipped in the port of Baltimore, and having provided herself with the commission, sailed from that port on a cruise, and captured the Nereyda at sea, in the year 1818. The sentence of condemnation was pronounced and the alleged sale took place in March, 1819, and the name of the captured vessel having been changed to that of El Congreso de Venezuela, and a commission obtained for her as a privateer from the government of Venezuela, she set sail for Baltimore, under 110\*] the command of Henry Childs, who was the original prize-master, where she arrived, and was libeled as before stated. It appeared in evidence that the vessel had continued, from the time of the capture, under the direction and control of Daniels and Childs, both of whom were citizens of the United States, and domiciled at Baltimore. No bill of sale to Francesche was produced, and no other evidence of his purchase except a certificate from the

auctioneer. A decree of restitution to the claimant was pronounced in the District Court, which was affirmed, *pro forma*, in the Circuit Court, and the cause was brought by appeal to this court.

The cause was argued, at the last term, on the original evidence, by Mr. Harper and Mr. D. Hoffman for the appellant, and by Mr. Winder for the respondent.

Mr. D. Hoffman, for the appellant, contended, (1) That the court is competent to restore this property to the appellant, by the general principles of the *jus gentium*, without any reference to the proof, that the neutrality and laws of this country have been violated by the captors, but on the sole ground that this taking on the high seas was not *jure belli*, but wholly without commission, as Jose Artega does not represent a state or nation, or a power at war with Spain. That the principles established by cases recently decided in this court do not impugn the doctrine contended for, as they occurred in the case of commissions \*granted by such of the South Ameri- [\*111 can provinces as our government, in the opinion of the court, had recognized to be engaged in a civil war with Spain. That our government, and this court, having, in no instance whatever, recognized Artega as engaged in a war with Spain, he is as incompetent to grant commissions of prize as any other individual in the Spanish provinces. That this court, therefore, as an instance court, will decree restitution and damages, as in ordinary cases of maritime tort.

2. That the neutrality and laws of this country having been violated by the captors, this court will decree restitution on that ground, even if the authority under which they acted were, in other respects, fully competent.

3. If the court has the power to restore this property, either on the ground of the total inability of Artega to issue commissions of prize, or in vindication of our violated laws and neutrality, it will look behind the condemnation of any court for the existence of these facts, and if they be found to exist, will wholly disregard the condemnation and consider it rather as an aggravation than an extenuation of the wrong.

4. That this court, in restoring this property, on the ground of violated neutrality and laws, will not disturb the decree of condemnation, or in any degree impugn the received doctrine of the conclusiveness of admiralty decrees, as said condemnation was made without any reference to our laws, or inquiry as to the ownership or equipment of the privateer.

\*5. That there is no sufficient proof [\*112 of the condemnation, which is relied on; that this court will require the exhibition at least of the libel, in order to disclose the grounds of the prize proceedings.

6. That the Vice-Admiralty of Juan Griego must be regarded by this court as wholly incompetent to pass on this prize, first, because there is no evidence whatever of an alliance between Venezuela and the Banda Oriental; and, if the alliance were proved, then, second, because this sentence was passed by the court of an ally, and not by a court of the belligerent captor sitting in the country of an ally.

7. That the evidence of the claimant's purchase is not sufficient; and if it were, his title

Wheat. 8.



would be affected by those infirmities which attached to the right of the captors.<sup>1</sup>

8. That under the circumstances of this case, the new commission granted to the Nereyda, by the government of Venezuela, after its condemnation, and the alleged purchase of it by Francesche, can afford it no protection in this court; that the doctrine of the immunity of sovereign rights, when it has an extraterritorial operation, is altogether inapplicable to the present case.

9. That as the evidence in this cause connects the court of Juan Griego, its proceedings, and **113\*** the commission of the Nereyda, with the manifest violators of our laws of neutrality, and the treaty with Spain, and evinces the whole to be a *congeries* of frauds practiced on our laws by our own citizens, aided and sustained by foreigners, this court will maintain the integrity of those laws, and pay no more regard, and perhaps less, to the commission, than to the condemnation.

And, first, as to the effect of the commission; most of what has already been submitted to the court as to the inefficiency even of a genuine sale of such a privateer to the government of any of the South American provinces, and the inability of a condemnation, even of a competent court, to deprive this tribunal of its restoring power, will apply with equal, and perhaps greater force, to the immunity claimed for this prize from the commission with which she is now clothed.

If this immunity be allowed, it must be on the ground that the sovereignty of Venezuela would be improperly subjected to judicature, and that this commission imparts to the vessel the same privilege from arrest, or detention, which is due in certain cases to a sovereign, or his ambassadors. This is founded wholly on an assumption, first of the fact that sovereignty is by this proceeding brought into judicature; and secondly, of a principle that sovereignty cannot, in any case, be thus dealt with; both of which, it is presumed, are untenable. We contend that the restoration of this prize, notwithstanding the commission, would in no degree effect the rights or dignity of the government of Venezuela; and that if our laws have **114\*** been violated, the power of restitution cannot be impaired, even if the rights of sovereignty were implicated; that the government of Venezuela, even if regarded, in all respects, as that of a free and independent state, has no sovereign rights in this country, when they come in collision with our own; that all sovereignty is, in its nature, as a general rule, local, and that its extraterritorial operation is to be found only in a few cases of exception to that rule.

This commission, like the condemnation, is a sovereign act, good for some purposes, and wholly inoperative as to others. The commission would justify the capture of Spanish property; that power this court cannot call in question; but the commission is not good to disarm this court of a power which it would otherwise possess, viz., of restoring this vessel, because

gained by the unlawful use of American means. The taking of this vessel, by our citizens, *per se*, rendered her justiciable in this court; she is liable to the jurisdiction of American admiralty tribunals, at any remote period and into whatsoever hands she may have come, whether by condemnation, *bona fide* sale, or otherwise; and though, in the exercise of this power, such condemnation, sale, or commission, may be rendered (in a degree) inoperative, this is only an incidental or collateral effect; the court would not directly impugn either; it merely restores the possession to those from whom, *quoad* this country, it had been illegally wrested. And if subsequently the condemnation, sale, or commission could benefit those claiming under them, \*or either of them, this court [**\*115**] would have no power to disturb such possession or title.

The commission which has been given to this prize is not sustained by any principles similar, or equivalent to those on which the force of condemnations ordinarily rests. It can seek no aid, from the doctrine of comity; it can claim no exemption from the binding operation of an actual or supposed notice of a proceeding, in which all the world is a party; it can demand no privilege from the doctrine of the absolute co-equality of all nations. On what principle, then, can the commission shield the vessel from the power of this court? These cruisers bear the flag and are clothed with the commissions of the country of their adoption; and yet we know that this court, in vindication of the laws of the land, would condemn them on informations filed under the neutrality acts; and this, too, even were they public, or national vessels of war.<sup>2</sup> Sovereignty, no doubt, would be as much implicated in the one case as in the other. It may, however, be said, that the Nereyda never violated the laws of this country, but that it is the capturing vessel which is *in delicto*; true; but the very ground on which the *res subjecta* is now claimed, is, that it never vested in the captors, as far as concerns this country. The innocence of the *res capta*, and the illegal means used for its acquisition, are the very grounds of our libel, and the foundation on which the power of this court reposes. If the capturing vessel has broken our [**\*116**] laws, and the fruit of its illegal act be within the reach of this court, no power is competent to arrest its arm. If a commission or condemnation of the prize could effect this, legislation would be worse than vain; it would be clothing foreign powers with the right of dispensing with our most solemn, important and penal laws; and, in the present case, it would be yielding to an unknown, undefined, self-created power, not only the rights of nations in their fullest extent, but the privilege of seducing our own citizens to the violation of our laws; and this, too, with perfect impunity, as the personal sanctions of the laws are not only extremely difficult to be enforced, but there is no occasion for the offenders to come within the reach of our courts.

The cases of *The Exchange*,<sup>3</sup> and *The Cas-*

1.—These points having been argued by Mr. Hoffman in the preceding cases of *The Grand Para* (*ante*, Vol. VII., p. 471), *The Santa Maria* (*Id.* p. 490), and *The Arrogante Barcelones* (*Id.* p. 496), he re-

ferred the court to his former arguments, which will be found reported in those cases.

2.—1 Wheat. Rep. 258.

3.—7 Cranch, 116.



*suis*,<sup>1</sup> will probably be relied on as establishing the doctrine that the commission conferred on this vessel by the government of Venezuela, as the sovereign act of a state or nation, so effectually screens the vessel from judicial cognizance that this court dare not examine into the cause, but must leave the vessel in the undisturbed possession of those holding the commission. If we analyze this celebrated case of *The Exchange*, and collate its facts and principles with that now under adjudication, we shall find them to stand on grounds essentially different.

1. The seizure of the *Exchange* was made by the sovereign power of France, from an American citizen who had violated his neutrality, and had thereby become *quasi* an enemy of that country. 2. The seizure was in the exercise of what was claimed by France as a belligerent right. 3. The *Exchange*, when she returned into our waters, was actually and *bona fide* a public vessel of war, held by the Emperor Napoleon, *jure coronæ*, and bore the flag and commission of a national ship of war. 4. The *Exchange* was in the possession of a sovereign who claimed a title in her, and who had done no act by which he could be subjected to judicature. 5. The case of *The Exchange* rested on the personal character and immunity of sovereigns, and an immunity was claimed for this vessel only as extensive as that which is allowed in the three cases, of the sovereign himself, his ambassadors, and his armies *in transitu*. 6. The *Exchange* entered the port of Philadelphia in distress, and sought an asylum *bona fide*. During this time she demeaned herself with strict propriety, and no act was done manifesting a consent to submit to judicature, nor by our government to exact it. 7. The libel against the *Exchange* involved the question of sovereign title as well as possession. It was a petitory suit, of which this court could have no jurisdiction whatever. 8. There was a suggestion by the law officer of the government, on behalf of the French sovereign, and the case was wholly *coram non judice*, even if the *Exchange* had not been a national vessel of war. 9. The *Exchange* was not seized on the high seas; it was a seizure within a port of the French empire, by order of the sovereign, under his [118\*] Rambouillet decree. There was, therefore, no case within the admiralty. The taking was neither a capture, nor a maritime tort; the court was, consequently, compelled to leave the possession undisturbed. 10. Its being, at the time of the seizure, American property, could in no way invest this court with the power of restitution, even had it been a maritime seizure *jure belli*. The legality of all captures is to be judged by the courts of the captor, unless in the two excepted cases of a violation of our territorial limits in effecting the capture, and equipment, ownership, or augmentation of the force of the vessel in this country. The *Exchange* was embraced by neither exception.

Setting aside the question of the sovereign's title, the case of *The Exchange* presented nothing more than the ordinary case of an American vessel, which, after being seized *jure belli*,

for a violation of her neutrality, returned to this country; the legality of which seizure, it must be admitted, belonged exclusively to the courts of France. The violation of her neutrality rendered her *quoad hoc* a belligerent. Nay, the very suggestion filed by the Attorney-General was avowedly for the purpose of maintaining our neutrality inviolate, and although the decree to which she had rendered herself obnoxious might have been a most arbitrary, and even wanton departure from the law of nations. This was not a matter for our courts, but for our government to judge of and to remedy; for had the government declared the Rambouillet decree contrary to the law of nations, still this court could not have [119 restored the *Exchange*.<sup>2</sup> This principle alone would have justified the court in refusing to restore the *Exchange* to its former owner. The case of *The Exchange* was made to rest on two distinct points, either of which was sufficient to decide the cause. First, whether the court could restore American property which might have been unjustly or illegally seized by a foreign government. This was, in truth, the only essential point. The cases of *The Betsey*,<sup>3</sup> *Del Col v. Arnold*,<sup>4</sup> and some others, seemed to sanction the right of restoring, simply on the ground of its being American property. A second question was therefore made, which, though but auxiliary, assumed, in the course of the argument, the chief importance. It was contended, that as the *Exchange* was now the property of a sovereign, which had been admitted into our country by implied consent, and which, during her stay, had done no act to terminate that permission, this court must regard the vessel as entitled to the same immunity as would be due to ambassadors or foreign troops passing by consent through our country. Much learning and eloquence were, no doubt, displayed in the argument of this point; but it is conceived that had the doctrine, since so clearly laid down in the case of *The Invincible*,<sup>5</sup> been at that time as well defined and understood as it is [120 at present, the case of *The Exchange* would have been decided without reference to the question of sovereign immunity.

The following points of comparison occur between *The Exchange* and the case now under adjudication:

1. The *Nereyda* was not seized by any sovereign power, but by Daniels, a private individual, a citizen of the United States, acting under an authority wholly unknown to this court, because in no way recognized by this government. 2. The *Nereyda* never was, and is not at this time, a public vessel of war of the government of Venezuela; but a privateer, the private property of Daniels, and in his, or, perhaps, Francesche's possession. The commission under which she now appears imports nothing more than an authority in Childs, her commander, to capture Spanish property; but it does not render her national or public property. The commission in the case of *The Exchange*, on the contrary, was also an evidence or muniment of the sovereign's title. The restitution of the *Nereyda* would deprive an indi-

1.—3 Dall. 123.

2.—Williams v. Amroyd, 7 Cranch, 423.

3.—2 Peters' Adm. Dec. 330.

4.—3 Dall. 333.

5.—2 Gallis. Rep. 36; 1 Wheat. Rep. 238.

Wheat. 8.

vidual of his possession; but the restitution of the Exchange could not have been effected without judging of the validity of the original seizure, annulling the commission, and pronouncing a sovereign's title wholly void. 3. The Nereyda is expressly claimed on behalf of a private individual. Neither Francesche nor Childs makes any mention of any possession or property being in the government of Venezuela. This proceeding, then, does not call on sovereignty to submit to judicature; and the commission cannot \*require of us to consider that as national property which the whole history of the case proves to be a mere private possession. 4. The Nereyda entered our waters voluntarily and for the express purpose of obtaining an unlawful equipment, and the very persons who brought her here had violated our laws and subjected themselves, and the property in their possession, to the jurisdiction of our courts. No asylum, therefore, was granted to the Nereyda, and her officers and crew. The United States cannot be supposed to have admitted the Nereyda exempt from all inquiry as to her real character, and as to the conduct of those in whose possession she was found. But the Exchange not only arrived here in distress, and demeaned herself with strict propriety, but those who had her in possession had never violated our laws, nor was she ever capable of restitution by this court; she entered our ports under an acknowledged and certain immunity. No cession, then, of territorial jurisdiction can be inferred from the entry of the Nereyda into our waters; and her commission, even if it made her a national vessel, would not, under the circumstances of the case, protect her, allowing the doctrine of sovereign immunity its greatest latitude. Sovereignty is essentially local in its operation; the moral equality of all nations establishes this as an aphorism in public law. Beyond a nation's dominions, sovereignty has, ordinarily, no operation; its extraterritorial power is but an exception to a well-known rule; and if we for a moment attend to the principle which supports the exception, we shall \*find it, in all cases, to rest on the consent, express or implied, of that nation within whose territory the immunity is claimed. The three exceptions so forcibly illustrated in the judgment of the court in the case of *The Exchange*, show the local nature of sovereignty, and strongly evince the special grounds on which the deviation from the general rule is justified. But even in the excepted cases, if there be not the utmost good faith, if there be any circumstances to negative the implication of consent, or any facts unknown at the time of an express compact, which would have prevented such compact had they been disclosed, the immunity would at once cease.

The claim of immunity for the Exchange was exacted only to the extent of, and made to rest on, those principles which protect from detention or arrest, 1st, a sovereign entering the territory of another; 2d, ambassadors; and 3d, the troops of a foreign prince, to whom a right of passage had been allowed. Now, if a sovereign should enter the dominions of another

without such implied or express consent; or if, after he has entered with consent, he should commit an act *malum in se*, or against the *jus gentium*; or if it be discovered that an ambassador had, prior to his appointment, committed some capital offense against the country to which he is sent; or if the troops, in their passage, should violate the rights of persons, or of property, it is presumed neither of them would be shielded from the penal law of the country.<sup>1</sup> If this be correct, the commission granted to \*the Nereyda cannot, on principle, [\*123 screen her from the restoring power of this court. The vessels of all nations, public as well as private, may seek an asylum in our ports. During this we have, ordinarily, no jurisdiction over them. The consent, however, under which they enter, is always subject to the qualification that they have not previously violated our laws or hospitality, and that they are in no other respect amenable to judicature. If the Nereyda had not been taken by United States arms, this court could not have interfered in behalf of the Spanish sovereign, from whom his rebellious subjects had taken her. The commission, then, it is presumed, can no more protect her from the power of this court, than the solemn and public documents by which an ambassador is made the representative of his sovereign could shield him from the criminal law of the country in which he resides, and whose laws he had previously violated unknown to that country.

The libel in this case does not involve the question of title. As relates to Venezuela, even the right of possession of this prize is not implicated. If this were a *petitory* suit, this court would disclaim any interference.<sup>2</sup> But the question simply is, whether those who have gained a possession, or their representatives, by means illegal in reference to our laws, shall be permitted to retain that possession against its original possessors, in the very country whose laws have been violated.

\*The Nereyda being at one time sub- [\*124 ject to the jurisdiction of this court (had she come into our possession), the court will not permit that to be done indirectly which could not be done directly. This contingent jurisdiction can no more be annihilated or impaired by the act of a nation or state than by an individual. As to this country, the taking was an absolute nullity. There was a deep-seated infirmity in the original capture, which could not be cured by the condemnation, nor by Francesche's purchase, even if it had been genuine. For if the condemnation be not sufficient, no act done in execution of that judicial sentence could be thus operative; *debile fundamentum fallit opus*; and Francesche could succeed only to the title of Daniels, whatever that was. Nor could the commission rehabilitate or perfect the title. It does not pretend to assert a title in anyone, nor does it design to confer a title on Francesche, or to intimate any claim of property in the government granting it. This sovereign act, then, imports nothing further than an authority to that vessel to capture Spanish property.

In the case of *The Exchange*, the prominent

1.—4 Inst. 152; 3 Bulst. 28; Molloy, B. 1, ch. 10, sec. 12.

Wheat. 8. U. S., Book 5.

2.—2 Bro. Civ. & Adm. Law, 110, 113, 114, 115, 117, 7 Cranch, 120, 121.



difficulty was, that its possessor, being a sovereign, could not be brought into court. But, in the present case, those claiming under the commission, have not only voluntarily appeared and claimed the Nereyda, but they have expressly submitted the case to the jurisdiction of this court. The claimant asked for and received the Nereyda on stipulation; this cancels, **125\*** or waives every objection \*to jurisdiction, if any existed.<sup>1</sup> Not that it is meant to assert, in general, that consent can confer jurisdiction; but that wherever a court has jurisdiction of the subject-matter, but not of the person, consent would remove the objection. If, on the other hand, the court has no jurisdiction over the subject-matter, but of the persons only, it would not be competent to act for the consent of the parties. In the case now before the court, there is no one act of the claimant, or of others, indicating any interest in this proceeding on the part of the government of Venezuela; but the case is impressed throughout with the character of a mere private and individual claim.

In the case of *The Cassius*, a prohibition was allowed on the ground, 1st. That the prize itself had been carried *infra præsidia*. 2d. That the question of damages should follow the main question, which belonged exclusively to the court of the captor. 3d. That as the *Cassius* was, and ever had been, the property of a sovereign nation, and not a mere privateer, our courts had no power to make her respond in damages. 4th. That there was no proof that the commander of the *Cassius* was an American citizen. 5th. That the treaty with France gave the exclusive cognizance, in all cases of prizes made by their vessels of war, to the courts of France.

Is there any point in this case which militates against the restitution of the Nereyda? In the **126\*** case of *The Cassius*, the court very properly decided that the privateer should not respond in damages for the captured property, as this had been taken *infra præsidia capiendum*; and the court of the captors having the exclusive right to judge of the legality of the capture, the question of damages should follow the main question. It also assumed the doctrine, which has been subsequently fully established in the case of *The Invincible*,<sup>2</sup> viz., that the power of this court to take the *res capta* from the possession of a belligerent and restore it to its former owner, could only be brought into action where the neutrality or territorial jurisdiction of this country had been violated by the captor. The case of *The Cassius* is, in all its points, good law; it is nothing more than the ordinary case of calling on this court to decree damages for an illegal capture of American property; no one will pretend to say that this can be done unless the court acquires a jurisdiction by reason of the existence of either of those facts which take the case out of the control of the general rule, which gives to the courts of the captors the sole right of judging of the validity of all captures. American ownership in the thing captured is not sufficient *per se*, and in the case of *The Cassius* no other

fact appeared in proof. Further, if we advert to the fact that the *Cassius* was subsequently prosecuted on an information for an illegal outfit, which, on that proceeding, was proved, and \*she condemned, maugre her commis- [**127** sion, the case of *The Cassius*,<sup>3</sup> on the civil proceeding, cannot be regarded as any authority to establish the doctrine of sovereign immunity, when the rights of two sovereigns come in collision.

*Mr. Winder*, contra, contended, 1. That there was no competent claimant before the court. The vessel libeled originally belonged, as was asserted, to the King of Spain, and was libeled by the Spanish consul, who cannot be considered by this court as authorized in his general character to appear for his government, when its sovereign rights are drawn in question in our tribunals. He must show some special authority for this purpose.<sup>4</sup>

2. The capture was made *jure belli*, under a regular commission from Artigas, the chief of one of the South American provinces engaged in the present war between Spain and her colonies. The existence of this civil war is notorious. It has been recognized by various acts of our government; and the consequent right of all the parties engaged in it to carry on hostilities against each other, has been repeatedly admitted by this court, and is laid down by all the text writers on the law of nations. The Oriental Republic, or Banda Oriental, is that portion of the ancient vice-royalty of La Plata, lying between the river Uruguay and Brazil; which, for a long period, and at the time \*the present capture was made, [**128** carried on hostilities both against its parent country, Spain, and against Portugal, independent of the government established at Buenos Ayres. This fact is stated in the President's message of the 17th of November, 1818, and in the reports of our commissioners, transmitted with it;<sup>5</sup> and is sufficient to authorize the court to allow to Artigas all the rights of war, according to the principles already settled as applicable to this subject. It is impossible to make any intelligible distinction, in this respect, between the different governments which have successively sprung up in different parts of South America. The rights of war must be allowed to all or to none. Their existence as governments *de facto* is matter of history and public notoriety; and the United States have since acknowledged the independence of all of them as they now exist, without pretending accurately to adjust their conflicting claims of territorial jurisdiction among each other.

3. The capture having been made under a lawful commission, was carried into a port of Venezuela, an ally or co-belligerent with the Banda Oriental in the war with Spain, and there condemned as prize to the captors, in the regular court of the ally. The present claimant asserts his claim as a purchaser under that sentence of condemnation. The fact of the connection between the different Spanish provinces in the war with the parent country, is mentioned by the President \*in his [**129** different communications to Congress, and he

1.—The Abby, 1 Mason's Rep. 364; 2 Bro. Civ. & Adm. Law, 398.

2.—1 Wheat. Rep. 238.

3.—1 Wheat. Rep. 253.

4.—The Anne, 3 Wheat. Rep. 435.

5.—4 Wheat. Rep. App'x, Note II., p. 23.

has the exclusive authority of determining the relations of foreign states. There is no doubt that a valid condemnation may be pronounced in the court of the captor's country, where the prize is lying in the port of an ally in the war. And if his ports may be used for this, and all other hostile purposes, it is not perceived why the aid of his courts may not be imparted for the purpose of consummating that title which is acquired by capture, and bringing *infra præsidia*. Indeed, it seems to be settled by the authority of text writers on the law of nations, and by express adjudications, that this may be done.<sup>1</sup> It must be mere matter of arrangement and mutual convenience between the co-belligerents themselves, and no neutral, or other nation, can have any right to complain. The validity of the capture is inquired into by a court of prize, having an inherent capacity to make the investigation, and to do justice to the claimants as well as the captors. Such was our own practice during the war of the revolution, when Congress authorized our prize courts to condemn prizes taken by French cruizers, and brought into the ports of the United States.<sup>2</sup> But even supposing the court of Venezuela not to be competent to adjudicate on the capture by its ally, yet the thing taken being once in its possession, and being the property of Spain, **130\*** its enemy, it \*might proceeds to condemn it as such, and the condemnation must give a valid title against all the world.

4. The captured vessel having been thus condemned as prize, was sold and fitted out as a privateer under a commission from the government of Venezuela. It is insisted that this condemnation, and the commission thus obtained, are alone sufficient to prevent the court from inquiring into her former history. The vessel comes into our ports under the general license which both South American and Spanish cruizers enjoy of frequenting them; and so long as she does not abuse that hospitality by augmenting her force contrary to our laws, has a right to remain and depart at pleasure. This was the principle established in the case of *The Exchange*. It was not upon the ground that the vessel had become the property of the French emperor by a regular condemnation as prize, but that she bore his flag and commission, and coming into our ports under a general permission, was not amenable to the jurisdiction of our courts, any more than that sovereign himself, or his ambassador, would have been. Whether the ship be a public or a private armed vessel, can make no difference. It is sufficient that she bears the commission of the state and is engaged in the service of the state. To exert any jurisdiction over her is to exert a jurisdiction over the sovereign rights of that state of whose military force she constitutes a part, and, from the nature of the present war, an important part. You may, indeed, by a **131\*** prospective regulation, revoke the \*permission which you have granted to the cruizers of the South American states, provided your act of revocation be impartial and extend to those of Spain also. But you cannot violate in a

particular case the permission you have already granted, and draw to your judicial cognizance the sovereign rights of a state which is co-equal, in the view of the law of nations, with the oldest and proudest sovereignty in the world.

The learned counsel also referred to his arguments in other analogous cases before the court at the same term, which will be found reported in those cases.<sup>3</sup>

*Mr. Harper*, for the appellant, in reply, noticed, 1. The preliminary objection which had been urged on the part of the respondent, that the Spanish consul had no competent authority to institute the present proceeding.

This objection admitted of several answers. In the first place, it was to be recollected that it was not the sovereignty or the sovereign rights of the Spanish government that were here in question. It was a mere right of property, held and claimed by the king, in trust, indeed, for the nation, but still a right of property. Some doubts had been raised—how well founded it was not then necessary to inquire—whether a sovereign could be brought into judicature to defend any of his rights; but surely it had never been doubted that he might go \*there if he thought fit, to assert his [**132** rights of property. This was the daily practice of our own, and every other government, that respected the laws, and did not act in all cases by its arbitrary will. If the King of Spain could appear voluntarily in a court of justice, to assert his rights of property, surely he might appear by his agent, his proctor, or his attorney. The consul is the general agent for asserting in courts of justice the rights of his countrymen, and of his government, as far as they related to property. Here the consul claims, not, however, in his own name or for himself, but in the name and for the rights of his government. As to the case of *The Anne*, which has been cited on the other side,<sup>4</sup> the claim was not founded on a right of property, but of violated sovereignty. During the war between the United States and Great Britain, an American privateer had taken a British vessel on the coast of Hispaniola, and, as was alleged, within the Spanish jurisdiction. Spain was neutral; and there being no acknowledged Spanish minister, the Spanish consul interposed a claim to protect the neutral rights of his government and complain of their violation. He had no extraordinary power; and the court decided that for this purpose his ordinary powers were not competent. But surely it does not follow from this decision that if the vessel taken had been a public ship of Spain, he might not have interposed a claim for the property; for he is peculiarly intrusted with the rights of property, \*while these of sovereignty are confid- [**133** ed to the ambassador or public minister.

But, in the second place, if the public minister of Spain alone can act in a matter of this kind, he has acted here. An express written authority has been produced from him to the consul, to claim in this very case for the King of Spain. Surely if the King of Spain may come into court to prosecute his rights, he may

1.—2 Brown's Adm. & Civ. Law, 257-281; Oddy v. Bovill, 2 East's Rep. 479.

2.—5 Wheat. Rep. App'x, 123.

Wheat. 8.

3.—The Santissima Trinidad, *ante*, Vol. VII., p. 290; The Grand Para Id. p. 484; The Arrogante Barcelones, Id. p. 498, 516.

4.—3 Wheat. Rep. 435.



come by his attorney, his proctor, or his solicitor, as the case may require. The Canton of Berne once filed a bill in the English High Court of Chancery;<sup>1</sup> and surely the Canton of Berne must have appeared by a solicitor. And how was this solicitor appointed? Unquestionably as the proctor was in the present case—by the accredited minister of the sovereign.

2. He then proceeded to consider the principal questions in the cause, the first of which related to the validity of the commission under which the capture complained of was made, which he contended was invalid, and did not authorize the capture. The commission relied on is from Jose Artigas, styling himself "Chief of the Oriental Republic," and "Protector of the Orientals;" and the question is, whether any such republic, community or government, is known to this court. This depends upon their recognition by the government of this country, through the President, its constitutional organ for such purposes. This recognition certainly need not include Artigas [134\*] \*by name, as the chief of the supposed republic, government or community; because, when once their existence is properly made known to this court, the persons who from time to time act as their chief officers, must be taken to be so. But the government itself must have been acknowledged by the proper authority, before its existence can be noticed, or its acts treated as valid, by this court. The question, then, is, has any such government as that of "the Oriental Republic," or "the Orientals," been recognized by the government of the United States? For the decision of this question we must refer to the various acts of recognition which have been done by the President.

The only message of the President to Congress, which contains a distinct recognition of the different South American governments, is that of the 17th of November, 1818.<sup>2</sup> It states "that the government of Buenos Ayres declared itself independent in July, 1816, having previously exercised the powers of an independent government, though in the name of the King of Spain, from the year 1810. That the Banda Oriental, Entre-Rios, and Paraguay, with the city of Santa Fe, all of which are also independent, are unconnected with the present government of Buenos Ayres; that Chili has declared itself independent, and is closely connected with Buenos Ayres; that Venezuela has also declared itself independent, and now maintains the conflict with various [135\*] \*success; and that the remaining parts of South America, except Monte Video, and such other portions of the eastern bank of the La Plata, as are held by Portugal, are still in the possession of Spain, or in a certain degree under her influence."

Here we find various countries distinctly enumerated, of some of which the governments are noticed, but no mention whatever of the "Orientals," or the "Oriental Republic." A country called the "Banda Oriental," indeed, is mentioned, and we may conjecture, but are nowhere informed, that it constitutes the whole, or a part of this supposed republic. It

is mentioned in connection with two other countries, called "Entre-Rios," and "Paraguay." Do they, also, form parts of "the Orientals," of whom Jose Artigas is the protector; or of the "Oriental Republic," of which he claims to be the chief? We are nowhere informed by the President; and although it might be plausibly conjectured, yet we know the fact to be otherwise. Paraguay, we know, historically, to be altogether separate from the Banda Oriental, and to have a chief of its own, one Francia, who is said to style himself "consul," and to conduct his government according to the forms of the Roman commonwealth. Venezuela is spoken of in the message as a distinct community, and we know it by that name. Chili is mentioned in the same manner, as a distinct community of that name, and, consequently, capable of having a government. The three other countries, or communities, are named in connection; but we are not \*informed whether they constitute [\*136 the territory of one government, of two, or of three; and no mention whatever is made of any such government, community or people, as the "Orientals," or the "Oriental Republic."

We are, then, left wholly in the dark by the President on this point; and we cannot look beyond his messages for information which he alone is authorized to give. We cannot look to the reports of the commissioners for the recognition of this government. This recognition appertains to the President alone, as the constitutional organ of the nation for all such purposes. He has, indeed, thought fit to lay before Congress the reports of the commissioners, as his justification for the step which he took, in recognizing some of these governments and for declining to recognize others. But he cannot have intended by this act to transfer the decision of this great question of national policy to this court, or to any other department of the government; and if he had intended to do so, it was not in his power. And if we look to the reports of the commissioners, we shall find abundant matter to justify the President in forbearing to recognize this pretended government. These reasons exist in its unsettled, irregular and ephemeral character. We were fully informed, by these reports, of the existence and pretensions of Artigas, of the nature of his government, and the countries over which it claimed to extend. One of the reports, that of Mr. Rodney, speaking of the people of the Banda Oriental, and Entre-Rios, says that they "have \*been compelled [\*137 to give up everything like civil avocations, and to continue, without any regular kind of government, under the absolute control of a chief, who, whatever may be his political principles or professions, in practice concentrates all power, legislative, executive and judicial, in himself."

3. But, admitting the commission to be valid, there was no valid condemnation of the property captured under its authority.

The paper produced as a condemnation, purports to be the sentence of a prize court of Venezuela, sitting at Juan Griego, or Gregorio, in the Island of Margarita, within the territory of that republic. It is objected to this condemnation, first, that it is not proved; and,

Wheat. 8.

1—9 Ves. 347.

2—4 Wheat. Rep. App'x, Note II., p. 24.

second, that it was pronounced by a court which had no jurisdiction.

The objection to the proof rests on two grounds. In the first place, the sentence is not certified under the seal of any court, or by any person who appears, or is stated or proved to be, the officer of any court. The person who certifies this sentence is stated, and proved to be, "the notary of the marine at Juan Griego, in Margarita;" but we are nowhere informed that he is charged with, or executes, the functions of clerk or register of the Admiralty Court, whose sentence this purports to be, or that he is in any manner employed by it, or authorized to authenticate its proceedings.

In the next place, this sentence, admitting it to be properly authenticated, appears alone. It **138\*** is "unaccompanied by any part of the proceedings in the cause in which it purports to have been pronounced. Before the sentence, decree or judgment of any court whatever, can be given in evidence, it must be shown that it was pronounced in a cause depending before that court, and within its jurisdiction. This is a universal rule, and applies, for the plainest reasons, to the decisions of prize courts, and of all other courts of justice. Without the production of the proceedings, it will always be impossible to ascertain whether the court had jurisdiction of the case; a point always, and in all cases, examinable, and which must always be established before the sentence, judgment or decree, can be given in evidence. For this reason the libel and claim, in admiralty and prize cases, must be produced, in order to let in the sentence. Not being produced here, the sentence, however well authenticated, must be disregarded.

But if received, it can produce no effect; because it appears, on its face, to be the sentence of a court which had no jurisdiction in the case which it undertook to adjudicate.

The commission under which the vessel and cargo in question were captured, as prize of war, was granted by Artegas, as chief of the Orientals, and protector of the Oriental Republic; a government which, if it have any such existence as can be noticed here, is entirely distinct from that of Venezuela, in the Prize Court of which, sitting at Juan Griego, in the Island of Margarita, the condemnation took place. But it is said that Venezuela was the ally of Artegas in the war; and that the prize **139\*** "court of an ally may condemn. We deny both these positions.

How does it appear that Venezuela was the ally of Artegas? The fact is not stated by the President in any of his public communications to Congress. Nor do the commissioners to South America, whose reports he communicated to the legislature, say anything of such an alliance, or anything from which it must, or even could, be inferred. The President, indeed, states to Congress, as the commissioners had done to him, that both Artegas and Venezuela were at war with Spain. But does it follow that they were in alliance with each other? We have lately learned that war has broken out between the Turks and the Persians. It may very soon break out between Russia and the Turks. Will the Russians and Persians, in that case, be *ipso facto* allies in the war against Turkey? Alliance means a connected union of efforts

and means; and not merely an accidental coincidence of objects. It follows that the President, by declaring to Congress that Artegas and Venezuela were both engaged in war with Spain, did not declare that Artegas and Venezuela were allies. But, admitting that he had declared it, still his declaration would not be competent evidence of such a fact. When the question relates to the existence of a government, it is proper to refer it to the decision of the chief magistrate, who is intrusted by the constitution with the care and management of our relations with other countries and governments; he must, of necessity, therefore, be constituted the \*judge, and the sole judge. [\***140** of the fact of their existence, upon which the exercise of these important functions must depend. As these relations, moreover, must often depend on the state of peace or war in which foreign governments may be, as it respects each other, it may be proper that the President should be constituted, for many purposes, the judge, and even the sole judge, of the existence of a state of war between certain nations; because, out of such a state may grow very important relations between us and them. But what relations can arise out of the fact of their being allies in the war, or each carrying it on separately, by his separate counsels and means? None whatever. It is a mere matter of fact, which, like any other matter, may affect the rights or interests of individuals, but cannot, in any way, become a public concern. Those, consequently, who may wish to set it up, in the course of a judicial proceeding, as the foundation of any right or claim, must prove it, as every other fact is proved. As well might it be attempted to prove, by an executive communication, the fact of capture, or of spoliation of papers, or any other fact on which either party in a prize proceeding might rely, as this fact of an alliance between Artegas and Venezuela, in the war against Spain.

Admitting it, however, to be proved, it immediately brings up the second question, whether the prize courts of one ally are competent to take cognizance of captures made under commissions from the other. We insist that they are not, according \*to the best established principles of prize law. [\***141**

In this opinion, the most eminent advocates, the soundest elementary writers, and the highest judicial tribunals, with one voice, unite. They all lay it down as an elementary principle, universal in its application, and subject to no exception, that the question of "prize, or no prize, belongs exclusively to the courts of the captors' country." In the case of *The Invincible*,<sup>1</sup> that most eminent and distinguished advocate, now unhappily no more, who so long adorned and enlightened this court, and whose opinions had almost acquired the authority of judicial decisions, treats this rule as an axiom, about which there could be no dispute. Mr. Pinkney there says that "if there be any rule of public law better established than another, it is that the question of prize is solely to be determined in the courts of the captors' country. The report on the memorial of the King of Prussia's minister, refers to it as the customary law of the whole civilized world. The

1.—1 Wheat. Rep. 246.



English courts of prize have recorded it. The French courts have recorded it; this court has recorded it. It pervades all the adjudications on the law of prize, and it lays as an elementary principle at the very foundation of that law."

The judgment of this court, in the same case, fully supports the doctrine. It speaks of a sentence as prize under a commission from a **142\*** power \*at war, as the "act of the sovereign;" as entitled to exemption from scrutiny, "except in the courts of that sovereign;" and as not subjecting the captors to any question whatever in any other court, till those of his sovereign shall have decided that the seizure was not authorized by the commission. It expressly asserts that "the exclusive cognizance of prize questions is yielded to the courts of the capturing power;" and admits this exclusive cognizance as a general principle.

So, in the case of *The Estrella*,<sup>1</sup> the court says: "We have been told, as heretofore, that to the courts of the nation to which the captor belongs, and from which his commission issues, exclusively appertains the right of adjudicating on all captures and questions of prize. This is not denied, nor has the court ever felt any disposition to intrench on this rule; but, on the contrary, whenever it occurred, as in the case of *The Invincible*, it has been governed by it." It is stated to be a rule "well established by the customary and conventional law of nations;" and the reasons on which it rests are stated in a clear and satisfactory manner. The rule is thus placed on three grounds: (1) The dignity of the sovereign who grants the commission, which would be impaired, if any tribunal but those authorized by himself were permitted to take cognizance of the acts done under that commission; in other words, if anyone but himself were allowed to superintend the conduct of his agents and officers. (2) The **143\*** efficient restraint and control of those officers and agents, to whom a power most liable to abuse is confided by the prize commission; and (3) The responsibility of their sovereign and nation, for the acts of unlawful violence which they may commit against neutrals, should those acts be sanctioned by their own government, through its prize courts. Undoubtedly, all these reasons, and especially the two first, require that the cognizance of questions of prize should be confined exclusively to the courts of the captors' country; and these reasons apply as strongly to the courts of an ally as to those of a neutral. The courts of an ally, like those of the neutral, are destitute of the means of inflicting punishment on the captor, if, in making the seizure, he have violated the instructions of his government, acted contrary to its general policy, or exceeded the authority conferred by the commission. Equally with the courts of a neutral, they are without the means of ascertaining what was the policy of the commissioning government, or its general rules and regulations, or what particular instructions accompanied the commission. It is the practice of every government to require sureties from those to whom it grants commissions of prize, for their proper conduct under the commission, and for the observance

of their instructions. These sureties must reside in the country where the commission is granted. Consequently, they must be out of the reach of the government and courts of an ally, as much as of a neutral; and, consequently, the security must be wholly unavailing, if the \*prizes made under the commission, [**144** or by color of it, may be carried into the ports of an ally, and adjudicated in his courts. Not being able to reach the sureties, they would be equally unable to reach the property of the principal offender, which would, also, be in his own country. No decree for damages, or even for costs, however flagrant the case might be, could be enforced against his sureties, or his property. Nothing would be left but the imprisonment of his person; and, as he would have offended against no law of the ally, would have infringed none of its orders or instructions, it would be extremely doubtful, at least, how far any penal proceedings could be supported against his person. All that could be done, would be to rescue his illegally acquired booty from his grasp, by a sentence of restitution. It is easy to see how utterly inadequate this remedy must often prove, and how greatly the temptations to take the chance of succeeding in an illegal and unauthorized seizure must be increased by such a state of impunity.

It cannot escape observation, that nowhere, by no writer or advocate, nor in any adjudged case, is any distinction taken, or hinted at, between the case of an ally and that of a neutral, in the application of this rule. It is everywhere laid down absolutely, and without exception; and in a very recent case, *The Josefa Segunda*,<sup>2</sup> it is taken for granted by this court, and forms the basis of its decision.

\*If we advert to the foundation of [**145** the prize jurisdiction, we shall find reasons equally strong for confining it exclusively to the courts of the captors' country. This jurisdiction is declared by this court, in the case of *Hudson v. Guestier*,<sup>3</sup> to be founded entirely on the "possession" of the *res capta*. "The seizure vests the possession in the sovereign of the captor, and subjects the vessel to the jurisdiction of his courts." And again, "possession of the *res* by the sovereign has been considered as giving jurisdiction to his courts." Now, let it be asked, who had possession of the *Nereyda* while she lay at Juan Griego? Certainly not the government of Venezuela, but that of Artigas, through its agent and officer, the commander of the capturing vessel. This court asserts most positively, in the case just cited, "that the possession of the captor is, in principle, the possession of his sovereign." They add, "he, the captor, is commissioned to seize in the name of the sovereign, and is as much an officer appointed for that service, as one who, in the body of a county, serves a civil process." Then the possession of the *res capta* was in the government of Artigas; and as it is the possession of the *res* by the sovereign that gives jurisdiction to his courts, it follows inevitably, that the courts of Venezuela, the government of which had no possession of the captured property, could take no cognizance of the capture; and, consequently, that the sen-

1.—4 Wheat. Rep. 307.

2.—5 Wheat. Rep. 338.

3.—4 Cranch's Rep. 296, 297.

tence of the court of Juan Griego is void, for **146\***] \*want of jurisdiction in the court by which it was pronounced.

Let it not be imagined that the possession was altered, or in any manner affected, by the bringing of the captured property into the port of the ally. This court has emphatically declared, in the same case before cited, that "the sovereign whose officer has, in his name, captured a vessel as prize of war, remains in possession of that vessel, and has full power over her so long as she is in a situation in which that possession cannot be rightfully devested." The same doctrine is asserted by all the judges, in the case of *Rose v. Himely*,<sup>1</sup> although there was much difference of opinion among the judges on other points. Could, then, this possession have been rightfully devested by the government of Venezuela, within whose territory the captured vessel had been brought? In the case of a neutral territory, this court has expressly adjudged, in *Hudson v. Guestier*,<sup>2</sup> that it could not. Upon what principle, then, could it be devested by the government of an ally? Ought not the captor to have as much immunity, as much safety, as many privileges in the ports of his friend and ally, his co-belligerent, as in those of a mere neutral? How could he be deprived of the possession? It could only be by an act of violence; and that, *ex vi termini*, would be wrongful. So far from being rightful, it would be an act of hostility and war.

But might not the captor, it may be asked, **147\***] part \*from his possession, and transfer it to the sovereign of the ally, so as to give jurisdiction to the courts of the latter? I answer that he could not; because the possession belongs to his sovereign, and not to him. He is merely the agent of the sovereign, for taking and holding the possession; and having no authority to transfer the possession, he could not rightfully transfer it so as to affect the right of his sovereign, to whom it belongs. It would be a breach of faith and duty, in him, to make the transfer; and to accept it would be a wrongful act on the part of the allied sovereign, upon which, according to a universal principle of law, no right could be founded. The captor, it is true, has an interest in the prize, by the grant of his sovereign; but, until a legal condemnation, that interest is inchoate and contingent. In the meantime, he has no power over it, except that of conducting it into a place of safety, and keeping it safely, till it can be brought to adjudication in the courts of his sovereign.

The treatise of Dr. Brown on the civil and admiralty law,<sup>3</sup> and the case of *Oddy v. Bovill*, in the English court of K. B.,<sup>4</sup> have been cited on the other side, to show that the courts of one ally may take cognizance of prizes made under the commissions of the other. But Dr. Brown cites no authority, and offers no reasons in support of his doctrine; which is evidently a mere mistake, arising from his having confounded the courts of an ally with prize courts of the **148\***] capturing power, sitting \*within the territory of his ally. This was the case in *Oddy v. Bovill*, and in the cases there cited

from Robinson's reports. The case of *Oddy v. Bovill* related to a Danish vessel, captured by the French, and condemned by the French consul at Malaga, exercising there, by the consent of Spain, the powers of a prize court of France, at a time when those two nations were at war against Great Britain, as allies. The question was, whether the condemnation was valid; in other words, whether the French prize court had jurisdiction of the case. The decision of the court of K. B. (two judges only being present) was in favor of the jurisdiction. It might here be remarked, that the determination of an English court of common law, on such a question, made long since our independence, possesses no intrinsic authority here; and that a single case, decided by two judges only, out of four, or rather out of twelve, has very little authority anywhere. But, waiving these objections, let it be asked, to what does this decision really amount? Does it affirm the principle contended for—that the prize courts of one ally may take cognizance of questions of prize, arising under captures made by the other? Certainly not. It establishes nothing more than this: That one ally may, with the assent of the other, establish prize courts of his own, within the territory of that other. This is obviously a very different principle, and entirely free from the objections to which the other is liable. It preserves entire that great and beneficial rule of public law, founded on the most solid reasons of general safety, convenience and benefit, that [**\*149** questions of prize shall be exclusively reserved to the courts of the captors' country. The French court sitting in Malaga, was as much a French court; to all intents and purposes, as if it had sat in Marseilles or Brest. Its location in a Spanish port was a matter in which Spain alone had any concern. It was wholly indifferent to the opposite belligerent and to neutrals. Its proceedings and decrees were exactly the same in the one case as in the other. The dignity of the French government was as well preserved, the court had the same control over the captors, the same means of judging how far their conduct was conformable to the instructions, laws and policy of their government, and the same means of enforcing decrees against them for costs and damages. Recourse could as effectually be had to their property or their sureties; and, in case of need, to their government, for redress. The rule is therefore maintained in this case, and all its beneficial objects are secured. Whereas, by extending this jurisdiction to the courts of the ally, this great and beneficial rule is wholly subverted.

These remarks on the case of *Oddy v. Bovill* apply fully to those which are there cited from Robinson's reports. The first of them, that of *The Christopher*,<sup>5</sup> by no means comes up to the case just commented on. It was the case of a British ship taken by the French, and carried into a port of Spain, then the ally of France, from \*whence the papers were [**\*150** sent to Bayonne in France. The ship was there libeled in the prize court, and condemned; and the objection to the validity of this condemnation, was not that it was pronounced by

1.—4 Cranch's Rep. 268.

2.—4 Cranch's Rep. 297.

Wheat. 8.

3.—Vol. II., p. 257, 231.

4.—2 East's Rep. 479.

5.—2 Rob. 273.



the court of an ally, or by a court of the captors' government sitting in the territory of an ally; but that when it was pronounced, the *res capta* was within the territory of the ally. This objection was overruled by Sir W. Scott, on the principle repeatedly affirmed by this court, that the possession of the captor, for and in behalf of his government, which is the foundation of the prize jurisdiction, continued in the country of the ally. This principle, after much hesitation, was afterwards extended by him in the case of *The Henrick and Maria*,<sup>1</sup> to the case of captured property carried into a neutral port, and lying there when it was condemned in a court of the captors' country. He declared his own opinion to be different, but held himself bound by a practice long established in the court where he presided.

The other cases from Robinson, relied on in *Oddy v. Bovill*, are those of *The Harmony* the *Adelaide*, and *The Betsey Cruger*. They are all referred to in a note to the case of *The Christopher*,<sup>2</sup> and were all cases of condemnations by French prize courts, sitting in the territory of Holland, while that power was an ally of France, in the war against Great Britain. The vessels were all condemned by the French Commissary of Marine, at Rotterdam. The [\*151\*] two first cases \*occurred in 1799; and an order for further proof being passed, the question of law respecting the legality of such condemnation was reserved. In the third case, that of *The Betsey Cruger*, in 1800, it was given up by the counsel, and the legality of the condemnation was admitted by the court. But still it was a condemnation, not by the court of the ally, as in the case at bar, but by the court of the captors' country, in strict conformity to the rule for which we contend.

Some general expressions of Sir W. Scott, in pronouncing his judgment in the case of *The Christopher*, are supposed to countenance the doctrine of condemnation by the courts of an ally. But these expressions must be modified and restrained by reference to the subject-matter. He was speaking of a case of condemnation by a court of the captors' country, sitting in that country, while the *res capta* was in the territory of an ally. To such a case alone was his attention directed; and in reference to such a case alone are his expressions to be considered. Taken, as they must be, with this limitation, they leave untouched the rule for which we contend.

It has been urged on the other side, that the mere presence of the captured property in the territory of Venezuela, then at war with Spain, gave its courts a right to treat that property as enemy's property, and to proceed against it as prize. But we are to recollect that this property was brought there by the captors, in the possession of whose government it was, by force of the seizure; and that this possession, [\*152\*] thus acquired, \*could not rightfully be divested or disturbed. The property did not come thither as the property of Spain, the enemy of Venezuela; but as the property of the captors, her allies, from whom she had no right, or pretense of right, to take it by force. The sovereign of the captors had the possession.

The right of the original owner was provisionally divested and destroyed by the capture; and, in this state of things, it could not be considered, or proceeded against, by the government of Venezuela itself, and much less by its prize courts, as the property of Spain. Venezuela herself considered the matter in this light. She did not interfere with the possession of the captors, or their rights of property. Her courts merely attempted, at the instance of the captors, and for their benefit, to exercise, in relation to this property, that prize jurisdiction which belonged exclusively to the courts of their own country.

4. Admitting, however, the sentence of condemnation to be valid, there is still another ground on which the claim set up under it ought to be rejected by this court. It is admitted that Daniels is a citizen of the United States, resident with his family in Baltimore; and it is in proof, that the vessel with which he made this capture was fitted out, armed and manned in the Chesapeake. If, then, he shall appear to be the real claimant, and not Francesche, in which name Childs professes to claim, his case is exposed to the full operation of that maxim of law which declares that no rights can be founded on a wrong: *Quod ex maleficio non oritur actio*. He appears, in that [\*153\*] case, in a court of the United States, to ask its aid in the assertion of a claim founded on a direct violation of our laws and treaties. The acts of Congress expressly forbid, under severe penalties, the armament of vessels within our territory, by our citizens or others, to cruise against any nation with whom we are at peace; and the fourteenth article of the treaty of 1795, with Spain, expressly stipulates that no American citizen shall take a commission from any foreign power, to cruise against Spain, her people or property, on pain of being treated as pirates. Although it might be difficult, as this court remarked on a former occasion, to enforce the penalty of piracy against Daniels, there can be no doubt that, if he be the real claimant, his claim is founded on his violation of the laws and treaties of his own country.

Here the learned counsel argued minutely upon the facts, to show that the alleged sale to Francesche was fraudulent, or had never taken place. He also insisted upon the want of a bill of sale, or some equivalent document, as a fatal objection to the claim of the pretended purchaser.<sup>3</sup>

5. If, however, Francesche must be considered as a real purchaser for himself, and our objections to the commission under which the capture was made, and to the condemnation founded on it, are to be regarded as invalid, we still insist that the captured property ought to be restored \*on the ground of the [\*154\*] illegal outfit of the capturing vessel. Here we are met by two objections; one founded on the condemnation in the prize court of Venezuela, by which it is alleged that all inquiry on the subject is closed; and the other on the commission of prize granted by the government of Venezuela to the captured vessel, after the condemnation.

1.—4 Rob. 52.

2.—2 Rob. 172.

3.—The *Bello Corrunes*, 6 Wheat. Rep. 170; The *Conception*, Id. 239.

The first of these objections rests on the ground that both the capture and the condemnation are valid. We have endeavored to show that neither of them is so; because the Oriental republic, of which Artagas, in granting the commission under which the capture was made, claims to act as the chief, is not a government acknowledged by ours, so as to be known to our courts of justice; and because the prize court of Venezuela had no jurisdiction of the capture, admitting it to have been rightfully made. But if the capture and condemnation be free from these objections, what is the effect of the sentence in withdrawing from our courts the power of protecting and enforcing our neutrality? This is a momentous question, novel in itself, and of the utmost importance in its consequences to the peace and honor of this nation.

In discussing it we must first turn our attention to the peculiar state of things to which it applies, to the nature of the war out of which it arises, and to the character and structure of the courts for whose decisions such an effect is claimed.

In adverting to the state of things to which this question applies, we cannot but remark **155\*** that the \*nations of South America, now engaged in war against Spain, are composed of colonies heretofore kept in a most rigid and slavish state of dependence on the mother country, and studiously debarred from all means of acquiring general knowledge, habits of self-government, or an acquaintance with the rules and principles of public law, as practiced or acknowledged by civilized states. Hence, they may be expected to be, and are, in fact, much more anxious to find means of annoying their enemy, than capable of judging how far those means might be consistent with the rights of neutral and friendly nations. They are, moreover, wholly destitute of the elements of maritime power. Their former masters restrained them from commerce, ship-building and navigation; for all of which, indeed, their country, from its want of ports, is peculiarly unfit. Their pursuits and habits are essentially agricultural. They are destitute of ships, equipments, ship-builders and mariners. For a naval force, consequently, the want of which they have always severely felt, they must look to foreigners; and there are none so near as the United States, or so ready to aid them as that portion of our maritime population which is ever more eager for enterprise and gain than scrupulous of means.

The manner in which the war has been carried on between the South Americans and Spain; and in which it will, no doubt, continue to be carried on, while it exists, is peculiarly calculated to inflame the resentments of both parties, and to render each more and more eager **156\*** to seize on every \*means of distressing its enemy. The South Americans, too, from the infant state and imperfection of their systems of finance, the disturbed state of their country, and their great sacrifices and efforts, are extremely deficient in revenue, and little able to maintain, or to provide a regular naval force for the public service. They cannot take North American vessels into pay, and commission them as public ships. Their only resource, consequently, is to engage and encourage private

adventurers, by granting them privateering commissions; and they, unfortunately, find multitudes in this country, who, through lust of gain, or a restless and irregular spirit of enterprise, catch eagerly at this bait. The profits of these irregular adventures depend, almost entirely, on the power of bringing the prizes into the United States, where alone they can find an adequate and advantageous market. Our laws inflict restitution to the former owners, as one of the means, and by far the most efficacious, of restraining these proceedings, so incompatible with our honor, peace and true interest. Our courts rigorously and successfully enforce this penalty of restitution. The other, and more penal enactments, are much more easily eluded by the various artifices and subterfuges which such persons know but too well how to employ. An attempt is now made to elude this penalty also, by the intervention of South American courts of prize. Let this attempt succeed; let such a sentence as that now relied on be once declared by this court to be a bar to all inquiry concerning the violation of our laws, our treaties \*and our neutral obligations, by means **[\*157]** of which a capture may have been effected; and what prize, seized by forces provided or augmented in our ports, will ever enter them unprovided with such a sentence? Can we shut our eyes to the character and composition of the courts where these decrees are pronounced; to the course of proceeding by which they are produced; to the means by which they may be, and in fact are, procured? Can we conceal from ourselves what has passed in this very case, and the manner in which the sentence relied on appears to have been obtained? Can we forget what has passed on this subject, in other cases which have been heard during the present term? With all these instructive lessons before our eyes, can we declare that the doctrine of the conclusiveness of the sentences of prize courts will apply, under such circumstances as are connected with this class of cases, and to such an extent as to shut out all inquiry into those antecedent violations of our laws, in which the captures originated? If such a declaration shall be made by this high tribunal, pronouncing, in the last resort, the maritime law of the country, most certainly no future capture will be made under a South American commission, the fruits of which will not find their way hither immediately, clothed with this protecting mantle; and this certainly of success and impunity will multiply tenfold the number of depredators, armed and equipped in our ports, to sally forth and seize the property of our neighbors, our friends and our own citizens.

\*That we are at liberty to look to **[\*158]** considerations of this sort in the application of established maxims and rules of law, to new combinations of circumstances, is not only manifest from the nature of the thing, and the general practice of all courts in analogous cases, but has been emphatically asserted by one of the members of this tribunal, in a very learned and elaborate judgment, which contains many important principles, and cannot fail to attract great attention.<sup>1</sup>

Our laws against arming and equipping vessels

1.—Per Mr. Justice Story, in the case of *The Jeune Eugenie*, since reported in the second volume of Mr. Mason's Reports.



in our waters, to cruise against our friends, cannot be enforced; our treaties on this subject cannot be executed; our peace and our honor cannot be preserved, if it shall be adjudged by this court that a sentence of condemnation such as this precludes all inquiry into the measures and means by which the force for making the capture was provided. Considerations of such magnitude would justify and require a modification of the principle on which this doctrine of conclusiveness rests, in its application to cases of this description, if it were so extensive as to embrace them.

But we deny that it does embrace them. The principle is merely this: That as prize courts are open to all the world, all the world are parties to a prize proceeding, and it therefore concludes all the world. There may be some objections to the terms in which this proposition is commonly stated, and to the correctness of the **159\*** reasoning \*which it embraces; but it may be admitted to be true in relation to those matters, which come, or might have come, rightfully before the prize court. Such are all questions of prize or no prize, and all their incidents. But the rule has never been held to extend, nor do any of the reasons, solid or fanciful, on which it rests, extend to matters which could not, or did not, come rightfully before the prize court pronouncing the sentence. Such are all cases where it had no jurisdiction. The point of its jurisdiction, though asserted by it ever so formally and positively, is always open to inquiry; and where it has gone beyond its jurisdiction, its acts are treated as nullities. Why? Because those matters did not, and could not, come rightfully before it. So its sentence will be disregarded, unless the libel on which it was founded be shown; because, without the libel, it cannot appear that there was jurisdiction; or, consequently, that the matters adjudicated came rightfully before the court. Now, it is quite clear that this violation of our neutral duties and our laws, by providing or augmenting within our territory the force by which this capture was effected, never did come, and never could have come before the prize court at Margarita. That court had no knowledge of our laws, and nothing to do with their enforcement. There neither was, nor could be, any party in the proceedings, who had a right to make the objection. It could not have been made by the former owners; who would have been told, and correctly told, that as they were enemies, their property was liable to condemnation, however it **160\*** might have been seized; that they had nothing to do with the mode or the means of capture; and that it belonged to the government of the United States alone, whose rights were alleged to have been infringed, to assert and protect those rights, and to complain of the violation of its laws. This would have been a solid and sufficient answer to the former owners. As to the United States, they had not then acknowledged the government of Venezuela, and, consequently, could have no minister or diplomatic agent there, to interpose for the protection of their rights. The question, therefore, never could have been raised or adjudicated in the prize court of Venezuela, which had no jurisdiction over it, nor any means of bringing it into judgment. The sentence, conse-

quently, of this prize court, is not conclusive on the question of antecedent violation of our laws, committed by making the capture, or preparing or augmenting the force by means of which it was made. These violations formed no part of the question of prize or no prize, or of any of its incidents; and, consequently, could never have come rightfully, and, in fact, did not come at all, before the court pronouncing this sentence. Therefore they make no part of the sentence, which is not in the least impugned or impeached by inquiring into them, or inflicting on their authors the penalty of restitution.

Where, indeed, is the difference between this and any other penalty pronounced by our laws against similar violators? Will it be pretended that we cannot proceed criminally against these \*captors, for arming, fitting, or recruiting in our waters, because the fruits of their offense have been adjudged to them as prize, by the prize court of Venezuela? I presume not; and if the sentence cannot screen them from one part of the punishment, upon what ground can it be considered as sufficient to screen them from another? Does this court, in ordering restitution, impeach the sentence, or meddle with it in any manner whatever? Does it inquire whether the sentence was right or wrong? Certainly not. But admitting that the sentence rightly disposed of the question of prize or no prize, and all its incidents, it seizes the goods, when found within our jurisdiction, as forfeited by the violation of the law, and restores them to the former owner as part of the penalty of this offense. This is the substance, although the form is different.

6. The last question in the cause is, whether the commission of prize, granted to this captured vessel by the government of Venezuela, after the condemnation, can shut out all inquiry into the antecedent violation of our laws, by means of which the capture was effected.

Much of what has already been said, as to the effect of the condemnation itself, will apply here. We cannot but know how easily such commissions as this may be obtained, how readily they are granted, and how certainly every prize ship would be clothed with one, if it were pronounced here to have the effect of preventing all inquiry into the means or place of capture. The mischief, indeed, thus produced, would be less formidable than the \*other; because it would apply only to **162** vessels, which are by far the least important objects of capture; but as far as it goes, it would render our laws for the preservation of our neutrality a complete nullity.

And upon what principle can it be contended, that a foreign commission of prize will produce such effects? Upon the principle of comity, it is answered, upon the ground of implied assent, under which the public ships of friendly states come into our ports, and which protects them from molestation while here. But this immunity is granted so long as they comport themselves well; and has never been considered as protecting them from the consequences of violating our laws. To this point the case of *The Cassius*<sup>1</sup> is full and express. The *Cassius* was not

1.—1 Dall. Rep. 121; 2 Dall. Rep. 365.

merely a vessel bearing a French commission of prize, but a public ship of the French government, regularly commissioned as a part of the French navy. But she had been fitted out within our territory, in contravention of our laws; and coming, afterwards, within our jurisdiction, under the French flag, and a regular commission, she was proceeded against to forfeiture for this offense. The decision is cited, relied on, and sanctioned by this court, in the case of *The Invincible*,<sup>1</sup> and it is declared that "there could be no reason suggested for creating a distinction (in relation to the restitution of prizes made in violation of **163**\*) neutrality) \*between the national and the private armed vessels of a belligerent."

In this case, indeed, of *The Cassius*, the vessel which was subjected to the operation of the law, notwithstanding her foreign commission, had herself committed the offense of illegal outfit. But this circumstance can make no difference in the application of the principle of comity and implied license. If that principle would not protect the offending vessel herself, though clothed with a public commission, and the flag of the navy, *a fortiori*, I apprehend it will not protect the spoil, the fruit of the offense. Why should it protect one more than the other? One is the instrument of the offense, and the other is its product. The offense is committed in relation to both. To punish the offense, and by punishing to restrain its commission, is the object in both cases. This furnishes the reason of the application, which is as strong at least in one case as in the other; indeed, it is much stronger, as far as the practical consequences of the two acts are concerned, for the capturing ship may avoid our ports after she has been well equipped; but the captured ship, which is either to be sold or equipped, must come here for a purchaser, or for equipment. Therefore, in every case, she will be sure to come under the protecting cover of a commission, if you once declare such a cover sufficient.

The cases of *The Exchange*,<sup>2</sup> and *The Invincible*,<sup>3</sup> have been relied on to support the **164**\*) doctrine \*of immunity, in application to this case. But neither of our resemble it in its great and distinguishing feature of violation of our neutrality. The *Exchange* was an American vessel, seized by a French force at St. Sebastians, in Spain, and conducted to Bayonne, where she was taken into the service of the French government, and regularly commissioned as a part of the French marine. She was afterwards sent to sea, and on her passage to the East Indies was compelled to put into one of our ports by stress of weather. While here, she was libeled by the former owner, on the ground that she had been unlawfully seized, and, consequently, that he never had been divested of his property. The French commander produced his commission; and the question was, whether this vessel, not having been in any manner connected, either as instrument or subject, with a violation of our neutrality, was protected by the comity of

nations, and the implied license under which she entered our waters. This is manifestly a question altogether different from that now under consideration. There was no violation of our laws, or our neutral obligations, as in the present case. The vessel had demeaned herself peaceably and correctly while within our territory; and though seized, undoubtedly, in a violent and unjustifiable manner, the seizure was not made by means acquired or increased within our territory. It was, in some measure, analogous to the case of a British, or a Portuguese vessel, seized on the high seas by a cruiser regularly fitted out in Venezuela, and commissioned to cruise \*against Spain. [**165** We could not inquire into the legality of this seizure, which might be legal on the ground of unneutral conduct on the part of the captured vessel. Even if it were one of our own vessels, we could not institute this inquiry, but must, in both cases, remit the question to the domestic forum of the captor. But this case of *The Exchange* has no analogy whatsoever to the case now in question, where the demand of restitution is founded expressly on the violation of our neutrality, our treaties and our laws.

Neither has the case of *The Invincible* any analogy to this. That was the case of a French privateer, taken by a British cruiser during the war between Great Britain and France, retaken by an American cruiser, we also being then at war with Great Britain, and brought by the recaptor into an American port, where he libeled her for salvage. While these proceedings were pending, a claim for damages was interposed by certain American citizens, who alleged that the *Invincible*, before her capture by the British, had plundered them at sea. And the question was, whether this claim could be sustained, or the claimant must be left to seek his remedy against the privateer in the courts of France. This court decided that the seizure of the American property was an exercise of the rights of war, which must depend for its justification or condemnation on the circumstances of the case. Consequently, that it involved the question of prize or no prize, which belonged exclusively to the courts of the captors' country. In this respect, they said, there was no \*differ- [**166** ence between the case of *The Invincible* and those of *The Cassius* and *The Exchange*; that is, between a private armed ship, and a ship belonging to the national marine. They were all parts of the public force, though raised and supported in different manners; and the legality or illegality of their conduct in making any capture, being a question of prize or no prize, equally belonged to the exclusive cognizance of their domestic tribunals. This principle, it is quite clear, had no analogy to that now advanced in support of the claim of the captors. There was no illegal outfit. No violation of our neutrality or our laws was alleged or pretended. The act complained of was a capture, as of enemy's property, under a regular French commission, by a vessel regularly fitted out in the French territory. This capture might be a good prize, according to the law of nations, by reason of some unneutral conduct in the owner, or his agents, which rendered him, *pro tanto*, a belligerent. Consequently, it was a simple question of prize or no prize, and was

1.—1 Wheat. Rep. 253.

2.—7 Cranch's Rep. 116.

3.—1 Wheat. Rep. 250.



most correctly adjudged to belong exclusively to the courts of the captors' country. But had a violation of our neutrality been alleged, either in making the capture or in preparing the means of making it, the case would so far have resembled ours, and a different course would, no doubt, have been pursued.

The cause was continued to the next term, under the following order for farther proof:

**167\*]** \*ORDER.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Maryland, and on certain exhibits and depositions filed by consent, and was argued by counsel. On consideration whereof, this court doth direct and order that the respondent have liberty to produce a copy of the libel or other paper on which the sentence of condemnation in the proceedings mentioned was founded, or to account for the non-production of such document; and that the parties be at liberty to take any proof which may tend to show that the sale of the *Nereyda* was or was not real, and that Antonio Julio Francesche, in the proceedings mentioned, was or was not a *bonæ fidei* purchaser for himself, and is, or is not the present owner of the said vessel.

The cause was again argued by the same counsel, on the further proof produced at the present term.

*Mr. Justice STORY* delivered the opinion of the court: This cause was heard at the last term, and an order was then made requiring the claimant to produce a copy of the libel, or other paper on which the sentence was founded, or to account for the non-production of such document; that also requiring the production of farther proof of the reality of the asserted sale of the *Nereyda*, and of the proprietary interest of the asserted owner. The cause has now been argued upon the farther proof brought in by the parties, and stands for the judgment of the court.

**168\*]** \*The *Nereyda* was a Spanish ship of war, and was captured by the privateer *Irresistible*, of which John D. Daniels was commander, and Henry Childs (the claimant), a lieutenant, under an asserted commission of the Oriental Republic of Rio de la Plata, and was carried into Margarita, in Venezuela, and there condemned as prize of the captors by the Vice-Admiralty Court of that island. A sale is asserted to have been there made of her to the claimant, Francesche, after condemnation, for the sum of thirty thousand dollars. She soon afterwards left Margarita, under the command of Childs, who was the original prize-master, and arrived at Baltimore, the place of residence of Childs and Daniels, who are both American citizens; and her subsequent history, after seizure and delivery upon stipulation or bail to the claimant, show that she has continued exclusively under the control, management and direction of the same persons.

The order to produce the libel, or to account for the omission, was made upon the fullest consideration by the court. Whoever sets up a title under a condemnation, is bound to show that the court has jurisdiction of the cause and that the sentence has been rightly pronounced upon the application of parties competent to

ask it. For this purpose it is necessary to show who are the captors and how the court has acquired authority to decide the cause. In the ordinary cases of belligerent capture, no difficulty arises on this subject, for the courts of the captors have general jurisdiction of prize, and their adjudication is \*conclusive. [\*169 upon the proprietary interest. But where, as in the present case, the capture is made by captors acting under the commission of a foreign country, such capture gives them a right which no other nation, neutral to them, has authority to impugn, unless for the purpose of vindicating its own violated neutrality. The courts of another nation, whether an ally or a co-belligerent only, can acquire no general right to entertain cognizance of the cause, unless by the assent or upon the voluntary submission of the captors. In such a case it is peculiarly proper to show the jurisdiction of the court by an exemplification of the proceedings anterior to the sentence of condemnation. And in all cases it is the habit of courts of justice to require the production of the libel, or other equivalent document, to verify the nature of the case, and ascertain the foundation of the claim of forfeiture as prize.

Notwithstanding the direct order for the production of the libel in this case, none has been produced; nor has the slightest reason been given to account for its non-production. The general usage of maritime nations, to proceed in prize causes to adjudication in this manner, either by a formal libel, or by some equivalent proceeding, is so notorious that the omission of it is not to be presumed on the part of any civilized government which professes to proceed upon the principles of international law. How, then, are we to account for the omission in this case? If, by the course of proceedings in Venezuela, a libel does not constitute any part of the acts of its courts, that could \*be easily shown. The neglect [\*170 to show this, or in any manner to account for the non-production of the libel, if it exists, cannot but give rise to unfavorable suspicions as to the whole transaction. And where an order for farther proof is made, and the party disobeys its injunctions, or neglects to comply with them, courts of prize are in the habit of considering such negligence as contumacy, leading to presumptions fatal to his claim. We think, in this case, that the non-production of the libel, under the circumstances, would justify the rejection of the claim of Francesche.

Upon the other point, as to the proprietary interest of Francesche under the asserted sale, there is certainly very positive testimony of witnesses to the reality of the sale to him, and to his ability to make the purchase. And if this testimony stood alone, although it is certainly not, in all respects, consistent or harmonious, no difficulty would be felt in allowing it entire judicial credence. But it is encountered by very strong circumstances on the other side; and circumstances will sometimes outweigh the most positive testimony. It is remarkable, that from the institution of this cause up to the present time, a period of nearly four years, Francesche has not, by any personal act, made himself a party to the cause. He has never made any affidavit of proprietary interest; he has never produced any document verified by

his testimony; he has never recognized the claim made in his behalf; he has never, as far as we have any knowledge, advanced any money for the defense of it. Yet the brig is admitted **171**\*] \*to have been a valuable vessel, and was purchased, as is asserted, for the large sum of thirty thousand dollars. Upon an order of farther proof, it is the usual, and almost invariable practice, for the claimant to make proofs, on his own oath, of his proprietary interest, and to give explanations of the nature, origin and character of his rights, and of the difficulties which surround them. This it is so much the habit of courts of prize to expect, that the very absence of such proofs always leads to considerable doubts. How are we to account for such utter indifference and negligence on the part of Francesche, as to the fate of so valuable a property? Is it consistent with the ordinary prudence which every man applies to the preservation of his own interest? Can it be rationally explained, but upon the supposition that his interest in this suit is nominal and not real.

This is not all. Immediately after the ostensible sale to Francesche, the Nereyda was put in command of Childs, an American citizen, who was an utter stranger to him, as far as we have any means of knowledge, and sailed for Baltimore, the home port of the Irresistible, and the domicile of Daniels and Childs. There is no evidence that she has ever revisited Margarita, and there is positive evidence that she has, for the three last years, been in habits of intimacy with the ports of the United States. Where are the owner's instructions, given to the master on his departure for Baltimore? Where is the documentary evidence of Francesche's ownership? Where are the proofs of his disbursements **172**\*] for the vessel \*during her subsequent voyages? From the time of her voyage to Baltimore, she has remained under the management of Daniels, or Childs, or some other apparent agent of Daniels. She has undergone extensive repairs, her rig has been altered, heavy expenses have been incurred, and a new master has been appointed to her. Under whose authority have all these acts been done? Where are the orders of Francesche for these acts? Daniels has constantly been connected with the vessel; he has superintended her repairs; he or his agents have paid the bills; he is the reputed owner of the vessel; and he has been consulted as to the material operations. How can all these things be, and yet the real owner be a foreigner, a Venezuelan? How can he be presumed to lay by, without any apparent interposition in the destiny of his own vessel?

There are some other extraordinary circumstances in the case. The Nereyda arrived at Margarita under the command of Childs as prize-master; and in a few days afterwards, Daniels arrived there with the Irresistible. The crew of the latter vessel run away with her; and Daniels then sailed in the Nereyda, in pursuit of the privateer, and of course on a voyage for his own peculiar benefit. How is this reconcilable with the supposition of a real sale to Francesche? What interest had the latter in regaining the Irresistible, or subduing a revolted crew? Why should his vessel, after that object was accomplished, have gone to Baltimore? Why should he intrust to strangers, Wheat. 8.

for a voyage in which he had no apparent interest, \*so valuable a property? If he [**173** made any contract for that voyage, why is not that contract produced? These are questions which it seems very difficult to answer in any manner useful to the asserted proprietary interest of Francesche. Yet the facts, to which allusion is here made, are drawn from the farther proof of the claimant; and this farther proof, it is not immaterial to observe, comes not from Margarita, where Francesche resided—and for aught that appears, still resides—but from La Guayra, with which he is not shown to have any immediate connection.

Looking, therefore, to all the circumstances of the case, the fact of the unchanged possession of the captors, the habits of the vessel, the apparent control of the property by Daniels, the utter absence of all proper documentary proofs of ownership, instructions, disbursements, and even connection with her on the part of the claimant, we think that there is the strongest reasons to believe that no real sale ever took place, and that the property remains still in the original captors, unaffected by the asserted transfer. The positive evidence is completely borne down by the strong and irresistible current of circumstantial evidence which opposes it.

Upon both grounds, therefore, viz., the omission to produce the original libel, or account for its non-production, and the insufficiency of the proofs of proprietary interest, the court are of opinion that the cause must be decided against the asserted claim.

If this be so, then, as it is clear that the original \*outfit of the privateer Irresistible [**174** was illegal, upon the principles already established by this court, the property of the Nereyda remains in His Majesty the King of Spain, and ought to be restored accordingly. The decree of the Circuit Court is therefore reversed, and the Nereyda is ordered to be restored to the libellant, with costs of suit.

*Decree reversed.*

Cited—11 Pet. 414; 1 Abb. U. S. 579.

[CHANCERY. LETTER OF ATTORNEY.]

HUNT v. ROUSMANIER'S ADM'RS.

A letter of attorney may, in general, be revoked by the party making it, and is revoked by his death.

Where it forms a part of a contract, and is a security for the performance of any act, it is usually made irrevocable in terms, or if not so made, is deemed irrevocable in law.

But a power of attorney, though irrevocable during the life of the party, becomes (at law) extinct by his death.

But if the power be coupled with an interest, it survives the person giving it, and may be executed after his death.

To constitute a power coupled with an interest,

NOTE.—Power of attorney, revocation of.

A power of attorney becomes invalid by the death of the principal, except so far as the attorney has an interest coupled with the power. Boone v. Clark, 3 Cranch, C. C. 389.

Such power is also suspended by the insanity of



there must be an interest in the thing itself, and not merely in the execution of the power.

How far a court of equity will compel the specific execution of a contract, intended to be secured by an irrevocable power of attorney, which was revoked by operation of law on the death of the party.

The general rule, both at law and in equity, is, that parol testimony is not admissible to vary a written instrument.

But, in cases of fraud and mistake, courts of equity will relieve.

It seems that a court of equity will relieve in a case of mistake of law merely.

### 175\*] \* APPEAL from the Circuit Court of Rhode Island.

The original bill, filed by the appellant, Hunt, stated that Lewis Rousmanier, the intestate of the defendants, applied to the plaintiff in January, 1820, for the loan of \$1,450, offering to give, in addition to his notes, a bill of sale, or a mortgage of his interest in the brig Nereus, then at sea, as collateral security for the re-payment of the money. The sum requested was lent; and on the 11th of January, the said Rousmanier executed two notes for the amount; and on the 15th of the same month, he executed a power of attorney, authorizing the plaintiff to make and execute a bill of sale of three-fourths of the said vessel to himself, or to any other person; and in the event of the said vessel, or her freight, being lost, to collect the money which should become due on a policy by which the vessel and freight were insured. This instrument contained, also, a proviso, reciting that the power was given for collateral security for the payment of the notes already mentioned, and was to be void on their payment; on the failure to do which, the plaintiff was to pay the amount thereof, and all expenses, out of the proceeds of the said property, and to return the residue to the said Rousmanier.

The bill further stated that on the 21st of March, 1820, the plaintiff lent to the said Rousmanier the additional sum of \$700, taking his

note for payment, and a similar power to dispose of his interest in the schooner Industry, then also at sea. The bill then charged that on the 6th of May, 1820, the said Rousmanier died insolvent, having paid only \$200 on the said notes. The plaintiff gave notice of his claim; and, on the return of the Nereus and Industry, took possession of them, and offered the intestate's interest in them for sale. The defendants forbade the sale; and this bill was brought to compel them to join in it.

The defendants demurred generally, and the court sustained the demurrer, but gave the plaintiff leave to amend his bill.

The amended bill stated that it was expressly agreed between the parties, that Rousmanier was to give specific security on the Nereus and Industry, and that he offered to execute a mortgage on them. That counsel was consulted on the subject, who advised that a power of attorney, such as was actually executed, should be taken in preference to a mortgage, because it was equally valid and effectual as a security, and would prevent the necessity of changing the papers of the vessels, or of taking possession of them on their arrival in port. The powers were, accordingly, executed, with the full belief that they would, and with the intention that they should, give the plaintiff as full and perfect security as would be given by a deed of mortgage. The bill prayed that the defendants might be decreed to join in a sale of the interest of their intestate in the Nereus and Industry, or to sell the same themselves, and pay out of the proceeds the debt due to the plaintiff. To this amended bill, also, the defendants demurred, and on argument the demurrer was sustained, and the bill dismissed. From this decree the plaintiff appealed to this court.

The cause was argued at the last term.

Mr. Wheaton, for the appellant, stated that the question in this case was, whether, under the agreement mentioned in the original and

the principal. *Bunce v. Gallagher*, 5 Blatch. 481; 7 Am. L. Reg. N. S. 32.

A revocation may be, by operation of law, by the death either of the principal or of the agent. *Littletton*, s. 66; *Co. Litt.* 52; *Shipman v. Thompson*, *Willes*, 104, 105; *Wynne v. Thomas*, *Willes*, 563; *Wallace v. Cook*, 5 Esp. 117; *Smout v. Ilberry*, 10 Mees. & W. 1; *Blades v. Free*, 9 Barn. & C. 167; *Galt v. Galloway*, 4 Pet. 332; *Aertson v. Cagg*, 2 *Humph. Tenn.* 350; *Harper v. Little*, 2 *Greenl.* 14; *Story on Agency*, sees. 264, 477, 488; *Gale v. Tappan*, 12 N. Hamp. 145; *Campanari v. Woodburn*, 28 Eng. L. & E. 321; *Ferris v. Irving*, 28 Cal. 645; *Watt v. Watt*, 2 Barb. Ch. 371; *Culver v. West. Un. Tel. Co.*, 60 N. Y. 691.

It will make no difference if the power is declared in express terms to be irrevocable; for if it be not coupled with an interest, although irrevocable by the party, it is revoked by his death. *Lepard v. Vernon*, 2 Ves. & Beam. 51; *Watson v. King*, 4 Camp. 272; 1 *Starkie R.* 121; *Houston v. Robertson*, 6 Taunt. 448; *Story on Agency*, see. 488.

But where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is part of a security, then, unless there is an express stipulation that it shall be revocable, it is, from its own nature and character, in contemplation of law, irrevocable, whether it is expressed to be so on the face of the instrument conferring the authority or not. *Smart v. Sanders*, 5 Man., Gr., & Scott. C. B. 895; *Knapp v. Alvord*, 10 Paige. 205; *Marfield v. Douglass*, 1 Sand. N. Y. 360; *Smith on Mere. Law*, 71, 72 (2d edit.); 2 *Liverm. on Agency*, 308; *Bromley v. Holland*, 7 Ves. 28; *Lepard v. Vernon*, 2 Ves. & Beam. 51; *Wat-*

*son v. King*, 4 Camp. 272; 2 *Kent's Comm.* 643; *Ganssen v. Morton*, 2 B. & Cress. 751; *Metcalf v. Clough*, 2 Mann. & R. 178; *Smith v. Craig*, 3 Watts & S. 14; *Walsh v. Whitecomb*, 2 Esp. 565; *Morgan v. Raynor*, 5 Abb. L. J. 109; *Bergen v. Bennett*, 1 *Caine's Cas.* 1; 1 *Pars. on Cont.* 69, 70, 71, 72; *Bonney v. Smith*, 17 Ill. 533; *Raymond v. Squire*, 11 John. 47; *Franklin v. Osgood*, 14 John. 527; *Jackson v. Burtis*, 14 John. 391; 15 John. 346.

An attorney ceases to be such on the death of his client. *Putnam v. Van Buren*, 7 How. Pr. N. Y. 31; *Beach v. Gregory*, 2 Abb. Pr. N. Y. 203; 3 *Id.* 78; 1 *Hilt.* 201; *Balbi v. Dervet*, 3 Edw. 418; *Bellinger v. Ford*, 21 Barb. 311.

Upon the question whether equity will relieve against a mistake of law, it is said in *Wheaton v. Wheaton*, 9 Conn. 101, that it would not perhaps be going too far to say that the doctrines laid down by Ch. J. Marshall in this case (8 Wheat. 174) were greatly shaken by the subsequent opinion of Judge Washington (1 Pet. 3); and taking the whole case together, it will hardly warrant a departure from principles so long considered as settled.

The later decision (1 Pet. 1) is explained and followed in *Oliver v. Mut. Ins. Co.*, 2 Curt., C. C. 277, 209; *Bank of U. S. v. Daniel*, 12 Pet. 32. In the last named case (12 Pet.), at pages 55, 56, it is said "That mere mistakes of law are not remediable is well established, as was declared in *Hunt v. Rousmanier*, 1 Pet. 15; and we can only repeat what was there said: 'That whatever exceptions there are to the rule, they will be found few in number, and to have something peculiar in their character,' and to involve other elements of decision." *Bk. of U. S. v. Daniel*, 12 Pet. 32, 55, 56.

Wheat. 8.

amended bill, by which the plaintiff was to have a specific security on certain vessels belonging to the defendants' intestate, for the repayment of a loan of money made to him in his life-time by the plaintiff, a court of equity will compel the defendants to give effect to that security, by joining in a sale of the vessels, or in any other manner.

That the original intention and contract of the parties was to create a permanent collateral security on the vessels, in the nature of, or equivalent to, a mortgage, is explicitly averred in the bill, and, of course, admitted by the demurrer. But it is supposed by the court below that they have failed to give effect to this their intention and contract, not from any mistake of fact, or accident, but from a mistake of law, in taking a letter of attorney with an irrevocable power to sell, instead of an absolute or conditional bill of sale. It is said that this power, though irrevocable during the life-time of the intestate, was revoked on his death by operation of law, not being a power coupled with an interest in the thing itself, but only coupled with an interest in the execution of the power, which is supposed to expire with the death of the party creating it, in the same manner as a mere **178\*** naked \*power; and it is therefore concluded that this is not a case where a court of equity will relieve.

1. But it is conceived that this conclusion proceeds upon the idea that the original contract between the parties was entirely merged and extinguished in the execution of the instruments which were executed, and which, by the accident of the death of one party, have turned out to be insufficient in point of law to give effect to that contract. Here was no mistake of law in the formation of the original contract. The law was fully understood in respect to all the facts on which the contract was founded. The loan, and the terms on which it was granted, were lawful; the intestate was the owner of the vessels, and legally competent to hypothecate them for his just debts; he did actually contract to give the plaintiff a specific, permanent lien upon them, as collateral security for the payment of the notes. The mistake is not in the facts, nor the law, nor in the contract, but in the remedy upon the contract. It was not necessary that the contract should be reduced to writing at all, or evidenced by any written instrument, for it is not within the statute of frauds, like an agreement for the sale of lands, &c. There was a complete legal contract, but, by the mistake of the parties, the mode selected for its execution is defective at law. This contract still subsists in full force, and is not extinguished and discharged by the writings, which have turned out to be inadequate means of giving effect to it. The contract was not for a power to sell, but for a specific security; not **179\*** for a pledge of the property \*which was to expire on the death of the party, but for a permanent lien upon it. It is an unquestionable rule of law, that all previous negotiations are extinguished and discharged by the contract itself; but the legal and just import of this rule is, that where the parties have definitively concluded a contract, all previous terms, propositions and negotiations concerning it, are merged in the contract itself; and this is equally true, whether the contract is in writing, or by parol

only. It does not, therefore, follow that the contract is extinguished, but the contrary. The contract clearly exists, and is supposed by all the authorities to exist; but is not to be affected by the negotiations of the parties which preceded its final completion.

The contract, in this case, is not merged and extinguished in the writing; the power looks to something future to be done by virtue of it, and pursuant to the contract; the power is not the contract; it is a means by which a future act was to have been done, in fulfillment of the contract by one of the parties. It cannot be pretended that the parties meant that the power should embrace the whole contract between them on both sides; neither does it. The agreement is not, and was not intended to be set out. The loan, the terms on which it was made, the negotiable notes, the assignment of the policy, all exist, independently of the power, and are binding engagements. The power was intended as a means in the hands of the plaintiff to coerce the intestate to the performance of his agreement; it was not \*intended as evidence [**\*180** at all, and, at most, it is evidence of part of the contract only; of the means which the parties had selected to carry into effect the contract, but which does not preclude a resort to other means, that having failed by accident. It cannot be denied that, according to the whole current of authorities, parol evidence is admissible to correct errors and mistakes in the written instrument. But how can this be reconciled with the notion that the parol contract is extinguished by the writing? For, if the writing alone is the contract, all idea of mistake is utterly and necessarily excluded. The writing, in that case, would be the original, and to admit parol proof, would be, not to correct, but to alter the original. And perhaps it may be well doubted whether the power, in this case, can be considered as legal direct, written evidence of any part of the contract. If A sells his ship to B, and gives him a power of attorney to take possession of her, it can hardly be considered that this power is the direct, written evidence of the contract; it is a power growing out of the contract, and given to aid its execution. The undisputed execution of the instrument by which the power was given is evidence of its being a voluntary act, and, by inference, proves that it was agreed to be given, but is not the direct evidence of the contract itself. There is an essential difference between a contract to perform a particular thing, and the actual performance of that thing. Here the contract was for a specific lien on the vessels, and to secure that lien the power was given; it is evidence of an after \*act intended to be done under [**\*181** the contract, rather than direct evidence of the contract itself.

It must be admitted that there was originally a contract for a lien, by mortgage, bill of sale, or some other mode; nor can it be successfully contended that the power of attorney, when adopted, operated either as an extinguishment of the original contract, or as a waiver of all other security; thus narrowing down that instrument, the original contract for a lien, in the same manner, and with like legal effect, as if the original contract was for that identical instrument and nothing more. The contract was for a legal and valid security on the ves-



sels; and the parties, by adopting the power, did not change, nor mean to change, the contract, but to execute it in part. It was a mode, and the parties believed, a good and sufficient mode of securing the lien, pursuant to the contract. It has now proved insufficient of itself. The contract, however, remains the same as at first, a contract for security, and wholly unexecuted; and if the particular instrument adopted by the parties to carry it into effect, proves insufficient for that purpose, it clearly entitles the injured party to the interposition of a court of equity.

2. It cannot be denied that, in some cases, mistakes in a written instrument may be corrected by parol evidence. But it is said by the court below that this is not one of those cases; that here is no mistake of fact; that the power contains the very language and terms the parties intended it should contain, and that **182\***] to grant relief in such a case, \*would be in opposition to the whole current of authorities.

But it is submitted that such is not the rule upon this subject. It would seem to be an inference, from the decision of the Circuit Court, that no relief can be granted unless something is omitted which was expressly agreed to be inserted, or something inserted more than was agreed; that the errors to be corrected are such as have occurred in omissions or additions in drawing up the written instrument, but not the errors in its legal import and effect; that if the formal instrument, and the language, are used, which the parties intended should be used, no relief can be had, although that instrument does not contain the legal intentions of the parties. But it is humbly conceived that the distinction, as here applied, is not supported by the authorities. If too much is inserted, or something is omitted in the written instrument, it may be corrected by parol evidence, because it does not contain the meaning and intention of the parties. And if every word, and no more, is inserted, which the parties designed to have inserted, yet, if those words do not embrace and import the meaning and intention of the parties, it is as clear a mistake and misconception as the other, and the contract is as effectually defeated by the mistake in the one instance as the other. The true foundation for the admission of parol evidence is, that the instrument does not speak the legal, though it may the verbal, language of the parties; it does not speak the legal import of their contract as **183\***] they intended it should. And \*wherever the intention of the parties will be defeated by a defect in the instrument, that defect may be proved and corrected by parol evidence, whether it arises from omission or addition, or from insufficient and inapt language and terms of the instrument. When it is satisfactorily proved by parol, that there is a mistake in the instrument as to its provisions, or a misconception of its legal import and effect, so that the intentions of the parties will, in either instance, be defeated, it is clearly a case of equitable cog-

nizance and a subject of equitable jurisdiction and relief.<sup>1</sup>

3. Again, the plaintiff is entitled to the benefit of his lien, upon the ground that the contract has been, on his part, fully performed; and even if no writing whatever had been executed, he would be entitled to the performance of it by the other party. Part performance has always been considered as obviating the necessity of written evidence, and gives to the performing party the benefit of specific relief against his negligent and faithless adversary. It has, indeed, been questioned in several cases (arising under the statute of frauds, and touching an interest in lands), whether the payment of a small part of the consideration money would take the case out of the statute, as amounting to part performance. But in all, or \*nearly all these cases, the payment [**\*184** was of what is called earnest money, to bind the bargain, and not in the nature of a substantial, beneficial payment of part of the consideration money. But even if it be a principle, that part payment does not exempt the case from the provisions of the statute; yet it is conceived that the rule does not extend to a case where the contract stated in the bill is distinctly admitted, and where the full consideration has actually been advanced and paid. Wherever the party has completely and fully executed his part of the contract, whether by payment of money or other acts, the rule in equity is, I apprehend, almost universal, to coerce the other party to a specific execution of the contract on his part.<sup>2</sup>

As to the cases which are supposed to lay down a general and inflexible rule, that a mistake of parties as to the law, is not a ground for reforming the instrument, they will all be found to resolve themselves into cases where there was no other, or previous agreement, than what was contained, or meant to be contained, in the instrument itself. Thus, in a leading case on this subject,<sup>3</sup> where an annuity was granted, but no power of redemption contained in the deed, it being erroneously supposed by the parties that it would make the contract usurious, Lord Thurlow refused to \*relieve. But here the whole contract [**\*185** was unquestionably merged in the deed, and therefore the Lord Chancellor refused to add a new term to the agreement, upon the ground that it was intentionally omitted by the parties, upon a mistake of the law. But in the case now before the court, there was no intentional omission in the instrument, upon a mistake of law or fact, for the instrument was never meant by the parties to contain the terms of the contract. It was merely intended as an instrument, or means, to carry the contract into effect, and I have already endeavored to show that the contract might well subsist, and be carried into effect without it. Not so with the grant of the annuity in *Lord Irnham v. Child*.

But there are many cases in the books where the party has been relieved from the conse-

1.—2 Freeman, 246, 281; Newland on Contracts, 348, 349; 3 Ves., Jun., 399; 1 Johns. Ch. Rep. 607; 1 Ves., Sen., 317, 456; 1 Bro. Ch. Rep. 341; 1 P. Wms. 277, 334; 2 Vern. 564; 3 Atk. 203; 2 Equ. Cas. Abr. 16; Sudg. Vend. 481; 3 Atk. 388; 2 Ves., Jun., 151; 1 Ch. Rep. 78; 2 Ventris, 367; 1 Vern. 37.

2.—Newland on Contr. 181; 1 Ves. 82; 7 Ves. 341; 3 Atk. 1; 2 Ch. Cas. 135; 4 Ves. 720, 722; 1 Vern. 263; 3 Ch. Rep. 16; Tothill, 67; Roberts, 154; 1 P. Wms. 282, 277; 1 Madd. Ch. 301; 2 Equ. Cas. Abr. 48.

3.—Lord Irnham v. Child, 1 Bro. Ch. Cas. 91.

quence of acts founded on ignorance of the law,<sup>1</sup> and I am unable to reconcile these cases with the idea that there is any universal rule on this subject, still less that it can be applied to the present case.

4. Lastly, the power was unquestionably intended by the parties to be irrevocable forever, and to transfer an interest in the thing itself, or the authority of disposing of it for the benefit of the plaintiff; and even admitting, *argumenti gratia*, that this intention has failed at law, by the death of the party, still it is insisted [\*186\*] ed that a \*court of equity will now compel the personal representatives to do what it would have compelled their intestate to do, if the intention had been defeated by any other accident during his life-time. It was an equitable lien, or mortgage; and such a lien will be enforced in equity against the claims of all other creditors, although imperfect at law.<sup>2</sup> So, too, an agreement for a mortgage, and an advance of money thereon, binds the heir and creditors.<sup>3</sup> And a deposit of title deeds, even a part of the title papers, upon an advance of money, without a word passing, creates an equitable mortgage.<sup>4</sup> *A fortiori*, ought an express agreement for a lien to be specially enforced in equity? The power is a power coupled with an interest, not merely in the execution of the power, but in the thing itself, at least in the view of a court of equity; and the only reason why it is not effectual at law to secure the specific lien stipulated, is on account of its being made in the form of a letter of attorney, authorizing the plaintiff to sell in the name of the grantor. Even admitting that such a power cannot be executed, *qua* power after the death of the grantor, still, the instrument containing the power recites that it was given as collateral security for the payment of the notes; and in case of loss of the vessel, or freight, authorizes the plaintiff to receive the amount to become [\*187\*] due on the policy of insurance \*on the same, which was also assigned. Here, then, is an equitable lien or mortgage, and equity will now compel the administrators to put the party in the same situation as if such lien or mortgage had been perfected.<sup>5</sup>

*Mr. Hunter*, for the respondents, stated that the first question was, whether the letters of attorney were powers coupled with an interest, or only personal authorities, which expired with the intestate.

This question was fully investigated by the learned judge in the court below, and determined in favor of the defendants. "In his judgment, these were not powers coupled with an interest, in the sense of the law. They were naked powers, and, as such, by their own terms, could be executed only in the name of Rousmanier, and, therefore, became extinct by his death." This question, arising on the original bill, seems now to be abandoned by the plaintiff's counsel, and it is therefore unnecessary to argue it anew. The court will be in possession of the able opinion referred to; it exhausts the subject, and it would be useless to

repeat, and presumptuous to add to, or vary its arguments. A single authority, however, may be added, on account of the coincidence of the facts in the case, to that now under discussion.

"One being indebted to B, makes a letter of attorney to him to receive all such wages as shall \*after become due to him, then [\*188 goes to sea, and dies; this authority is determined, so that he cannot compel an account of wages, if any due at making the letter of attorney, much less of what after became due, but the administrator must pay according to the course of the law."<sup>6</sup>

2. As to the amended bill, it entirely disappoints the liberal intentions of the judge in granting it. He said that courts of equity would relieve where the instruments have been imperfectly drawn up by mistake, or where, by accident, the parties have failed in executing their agreements.

The amended bill refers neither to accident nor mistake, or to any facts tending to prove their existence. It excludes and negatives the supposition of accident or mistake. The whole matter (it appears) was done upon advice, with the assistance of counsel learned in the law. The security which the plaintiff ultimately received was that which he preferred. He could, at the time, have taken that kind of security he seems now to desire. He rejected the offer of a mortgage, or bill of sale, and elected to take these powers of attorney. They were the most convenient for both parties, and so far was either party from being surprised or mistaken, that what was done appears as the judicious result of mutual and advised deliberations. Neither party had reference to the death of the other; it may be admitted that it was the death of Rousmanier which frustrated Hunt's expectation of indemnity; but where \*an event [\*189 happens without default on the other side, although expectation may be frustrated, and that expectation grounded, too, on the true intent of the parties, yet equity will not give relief.<sup>7</sup> The case presents no mistake or misconception. Fraud is not suggested; and it is admitted, there is no mistake either of omission or addition. It is clear, that the parties intended not an ordinary sale, or assignment of the vessels in question; yet the plaintiff seeks to have the same effect produced by his powers of attorney, as if they were grand bills of sale, or mortgages.

In the cases that have arisen upon the redeemability of annuities, where the parties, by mutual and innocent error, left out of the deed a provision for redemption, under an idea that, if inserted, it would make the transaction usurious, there being no charge of fraud in the omission, the court would not grant relief. They could see no mistake. Lord Eldon says, the court were desired to do, not what the parties intended, but something contrary thereto. They desired to be put in the same situation as if they had been better informed, and had a contrary intention. It is admitted that the

1.—*Landsdowne v. Landsdowne*, Mosely's Rep. 364; *Pusey v. Desbouvrie*, 3 P. Wms. 315; *Pullen v. Ready*, 2 Atk. 591.

2.—3 Johns. Ch. Rep. 315.

3.—3 Ves., Jun., 582; 1 Atk. 147.

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4.—*Russel v. Russel*, 1 Bro. Ch. Cas. 269.

5.—*Burn v. Burn*, 3 Ves., Jun., 573.

6.—*Mitchel v. Eades*, Prec. in Ch. 125.

7.—1 Ves. 98, 99; 2 Atkyns, 261.



plaintiff's security was to be by powers of attorney; and why should the court now turn them into bills of sale, or mortgages, or any security equivalent to these, but different from those originally and deliberately taken.<sup>1</sup>

**190\***] \*It was the fault of the plaintiff that he waived taking a mortgage or a bill of sale; and no maxim of equity is better established than this, "that no man is entitled to the aid of a court of equity, when the necessity of resorting to that court is created by his own fault."<sup>2</sup>

It seems to be admitted that there was no mistake in point of fact; it is, in substance, urged that there was a mistake in point of law; both parties, assisted by counsel, were mistaken in supposing a defeasible to be an indefeasible security; that powers of attorney, deriving their sole force from the life of the constituent, were perpetually obligatory, though death, and the law decreed, otherwise. No case is cited which has gone the length of deciding that a transaction taintless of fraud, undisturbed by accident, and unaffected by mistake in fact, has been rescinded and reversed because the parties innocently misconceive the law.

All the cases are of a contrary tendency. Every party stands upon his own case, and his counsel's "wit." In the case of *Pullen v. Ready*,<sup>3</sup> Lord Hardwicke, in substance says: If parties act with counsel, the parties shall be supposed to be acquainted with the consequences of law, and nothing is more mischievous than to decree relief for an alleged mistake, in a matter in which, if there was any mistake, it was that of all the parties, and no one of them is more under an imposition than the other. Every man, **191\***] says Mr. Chancellor Kent, \*must be charged at his peril with the knowledge of the law; there is no other principle that is safe or practicable in the common intercourse of mankind. Courts do not undertake to relieve parties from their acts and deeds fairly done, on a full knowledge of facts, though under a mistake of the law.<sup>4</sup> I never understood, says Lord Eldon,<sup>5</sup> that though this court, upon ground of a mistake (in point of fact), would reform an instrument, that, therefore, it would hold that the instrument has a different aspect from that which belongs to it at law. Lord Thurlow, long before, refused to add a new term to an agreement, upon the ground that it was intentionally omitted upon a mistake of the law.<sup>6</sup> And the master of the rolls subsequently adhered to this doctrine.<sup>7</sup> It was substantially upon this view of the case that the learned judge in the court below decided that the demurrer to the amended bill was well taken. "He could perceive no ground for the interference of a court of equity. There was no mistake in the execution of the instruments; they expressed exactly what the parties intended they should express; this security was the choice of the plaintiff; in the event it has turned out unproductive; but this is his misfortune, and affords no ground to give him a preference over other creditors." As a creditor, he obtains

his share, \*legal payment of his note. [**\*192** The administrators, as trustees for all the creditors, are bound to exert themselves to prevent a priority which they believe to be unsanctioned by law. They contend for equality, they act on the defensive; they are solicitous to avoid an evil; they have no hope of receiving a gain; and they who are so placed (*de damno evitando certantes*), may take advantage, if it may be so called, of the error of another. This, says Lord Kaimes, is a universal law of nature, and is especially applicable as to creditors.<sup>7</sup>

The reasoning of the counsel for the appellant has no reference to the facts of the case. It strips the case of all its facts and circumstances, and goes upon the general intention of the deceased intestate to give his creditor a permanent and specific security. This general intention was consummated and ascertained by a particular and detailed execution, in the very mode which the creditor preferred.

The powers of attorney are now regarded by the plaintiff's counsel as non-existent. To give motion and progress to their argument, they would remove this obstruction; and to do this, they are obliged to attempt (merely human as they are) that which the schoolmen long ago (without impiety) said was impossible even with Deity: *Quod factum est Deus ipse non potest revocare*. But, at first, the powers of attorney were resorted to, and set up as charging the defendants, and that upon their own strength and validity, without the \*suggestion of [**\*193** mistake or insufficiency; they were the foundation of the original bill.

Having chosen to begin his pursuit on the writing exclusively, and in perfect confidence of its validity, is it competent to the plaintiff, by an amendment to his bill, to resort to verbal negotiations merely introductory of the final settlement and consummate act between the parties, in which all negotiations were merged beyond the power of revival? The existence of the powers is at first not only asserted, but they are endowed with a continued existence beyond the life of their author. As this is found to be impossible, they are now to be considered as nothing; far from being a specific performance of the general intention, they are not the contract, nor any evidence of it. They are overthrown, for the purpose of erecting upon their overthrow a firmer fabric of obligation out of loose equities and verbal negotiations. There seems, in this course, to be too much inconsistency for sound and safe reasoning. Administrators must, necessarily, be ignorant of the private verbal communications of the parties, and they are left defenseless, and liable to impositions which cannot be detected nor repelled. The case of *Haynes v. Hare*, determined by Lord Loughborough,<sup>8</sup> is, as to many of its facts, and all its points of law, similar to the one now under consideration. The court then said, there is nothing so dangerous as to permit deeds and conveyances, after the death of the parties to them, to be liable \*to have [**\*194** new terms added to them on the disclosure of

1.—See Phillip's Evid. 451; 6 Ves., Jun., 332; 1 Bro. Ch. Cas. 92; 3 Bro. Ch. Cas. 92.

2.—2 Atk. 587, 591.

3.—Lyon v. Richmond, 2 Johns. Ch. Rep. 51, 60.

4.—Underhill v. Howard, 10 Ves. 209, 228.

5.—Irnham v. Child, 1 Bro. Ch. Cas. 91.

6.—Lord Portmore v. Morris, 2 Bro. Ch. Cas. 219; Marquis of Townsend v. Sterngroom, 6 Ves. 328, 382.

7.—Principles of Equity, 26, 27, 162.

8.—1 H. Bl. 664.

an attorney, in a matter in which he could meet with no contradiction.<sup>1</sup>

3. Even if we could suppose the existence of a mistake, yet a review of all the leading cases would not furnish one, in any degree analogous to the present, in which relief has been granted. In the case of *Graves v. the Boston Marine Insurance Company*, the plaintiffs, in the bill, grounded themselves on the allegation, that their case was but the common one of a mistake in using inapt words to express the meaning of the parties.<sup>2</sup> The proofs as to the intention of one of the parties, was perfectly satisfactory, and as to the other, it pressed so heavily on the court, that they acknowledged there were doubts and difficulties in the case. But they decided against relief; they shrunk from the peril of conforming a written instrument to the alleged intention of the party plaintiff, upon a claim not asserted until an event made it his interest so to do. In a case between the original parties, unaffected by death or insolvency, where no new and third party sought mere equality of condition, the court appeared to have acted upon the principle that they had before them a written instrument, not in itself doubtful, and they repelled the recourse to parol testimony, or extraneous circumstances, to create a doubt where the instrument itself was clear and \*explicit.<sup>3</sup> The doctrine of the cases under the statute of frauds, applies *a fortiori*, for, by the common law, an attorney must be made by deed.<sup>4</sup>

4. But again, admitting, *argumenti gratia*, the existence of a mistake, can a plaintiff claim on that account relief, admitting that a defendant could. A defendant, in a proper case, is privileged to show a mistake as matter of defense, and for the purpose of rebutting the plaintiff's equity; but no English case can be shown, where the plaintiff has been allowed to give parol evidence varying a written instrument on the ground of mistake.<sup>5</sup> These cases, of the highest authority, and determined on great consideration, show the difference of right and condition as to plaintiff and defendant, of evidence offered for the different purpose of resisting a decree, and that offered for obtaining it. The difference exists in the code of every civilized nation. *Favorabiliores rei potius quam actores habentur*, is the maxim of the civil law. *Potior est conditio defendentis*, is the familiar language of our own. These, and other similar maxims, are of universal prevalence, and uncontradicted reception, and equally applicable in concerns civil and criminal. Both parties are the object of equal protection; but to make that \*protection equal, a certain position and condition is assigned to the defendant; he is so placed that he may not be overcome by surprise; the law seeks for actual, not nominal reciprocity; the relative condition of the parties enters into the account; even-handed justice first corrects the balance, by making the proper allowances before she weighs the merits of the cause. Looking to the statute of frauds, or to the pre-

existing rule of the common rule (*a fortiori*, applicable in the instance of a power of attorney, which cannot be but with deed), we must conclude that, in a case like this, the defendants are not to be charged, unless they have agreed to be so by writing; and if there is a writing, it excludes a reference to what may have been the previous talk or negotiation, the original proposition, or the rejected offer. There is a writing or deed which does not charge the present defendants, and there the case ought to end. It is not necessary to invoke the aid of arguments drawn from public policy, or to exhibit the sad inconveniences that would result from the plaintiff's success. The impolicy of permitting a transaction of the kind exhibited by the plaintiff's bill, is obvious. It is contrary to what ought to be the openness of commercial dealing, and to the entire spirit of the commercial laws. That requires publicity in transfers of property, demands that possession should accompany the grant, permits the control of the possessor to prove the ownership, and avoids or limits secret trusts and liens; secret letters of attorney, granting a power to sell, especially in the case of ships, \*without delivery, without a change of [\*197 papers, without notice to the government or to the mercantile public, are fraught with dangerous consequences, and could hardly be supported as against creditors, though the life of the constituent still sustained their existence and efficacy. Upon the whole, it is submitted that it is the aim of the plaintiff's counsel unduly to amplify equitable jurisdiction, and to extend an unwarrantable relief, upon the ground of mistake, in a case where no mistake exists, and where, even if it did, his right or faculty of availing himself of it is denied. "*Optima est lex qua minimum reliquit arbitrio Judicis; Optimus Juxta qui minimum sibi.*"

Mr. Wheaton, for the appellant, in reply, first remarked that the whole of the argument submitted by the counsel for the respondents, proceeded upon a mistaken assumption that the entire contract between the parties was merged in the written power, and that this instrument is the only admissible evidence of the terms and conditions on which the loan was made. But the demurrer admits all the facts stated in the original and amended bill, as if the same were proved by parol testimony; all the terms and conditions of the contract were not intended to be reduced to writing by the parties, nor are they required by any positive law to be so expressed; and the power itself was merely incidental to the contract, and intended, like the transfer of the policy of insurance, as a means of carrying it into effect. It might as well be contended that the transfer of the policy was \*the entire contract, as the letter of [\*198 attorney embraced all its terms and conditions. The true question is, whether, under all the circumstances of the case, an equitable lien was created, which a court of chancery will carry into effect.

Nor was it meant to be admitted that this

1.—See *Poole v. Cabanes*, 8 Term. Rep. 328.

2.—2 Cranch's Rep. 430.

3.—See *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 282; *Souvelage v. Arden*, 1 Johns. Ch. Rep. 252.

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4.—Co. Litt. 401; 2 Roll. Abr. 8; 1 Bac. Abr. 314 tit. Authority.

5.—*Phillips's Evid.* 454; *Woolan v. Hearn*, 7 Ves., Jun., 211; *Higginson v. Clowes*, 15 Ves. 516; *Clinan v. Cooke*, 1 Scho. & Lef. 38, 39, determined by Lord Redesdale.



was not a power coupled with an interest, in the sense of the law. It was merely meant to insist, that even if that point were conceded, it formed no obstacle to the interference of a court of equity in the present case. But it is with very great deference submitted, that this is not a mere naked power, according to the definition given of it by Chief Justice (now Chancellor) Kent.<sup>1</sup> That learned and accurate lawyer says: "A power simply collateral, and without interest, or a naked power, is where, to a mere stranger, authority is given to dispose of an interest, in which he had not before, nor hath by the instrument creating the power, any estate whatever; but when a power is given to a person who derives, under the instrument creating the power, or otherwise, a present or future interest in the land, it is then a power relating to the land." In the text of Co. Litt. 1, 66, the deed of feoffment was made to one person, and a letter of attorney to deliver seizin to another, who was a mere stranger. But here the power is given by a debtor to his creditor, and is expressly declared to be given as a collateral security for the debt. And, in the case cited from *Precedents in Chancery*, 125, the power \*did not purport, on the face of it, to be given as a collateral security, nor was there any evidence of a contract for a lien or security on the wages.

Nor do we proceed solely on the ground of a mere mistake, either in fact or law. We ask to have the contract executed in good faith by the personal representatives of the debtor, precisely as he would have been compelled to carry it into effect if its execution had been prevented by any other accident than that of his death. It is perfectly clear that both parties intended to create a specific lien; and the lien is supposed to be as valid now, as in the lifetime of the intestate; for it is submitted to be a well-established principle of equity (with very few exceptions, of which this case is not one), that when the party is holden to the specific execution of a contract, his personal representatives are equally holden. If the power is now defective in securing a lien, it was equally so in his life-time. No legal or equitable right is, in this respect, lost by his death.<sup>2</sup>

The respondent's counsel assumes it to be a settled doctrine of equity that a plaintiff is never permitted to show, by parol proof, that there has been a mistake or misapprehension in a written contract, the execution of which he seeks to enforce; and that the rule which permits the introduction of such proofs is exclusively confined to the defendant, against whom the contract is sought to be enforced. It is **200\*** true that Lord Redesdale, \*in *Clinan v. Cooke*,<sup>3</sup> seems to be of that opinion; and in a few other cases, relief has been denied on that ground. But all these were cases arising under the statute of frauds, and nearly all of them respected an interest in lands; and in all such cases, parol proof, when offered to vary or materially affect a written contract, is certainly received with great circumspection and reserve. It is, however, submitted that the rule stated by the respondent's counsel is not founded in

principle; and that parol evidence to show mistakes in written instruments is, in equity, equally open to both parties. And, it will be found that in almost all the cases where the plaintiff has failed in seeking the aid of parol proof, it was not because any such rule was interposed, but because his evidence of the supposed mistake was not clear and satisfactory. The case referred to in 2 Cranch, 419, is of this description. The court, in that case, would have afforded the plaintiff relief, if he had been able to prove the mistake which he alleged in the policy. The same principle is adopted in 2 Johns. Ch. Rep., 274, 630; and if there were any doubts growing out of some of the English decisions, they would be dissipated by the learned and able investigation of Mr. Chancellor Kent,<sup>4</sup> where all the authorities are carefully reviewed, and it is clearly established, that no distinction is made, in this respect, between the party plaintiff or defendant, but that the benefit of the rule is impartially extended to both.

\*The cause was continued to the next [**201** term for advisement.

Mr. Chief Justice MARSHALL delivered the opinion of the court: The counsel for the appellant objects to the decree of the Circuit Court on two grounds. He contends,

1. That this power of attorney does, by its own operation, entitle the plaintiff, for the satisfaction of his debt, to the interest of Rousmanier in the Nereus and the Industry.

2. Or, if this be not so, that a court of chancery will, the conveyance being defective, lend its aid to carry the contract into execution, according to the intention of the parties.

We will consider, 1. The effect of the power of attorney.

This instrument contains no words of conveyance or of assignment, but is a simple power to sell and convey. As the power of one man to act for another depends on the will and license of that other, the power ceases when the will, or this permission, is withdrawn. The general rule, therefore, is, that a letter of attorney may, at any time, be revoked by the party who makes it; and is revoked by his death. But this general rule, which results from the nature of the act, has sustained some modification. Where a letter of attorney forms a part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, or if not so, is deemed irrevocable in law.<sup>5</sup>

\*Although a letter of attorney depends, [**202** from its nature, on the will of the person making it, and may, in general, be recalled at his will, yet, if he binds himself for a consideration, in terms, or by the nature of his contract, not to change his will, the law will not permit him to change it. Rousmanier, therefore, could not, during his life, by any act of his own, have revoked this letter of attorney. But does it retain its efficacy after his death? We think it does not. We think it well settled, that a power of attorney, though irrevocable during the life of the party, becomes extinct by his death.

1.—*Bergen v. Bennett*, 1 Caines' Cas. in Error, 1.

2.—2 Madd. Ch. 112; 1 Madd. Ch. 41; 4 Bro. Ch. Cas. 472; 17 Ves. 489.

3.—1 Sch. & Lef. 22.

4.—2 Johns. Ch. Rep. 585.

5.—2 Esp. N. P. Rep. 565.

This principle is asserted in Littleton (see. 66.), by Lord Coke, in his commentary on that section (52 b.), and in Willes' Reports (105, note, and 565). The legal reason of the rule is a plain one. It seems founded on the presumption that the substitute acts by virtue of the authority of his principal, existing at the time the act is performed; and on the manner in which he must execute his authority, as stated in *Coombes' case*.<sup>1</sup> In that case it was resolved that "when any has authority as attorney to do any act, he ought to do it in his name who gave the authority." The reason of this resolution is obvious. The title can, regularly, pass out of the person in whom it is vested, only by a conveyance in his own name; and this cannot be executed by another for him, when it could not, in law, be **203**\*] executed by himself. A \*conveyance in the name of a person who was dead at the time, would be a manifest absurdity.

This general doctrine, that a power must be executed in the name of a person who gives it, a doctrine founded on the nature of the transaction, is most usually engrafted in the power itself. Its usual language is, that the substitute shall do that which he is empowered to do in the name of his principal. He is put in the place and stead of his principal, and is to act in his name. This accustomed form is observed in the instrument under consideration. Hunt is constituted the attorney, and is authorized to make, and execute, a regular bill of sale in the name of Rousmanier. Now, as an authority must be pursued, in order to make the act of the substitute the act of the principal, it is necessary that this bill of sale should be in the name of Rousmanier; and it would be a gross absurdity that a deed should purport to be executed by him, even by attorney, after his death; for the attorney is in the place of the principal, capable of doing that alone which the principal might do.

This general rule, that a power ceases with the life of the person giving it, admits of one exception. If a power be coupled with an "interest," it survives the person giving it, and may be executed after his death.

As this proposition is laid down too positively in the books to be controverted, it becomes necessary to inquire what is meant by the expression, "a power coupled with an interest." Is it an interest in the subject on which the power **204**\*] is to be \*exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing.

The words themselves would seem to import this meaning. "A power coupled with an interest" is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word "interest," an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised, and by its exercise, is extinguished. The power ceases when the interest commences, and, therefore, cannot, in accurate

law language, be said to be "coupled" with it.

But the substantial basis of the opinion of the court on this point, is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which, in such a case, is the act of the principal, to be legally effectual, must be in his name, must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of \*the person making it. **205** ing it. But if the interest, or estate, passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits power to the life of the person giving it, exists no longer, and the rule ceases with the reason on which it is founded. The intention of the instrument may be effected without violating any legal principle.

This idea may be in some degree illustrated by examples of cases in which the law is clear, and which are incompatible with any other exposition of the term "power coupled with an interest." If the word "interest," thus used, indicated a title to the proceeds of the sale, and not a title to the thing to be sold, then a power to A to sell for his own benefit, would be a power coupled with an interest; but a power to A to sell for the benefit of B, would be a naked power, which could be executed only in the life of the person who gave it. Yet, for this distinction, no legal reason can be assigned. Nor is there any reason for it in justice; for, a power to A, to sell for the benefit of B, may be as much a part of the contract on which B advances his money as if the power had been made to himself. If this were the true exposition of the term, then a power to A to sell for the use of B, inserted in a conveyance to A, of the thing \*to be sold, would not be a **206** power coupled with an interest, and, consequently, could not be exercised after the death of the person making it; while a power to A to sell and pay a debt to himself, though not accompanied with any conveyance which might vest the title in him, would enable him to make the conveyance, and to pass a title not in him, even after the vivifying principle of the power had become extinct. But every day's experience teaches us that the law is not as the first case put would suppose. We know that a power to A to sell for the benefit of B, engrafted on an estate conveyed to A, may be exercised at any time, and is not affected by the death of the person who created it. It is, then, a power coupled with an interest, although the person to whom it is given has no interest in its exercise. His power is coupled with an interest in the thing which enables him to execute it in his own name, and is, therefore, not dependent on the life of the person who created it.

The general rule, that a power of attorney, though irrevocable by the party during his life,



is extinguished by his death, is not affected by the circumstance that testamentary powers are executed after the death of the testator. The law, in allowing a testamentary disposition of property, not only permits a will to be considered as a conveyance, but gives it an operation which is not allowed to deeds which have their effect during the life of the person who executes them. An estate given by will may take effect at a future time or on a future contingency, **207\*** and, in the meantime, descends to the heir. The power is, necessarily, to be executed after the death of the person who makes it, and cannot exist during his life. It is the intention that it shall be executed after his death. The conveyance made by the person to whom it is given, takes effect by virtue of the will, and the purchaser holds his title under it. Every case of a power given in a will is considered in a court of chancery as a trust for the benefit of the person for whose use the power is made, and as a devise or bequest to that person.

It is, then, deemed perfectly clear that the power given in this case is a naked power, not coupled with an interest, which, though irrevocable by Rousmanier himself, expired on his death.

It remains to inquire, whether the appellant is entitled to the aid of this court, to give effect to the intention of the parties, to subject the interest of Rousmanier in the Nereus and Industry to the payment of the money advanced by the plaintiff on the credit of those vessels, the instrument taken for that purpose having totally failed to effect its object.

This is the point on which the plaintiff most relies, and is that on which the court has felt most doubt. That the parties intended, the one to give and the other to receive, an effective security on the two vessels mentioned in the bill, is admitted; and the question is, whether the law of this court will enable it to carry this intent into execution, when the instrument relied on by both parties has failed to accomplish its object.

The respondents insist that there is no defect **208\*** in the instrument itself; that it contains precisely what it was intended to contain, and is the instrument which was chosen by the parties deliberately, on the advice of counsel and intended to be the consummation of their agreement. That in such a case the written agreement cannot be varied by parol testimony.

The counsel for the appellant contends, with great force, that the cases in which parol testimony has been rejected, are cases in which the agreement itself has been committed to writing; and one of the parties has sought to contradict, explain, or vary it, by parol evidence. That in this case the agreement is not reduced to writing. The power of attorney does not profess to be the agreement, but is a collateral instrument to enable the party to have the benefit of it, leaving the agreement, still in full force, in its original form. That this parol agreement not being within the statute of frauds, would be enforced by this court if the power of attorney had not been executed; and not being merged in the power, ought now to be executed. That the power being incompetent to its object, the court will enforce the agreement against general creditors.

This argument is entitled to, and has received, very deliberate consideration.

The first inquiry respects the fact. Does this power of attorney purport to be the agreement? Is it an instrument collateral to the agreement? Or is it an execution of the agreement itself in the form intended by both the parties?

The bill states an offer on the part of Rousmanier to give a mortgage on the ves- **[209]** sels, either in the usual form, or in the form of an absolute bill of sale, the vendor taking a defeasance; but does not state any agreement for that particular security. The agreement stated in the bill is generally, that the plaintiff, in addition to the notes of Rousmanier, should have specific security on the vessels; and it alleges that the parties applied to counsel for advice respecting the most desirable mode of taking this security. On a comparison of the advantages and disadvantages of a mortgage, and an irrevocable power of attorney, counsel advised the latter instrument, and assigned reasons for his advice, the validity of which being admitted by the parties, the power of attorney was prepared and executed, and was received by the plaintiff as full security for his loans.

This is the case made by the amended bill; and it appears to the court to be a case in which the notes and power of attorney are admitted to be a complete consummation of the agreement. The thing stipulated was a collateral security on the Nereus and Industry. On advice of counsel, this power of attorney was selected, and given as that security. We think it a complete execution of that part of the agreement; as complete, though not as safe an execution of it, as a mortgage would have been.

It is contended that the letter of attorney does not contain all the terms of the agreement.

Neither would a bill of sale, nor a deed of mortgage, contain them. Neither instrument constitutes the agreement itself, but is that for which the agreement stipulated. The **[210]** agreement consisted of a loan of money on the part of Hunt, and of notes for its repayment, and of a collateral security on the Nereus and Industry, on the part of Rousmanier. The money was advanced, the notes were given, and this letter of attorney was, on advice of counsel, executed and received as the collateral security which Hunt required. The letter of attorney is as much an execution of that part of the agreement which stipulated a collateral security, as the notes are an execution of that part which stipulated that notes should be given.

But this power, although a complete security during the life of Rousmanier, has been rendered inoperative by his death. The legal character of the security was misunderstood by the parties. They did not suppose that the power would, in law, expire with Rousmanier.

The question for the consideration of the court is this: If money be advanced on a general stipulation to give security for its repayment on a specific article, and the parties deliberately, on advice of counsel, agree on a particular instrument, which is executed, but from a legal quality inherent in its nature, that was unknown to the parties, becomes extinct by the death of one of them, can a court of equity direct a new security of a different char-

Whcat. 8.

acter to be given? or direct that to be done which the parties supposed would have been effected by the instrument agreed on between them?

This question has been very elaborately argued and every case has been cited which could **211\*** be supposed to bear upon it. No one of these cases decides the very question now before the court. It must depend on the the principles to be collected from them.

It is a general rule, that an agreement in writing, or an instrument carrying an agreement into execution, shall not be varied by parol testimony, stating conversations or circumstances anterior to the written instrument.

This rule is recognized in courts of equity as well as in courts of law; but courts of equity grant relief in cases of fraud and mistake, which cannot be obtained in courts of law. In such cases, a court of equity may carry the intention of the parties into execution, where the written agreement fails to express that intention.

In this case, there is no ingredient of fraud. Mistake is the sole ground on which the plaintiff comes into court; and that mistake is in the law. The fact is, in all respects, what it was supposed to be. The instrument taken is the instrument intended to be taken. But it is, contrary to the expectation of the parties, extinguished by an event not foreseen nor adverted to, and is, therefore, incapable of effecting the object for which it was given. Does a court of equity, in such a case, substitute a different instrument for that which has failed to effect its object?

In general, the mistakes against which a court of equity relieves, are mistakes in fact. The decisions on this subject, though not always very distinctly stated, appear to be founded on some misconception of fact. Yet some of **212\*** them bear a considerable analogy to that under consideration. Among these is that class of cases in which a joint obligation has been set up in equity against the representatives of a deceased obligor, who were discharged at law. If the principle of these decisions be that the bond was joint from a mere mistake of the law, and that the court will relieve against this mistake on the ground of the pre-existing equity arising from the advance of the money, it must be admitted that they have a strong bearing on the case at bar. But the judges in the courts of equity seem to have placed them on mistake in fact, arising from the ignorance of the draftsman. In *Simpson v. Vaughan*,<sup>1</sup> the bond was drawn by the obligor himself, and under circumstance which induced the court to be of opinion, that it was intended to be joint and several. In *Underhill v. Howard*,<sup>2</sup> Lord Eldon, speaking of cases in which a joint bond has been set up against the representatives of a deceased obligor, says: "The court has inferred from the nature of the condition, and the transaction, that it was made joint by mistake; that is, the instrument is not what the parties intended in fact. They intended a joint and several obligation; the scrivener has, by mistake, prepared a joint obligation."

All the cases in which the court has sustained a joint bond against the representatives of the deceased obligor, have turned upon a supposed

mistake in drawing the bond. It was not until the case of *Sumner v. Powell*,<sup>3</sup> that **[\*213]** anything was said by the judge who determined the cause, from which it might be inferred that relief in these cases would be afforded on any other principle than mistake in fact. In that case, the court refused its aid, because there was no equity antecedent to the obligation. In delivering his judgment, the master of the rolls (Sir W. Grant) indicated very clearly an opinion that a prior equitable consideration, received by the deceased, was indispensable to the setting up of a joint obligation against his representatives; and added, "so, where a joint bond has, in equity, been considered as several, there has been a credit previously given to the different persons who have entered into the obligation."

Had this case gone so far as to decide that "the credit previously given" was the sole ground on which a court of equity would consider a joint bond as several, it would have gone far to show that the equitable obligation remained, and might be enforced, after the legal obligation of the instrument had expired. But the case does not go so far. It does not change the principle on which the court had uniformly proceeded, nor discard the idea that relief is to be granted because the obligation was made joint by a mistake in point of fact. The case only decides, that this mistake, in point of fact, will not be presumed by the court in a case where no equity existed antecedent to the obligation, where no advantage was received **\*by**, and no credit given to, the person, **[\*214]** against whose estate the instrument is to be set up.

Yet the course of the court seems to be uniform, to presume a mistake in point of fact in every case where a joint obligation has been given, and a benefit has been received by the deceased obligor. No proof of actual mistake is required. The existence of an antecedent equity is sufficient. In cases attended by precisely the same circumstances, so far as respects mistake, relief will be given against the representatives of a deceased obligor, who had received the benefit of the obligation, and refused against the representatives of him who had not received it. Yet the legal obligation is as completely extinguished in the one case as in the other; and the facts stated, in some of the cases in which these decisions have been made, would rather conduce to the opinion that the bond was made joint from ignorance of the legal consequences of a joint obligation, than from any mistake in fact.

The case of *Landsdowne v. Landsdowne* (reported in Mosely), if it be law, has no inconsiderable bearing on this cause. The right of the heir at law was contested by a younger member of the family, and the arbitrator to whom the subject was referred decided against him. He executed a deed in compliance with this award, and was afterwards relieved against it, on the principle that he was ignorant of his title.

The case does not suppose this fact, that he was the eldest son, to have been unknown to him; and, if he was ignorant of anything, it was of the law, which gave him, as eldest **[\*215]** son, the estate he had conveyed to a younger



brother. Yet he was relieved in chancery against this conveyance. There are certain strong objections to this decision in other respects; but, as a case in which relief has been granted on a mistake in law, it cannot be entirely disregarded.

Although we do not find the naked principle, that relief may be granted on account of ignorance of law, asserted in the books, we find no case in which it has been decided, that a plain and acknowledged mistake in law is beyond the reach of equity. In the case of *Lord Irnham v. Child*,<sup>1</sup> application was made to the chancellor to establish a clause which had been, it was said, agreed upon, but which had been considered by the parties, and excluded from the written instrument by consent. It is true, they excluded the clause, from a mistaken opinion that it would make the contract usurious, but they did not believe that the legal effect of the contract was precisely the same as if the clause had been inserted. They weighed the consequences of inserting and omitting the clause, and preferred the latter. That, too, was a case to which the statute applied. Most of the cases which have been cited were within the statute of frauds, and it is not easy to say how much has been the influence of that statute on them.

The case cited by the respondent's counsel from precedents in chancery, is not of this description; \*but it does not appear from that case, that the power of attorney was intended, or believed to be a lien.

In this case, the fact of mistake is placed beyond any controversy. It is averred in the bill, and admitted by the demurrer, that "the powers of attorney were given by the said Rousmanier, and received by the said Hunt, under the belief that they were, and with the intention that they should create, a specific lien and security on the said vessels."

We find no case which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief.

The decree of the Circuit Court is reversed; but as this is a case in which creditors are concerned, the court, instead of giving a final decree on the demurrer in favor of the plaintiff, directs the cause to be remanded, that the Circuit Court may permit the defendants to withdraw their demurrer, and to answer to the bill.

DECREE.—This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Rhode Island, and was argued by counsel. On consideration whereof, this court is of opinion that the said Circuit Court erred in sustaining the demurrer of the defendants, and dismissing the bill of the complainant. It is therefore decreed and ordered that the decree **217\*** of the said Circuit Court \*in this case be, and the same is hereby reversed and annulled. And it is further ordered, that the said cause be remanded to the said Circuit Court, with directions to permit the defendants to

withdraw their demurrer, and to answer the bill of the complainants.

See S. C. 2 Mason, 244, 353; 3 Mason, 294; 1 Pet. 1. Cited—14 Pet. 206, 224; 5 Hew. 269, 272, 291; 15 Wall. 144; 1 Otto, 50; 8 Otto, 82, 90; 11 Otto, 584; 1 Sumn. 140; 2 Sumn. 393, 435; Bald. 489, 492; 2 Blatchf. 147; 5 Cranch, C. C. 161; 3 Mason, 301, 304; 9 Bnak. Reg. 172, 178; 13 Bank. Reg. 177; 1 Woods, 558, 568; Blatchf. & H. 388, 389; Pat. O. Gaz. 1880, p. 1516.

#### [LOCAL LAW. COVENANT.]

GOLDSBOROUGH, *Plaintiff in Error*,

v.

ORR, *Defendant in Error*.

Where the acts stipulated to be done, are to be done at different times, the covenants are to be construed as independent of each other.

Application of this principle to the peculiar circumstances of the present case.

Under the act of assembly of Maryland of 1795, c. 56, if the defendant appears, and dissolves the attachment, a declaration and subsequent pleadings are not necessary, as in other actions, but the cause may be tried upon a short note.

It seems, under the same act, that an attachment will not lie in a case *ex contractu* for unliquidated damages for the non-delivery of goods. But where the plaintiff is entitled to a stipulated sum of money, in lieu of a specific article to be delivered, an attachment will lie.

THIS cause was argued at the last term by *Mr. Lear*<sup>2</sup> for the plaintiff in error, and by *Mr. Jones*<sup>3</sup> for the defendant.

\**Mr. Justice STORY* delivered the opinion—[\***218** ion of the court:

This is a case originating under the attachment act of Maryland of 1795 (ch. 56), and brought to this court upon a writ of error to the Circuit Court of the District of Columbia, for Washington county. The suit was brought by Orr, the defendant in error, on what is

2.—He cited 1 Jac. Law Dict. 160; 3 Harr. & M'Henr. Rep. 347; 1 Harr. & Johns. Rep. 491; 6 East's Rep. 614; 1 H. Bl. 363; 3 East's Rep. 93.

3.—He cited 1 Com. Dig. 598, B.

NOTE.—Independent covenants. Covenants may be wholly independent, although relating to the same subject, and made by the same parties, and included in the same instrument. In that case they are two separate contracts. Each party must then perform what he undertakes, without reference to the discharge of his obligation by the other party, and each party may have his action against the other for the non-performance of his agreement, whether he has performed his own or not.

As to when covenants are independent, see *Pordage v. Cole*, 1 Saund. 319; *Thorp v. Thorp*, 12 Mod. 460; 1 Salk. 171; *Peters v. Opie*, 2 Saund. 350; *Wilks v. Smith*, 10 Mees & W. 355; *Eastern R. Co. v. Philipson*, 16 C. B. 2; *Mayor of Norwich v. Railway Co.*, 4 Ell. & B. 397; *North. G. L. Co. v. Parnell*, 15 C. B. 360; 29 E. L. & E. 229; *Underhill v. Saratoga R. Co.*, 20 Barb. 455; *Edgar v. Boies*, 11 S. & R. 445; *Stevenson v. Kleppinger*, 5 Watts. 420; *Lowry v. Mehaffy*, 10 Watts. 387; 2 Pars. on Cont. 528; *Robb v. Montgomery*, 20 John. 15; *Cunningham v. Morrell*, 10 John. 203; *McClure v. Rush*, 9 Dana. 64; *Allen v. Saunders*, 7 B. Mon. 593; *Kettle v. Harvey*, 21 Vt. 301; *Lord v. Belknap*, 1 Cush. 279; *Thompkins v. Elliot*, 5 Wend. 436; *Grant v. Johnson*, 5 Barb. 161; 6 Id. 337; 1 Seld. 247; *Bean v. Atwater*, 4 Conn. 8; *Leonard v. Bates*, 1 Blackf. 172; *Kane v. Hood*, 13 Pick. 281; *Dey v. Dox*, 9 Wend. 129; *Morris v. Silter*, 1 Denio, 59; *Rider v. Poud*, 18 Barb. 179;

Wheat. 8.

1.—1 Bro. Ch. Cas. 91.

technically called a short note, expressing the true cause of action as follows:

*Howes Goldsborough, Esq.,*

*To Benjamin G. Orr, Dr.*

May 5, 1818. To the west house of four on P street south, between 4½ street west and Water street, with the four lots adjoining to the west,	\$4,500 00
To the house on P street south, adjoining the above house on the east side, and lot No. 21, on O street south,	4,500 00
February 15, 1819. To lots Nos. 9 and 10, and part of 11, containing ——— square feet, 12½ cents per foot,	1,906 00
	<u>\$10,906 00</u>
By amount of your account up to 17th of April, 1819,	7,986 11
	<u>\$2,919 89</u>

Errors excepted, 4th of June, 1819.

BENJAMIN G. ORR.

**219\*]** \*The original defendant, Goldsborough, appeared and dissolved the attachment by putting in special bail, and pleaded *non assumpsit*, upon which issue was joined, and a verdict found for the plaintiff for the above balance of \$2,919.89, with interest. A bill of exceptions was taken at the trial, in substance as follows:

The plaintiff in this case, to support the issue joined, on his part, offered in evidence the account marked A, which is as follows, to wit:

*Howes Goldsborough, Esq.,*

*Bo't of Benjamin G. Orr,*

May 5, 1818. The west house of four houses on P street south, between 4½ street west and Water street, with four lots adjoining to the west,	\$4,500 00
--	------------

*Cr.*

By his note, payable to A. J. Comstock, on the 1st of February, 1819,	1,190 24
By do., payable to A. J. Comstock, on the 1st of August, 1819,	1,238 09
	<u>2,428 33</u>

To balance due Benjamin G. Orr, payable in lumber, at usual lumber-yard prices, of which some part has already been delivered to his orders, \$2,071 67

BENJAMIN G. ORR,  
H. GOLDSBOROUGH.

Washington, May 5, 1818.

\*The agreement marked B, which is [\*220 as follows, to wit:

It is agreed between Benjamin G. Orr, of the city of Washington, and Howes Goldsborough, of the state of Maryland, as follows, to wit:

The said Orr sells to said Goldsborough the three-story brick house adjoining the one now in the possession of Commodore Rodgers on P street south, with the coach-house and stable adjoining, and the lot on which they stand, being numbered three, and a lot numbered twenty-one, on O street south, for four thousand five hundred dollars.

The said Orr also sells to said Goldsborough, lots Nos. 9 and 10, and part of 11, in the same square, with the water privilege thereto belonging, for twelve and a half cents for each square foot which they contain, all of which sales are to be paid for in lumber, in the city of Washington, at the usual lumber-yard prices; one-half thereof to be deliverable the present year, the other half in the year 1819, as it may be wanted by the said Orr. The said Orr further agrees to take of the said Goldsborough as much more lumber, which, added to the amount of the above property, when calculated in money, as will make the whole amount to ten thousand dollars. And for such further amount to give his note, payable on the 15th day of February, in the year 1819, to the said Goldsborough. The titles to be made on demand, and the delivery of the lumber to be guaranteed by Commodore Rodgers. Washington, May 5th, 1818.

BENJAMIN G. ORR,  
H. GOLDSBOROUGH.

\*I do hereby guaranty that H. Golds- [\*221 borough shall deliver the lumber mentioned in the within contract, on condition that B. G. Orr, on his part, complies with the stipulation on his part, also mentioned in this said instrument of writing. JOHN RODGERS.

Boone v. Eyre, 1 H. Bl. 273, note a; Fothergill v. Walton, 2 J. B. Moore, 630; Stavers v. Curling, 3 Bing. N. C. 355; Franklin v. Miller, 4 A. & E. 599; Fishmongers Co. v. Robertson, 5 Man. & G. 131; Storer v. Gordon, 3 M. & S. 308; Ritchie v. Atkinson, 10 East, 295; Havelock v. Geddes, 10 East, 555; Jonassohn v. Railway Co., 10 Exch. 434; 28 Eng. L. & Eq. 481; Gould v. Webb, 4 Ellis & B. 933; 30 Eng. L. & Eq. 331; Mill-dam Foundry v. Hovey, 21 Pick. 417; Tilleston v. Newell, 13 Mass. 406; Bennet v. Pixley, 7 John. 249; Obermyer v. Nichols, 6 Binn. 159; Morrison v. Galloway, 2 Harris & J. 461; Todd v. Somers, 2 Gratt. 167; Lewis v. Weldon, 3 Rand. 71; McCullough v. Cox, 6 Barb. 386; Payne v. Bettisworth, 2 A. K. Marsh, 427; Keenan v. Brown, 21 Vt. 86; Pepper v. Haight, 20 Barb. 429.

Where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred. Duke of St. Albans v. Shore, 1 H. Black, 270; Graves v. Legg, 9 Exch. 709; 25 Eng. L. & Eq. 552; Grey v. Frier, 4 Clark & F. 565; 26 Eng. L. & Eq. 27; Dakin v. Williams, 11 Wend. 67.

Where two acts are to be done by the parties at

the same time, neither party can maintain an action without showing performance, or offer to perform on his part, as where the vendor covenants to convey an estate, and the vendee covenants to pay the purchase money on the same day. Bk. of Col. v. Hagner, 1 Pet. 455; Slater v. Emerson, 19 How. 224; Campbell v. Gittings, 19 Ohio, 347; Washington v. Ogden, 1 Black, 450; Williams v. Healey, 3 Denio, 363; Gazley v. Price, 16 John. 267; Dunham v. Pettee, 4 Seld. 508; Lester v. Jewett, 1 Kern. 453; Hyde v. Booraem, 16 Pet. 169; Tilghman v. Tilghman, 1 Baldw. 464. See also Slocum v. Despard, 8 Wend. 615; Northrup v. Northrup, 6 Cow. 296; Champion v. White, 5 Cow. 509; Robb v. Montgomery, 20 John. 130; Adams v. Williams, 2 Watts. & S. 227; Hallway v. Davis, Wright, 129; Leonard v. Bates, 1 Blackf. 172, note; Kane v. Blood, 13 Pick. 281; McNamara v. Gaylord, 1 Bond, 302; Thompson v. Railway Co., 1 Bond, 152; Railway Co. v. Smith, 21 Wall. 255; Woodruff v. Hough, 1 Otto, 596; Phil. R. R. Co. v. Howard, 13 How. 307, 339; Hitchcock v. Galveston, 2 Woods. 272; Buckingham v. Jackson, 4 Biss. 295; Langdon v. Purdy, 1 McArthur, 23; Boody v. R. R. Co., 3 Blatchf. 25; S. C. 24 Vt. 660.



And the receipt marked C, which is as follows, to wit:

Received of Benjamin G. Orr, his note, payable on the 15th day of February, eighteen hundred and nineteen, for the sum of three thousand five hundred and ninety-four dollars, in compliance with his agreement, dated the 5th day of May, 1818.

H. GOLDSBOROUGH.

And further proved by a witness, that late in the winter, or in the spring of 1819, the defendant refused to deliver any more lumber to the orders of the plaintiff; the balance of lumber due under said contracts being duly demanded of the defendant by agent of the plaintiff; and it was admitted that the said houses and lots mentioned in said contracts had been duly conveyed according to agreement. And the defendant thereupon proved that he delivered lumber to the orders of the plaintiff to the amount of \$7,986.11, according to a particular account thereof, which was produced, which includes the same amount of \$2,428.33. mentioned in the first account A, the notes therein mentioned being payable in lumber, and the lumber given in discharge of the same, being charged in the general account B; and that he delivered lumber to the plaintiff's order, whenever called for, until the 15th of February, 1819, when the note filed in the cause, and mentioned in this defendant's receipt, fell due; that then, the said note not being paid by plaintiff, the defendant refused to deliver any more lumber, and the plaintiff requested said defendant to give him further time until some day in the April following to pay the said note (at which time he promised to take it up), and to continue the delivery of lumber to his orders as he might want it, until that day; and the witness, who was the defendant's agent, would have gone on to deliver the whole quantity, if it had been called for before the time limited as aforesaid for the payment of the note in April, not having been restricted by defendant's orders as to quantity; and that on the said day of April, the plaintiff again made default in paying the said note, and the defendant then refusing to deliver any more lumber, this suit was brought. If they believe the facts above stated to be true, the plaintiff is not entitled to recover in the suit. Which direction the court refused to give. To which refusal, the defendant, by his counsel, excepts, &c.

And the parties have since annexed to the record, as a part thereof, the following explanatory statement:

Whole amount of the purchase money of the house and lots sold	
by the agreement, B, viz:	
House, with coach-house,	
&c., and lot 21, -	\$4,500
Lots 9, 10, and part of 11,	
at 12½ cts. per square	
foot, - - -	1,906
	<hr/>
Do., for the other house and lots	
sold as per account A, -	4,500 00
	<hr/>
Total amount for both houses, and	
all the lots under both con-	
tracts, - - -	\$10,906 00

Of this amount Goldsborough had delivered lumber on account of Orr, to the amount stated in the account D (including all the credits stated in the account A), - - -	\$7,986 11
Leaving a balance to be delivered on account of the houses and lots sold and conveyed by Orr to Goldsborough, for which judgment is now recovered, with interest, -	2,919 89
	<hr/>
	\$10,906 00
<hr/>	
In order to complete the contract B, so as to make the whole amount in lumber to be taken by Orr under that contract, \$10,000 00	[*224
He gave the note mentioned, for	3,594 00
To which, adding the purchase money for the house and lots sold by that contract, -	6,406 00
	<hr/>
Makes the total amount to be taken in lumber under that contract. - - -	\$10,000 00
	<hr/>

Upon the argument of the cause in this court, the principal question has been whether the failure of Orr to pay the note of \$3,594, constitutes a good defense to this suit. That there is a balance due to Orr of \$2,919.89, for property actually conveyed by him to Goldsborough, under the agreements stated in the case, is most manifest; and the only point open for consideration is, whether the payment of the note is a condition precedent to the recovery of that balance. This must be decided by the terms of the written agreement B; for if the contract on one side be not dependent upon the performance of the contract on the other, or if they be not mutual and concurrent contracts, to be performed at the same time, there can be no doubt that the defense is unsupported. And, upon full consideration, we are all of opinion, that the contracts are not dependent or concurrent, by the true and necessary interpretation of that agreement. The agreement on the part of Orr was literally complied with. The titles to the property sold were duly made, the note was duly given, and Orr was at all times ready to receive the lumber according to his rights under the agreement. It is observable that one moiety of the lumber was deliverable in 1818; and as to this it is clear that the payment of the note could not be a condition precedent. The other moiety was deliverable in the year 1819, as it was wanted by Orr, and of course he might elect to demand the whole before, as well as after the note became due, at his pleasure. If this be so, it could not be within the contemplation of the parties, that the delivery of the lumber should be dependent upon the payment of the note, for the whole might be rightfully demanded before it became due. Nothing is better settled, both upon reason and authority, than the principle that where the acts stipulated to be done, are to be done at different times, the stipulations are to be construed as independent.

dent of each other. The parol enlargement of the time of payment of the note cannot be admitted to change the nature of the original agreement; nor is there any pretense to say that there was any waiver of the original agreement, even supposing that, in point of law, such a waiver could be insisted upon, in a case circumstanced like the present. For the parties recognized the existence of that agreement, and lumber continued to be delivered under it as Orr required. If, indeed, any waiver were to be implied, it would be a waiver by Goldsborough of a payment of the note as a condition precedent to the delivery of the lumber. But the parol contract does not, in any degree, vary the legal rights or obligations of the parties. The court below was, therefore, right in refusing the instruction prayed for by the counsel for the defendant.

After the argument, some difficulties occurred as to the nature and form of the proceedings under this attachment act; but upon hearing the parties again our doubts are entirely removed. One of the doubts was, whether, in cases of attachment, if the defendant appeared and dissolved the attachment, there ought not to be a declaration and subsequent pleadings, according to the course in ordinary actions. Upon the terms of the acts respecting attachments, we should have inclined to the opinion that such a declaration, and such pleadings, were necessary. But the practice is shown to have been otherwise, and that practice has been solemnly adjudged by the Court of Appeals of Maryland to be in conformity to law.<sup>1</sup> We have no disposition to disturb this construction.

Another doubt was, whether an attachment will lie in a case *ex contractu*, for unliquidated damages for non-delivery of goods. The act of 1795 gives the remedy upon the creditor's making oath, &c., that the debtor is *bona fide* indebted to him in a sum certain over all discounts, "and at the same time producing the bond or bonds, bill or bills, contested bill or bills of exchange, promissory note or notes, or other instrument or instruments in writ-

ing, account or accounts, by which the debtor is so indebted." This enumeration would seem to include such cases only of contract as were for payment of money, either certain in themselves, or for which debt, or *indebitatus assumpsit*, or actions of that nature, would lie. It does not seem to include a contract for the delivery of goods, or doing any other collateral act.<sup>2</sup> But, however this may be, and we give no opinion respecting it, we are satisfied that upon the contract in the present case, the plaintiff is entitled to a specific sum in money, so as to bring himself within the purview of the act. The value of the property sold was estimated in money; and though it was payable in lumber, yet if, upon demand, the defendant refused to deliver the lumber, he lost the benefit of that part of the contract, and the plaintiff became entitled to receive the sum stipulated to be paid in money.

Some objections were taken by the defendant to the preliminary proceedings in this suit; but it is unnecessary to consider them, because, whatever might have been their original defects, they are waived by going to trial upon the merits.

*The judgment of the Circuit Court is therefore affirmed with costs.*<sup>2</sup>

Cited—1 Bald. 494.

[\*CHANCERY. POST-NUPTIAL SETTLEMENT. \*229

#### SEXTON v. WHEATON ET UX.

A post-nuptial voluntary settlement, made by a man who is not indebted at the time, upon his wife, is valid against subsequent creditors.

1.—Samuel Smith and others v. Robert Gilmor and others, Garnishees of Wilhelm and Jan Willink. June term, 1816, of the Court of Appeals, MSS.

2.—See under the act of 1715, ch. 40, The State v. Beall, 3 Harr. & M'Henry's Rep. 347.

3.—The editor having been favored with a MSS. note of the case of Smith and others v. Gilmor and others, cited by the court in the preceding case, determined in the Court of Appeals of Maryland, takes the liberty of adding it for the information of the learned reader:

228\*] \*Samuel Smith and others, v. Robert Gilmor and others, Garnishees of Wilhelm and Jan Willink.

Appeal from Baltimore County Court. In this case, an attachment issued on the 2d of February, 1805, in the names of the present appellants, against the lands, tenements, goods, chattels, and credits of Wilhelm and Jan Willink, under, and in virtue of a warrant from a justice of the peace of Baltimore county, directed to the clerk of the County Court of that county, accompanied by an affidavit and account, pursuant to the directions of the act of Assembly of 1795, ch. 56. At the same time the plaintiffs prosecuted a writ of *capias ad respondendum* against the defendants, and filed a short note, stating that the suit was brought to recover the sum of \$14,094.84, due from the defendants to the plaintiffs, on account, and a copy thereof was sent with the said writ, indorsed, "to be set up at the court-house door by the sheriff." The attachment was returned by the sheriff, laid in the hands of Robert Gilmor and others (the appellees), and the writ of *capias ad respondendum* was returned *tarde*. The garnishees being called, appeared; and by their counsel pleaded that Wilhelm and Jan Willink did not assume, &c., and that at the time of laying the attachment, &c., they had no goods, &c., of the said Willinks in their hands. The general replication was put into the last plea, and issues were joined. Verdicts for the plaintiffs for \$12,775 current money, damages. Motion by the garnishees in arrest of judgment, and the reason assigned was because no declaration had been filed in the case. The County Court sustained the motion, and arrested the judgment. The plaintiffs appealed to this court.

The case was argued in this court by Windor for the appellants, and by Martin and Harper for the appellees.

The Court of Appeals reversed the judgment of the County Court, and rendered judgment of condemnation on the verdicts for the plaintiffs for \$12,775 current money, damages, together with \$1,975.93 current money, additional damages and costs.



The statute 13 Eliz., c. 5, avoids all conveyances not made on a consideration deemed valuable in law, as against previous creditors.

But it does not apply to subsequent creditors, if the conveyance is not made with a fraudulent intent.

What circumstances will constitute evidence of such a fraudulent intent.

**A**PPEAL from the Circuit Court for the District of Columbia and County of Washington.

This was a bill brought by the appellant, Sexton, in the court below, to subject a house and lot in the city of Washington, the legal title to which was in the defendant, Sally Wheaton, to the payment of a debt for which the plaintiff had obtained a judgment against her husband, Joseph Wheaton, the other defendant.

The lot was conveyed by John P. Van Ness, and Maria, his wife, and Clotworthy Stephenson, to the defendant, Sally Wheaton, by deed, bearing date the 21st day of March, 1807, for a valuable consideration, acknowledged to be received from the said Sally. And the plaintiff claimed to subject this property to the payment of his debt, upon the ground that the conveyance was fraudulent, and, therefore, void as to creditors.

The circumstances on which the plaintiff re-  
**230\***] lied, \*in his bill, to support the allegation of fraud, were, that the said house and lot were purchased by the defendant, Joseph, who, contemplating at the time carrying on the business of a merchant in the said city of Washington, procured the same to be conveyed to his wife; and obtained goods on the credit of his apparent ownership of valuable real property. That for the purpose of obtaining credit with the commercial house of the plaintiff, in New York, he represented himself, in his letters, as a man possessing real estate to the value of \$20,000, comprehending the house in question, besides 100 bank shares, and other personal estate. That the defendant, Sally, knew and permitted these representations to be made. That the defendant, Joseph, in the presence of the defendant Sally, applied to General Dayton, the friend of the plaintiff, to be recommended to a commercial house in New York, and in the statement of his property, as an inducement to make such recommendation, he includ-

ed the premises. That the defendant, Sally, permitted this misrepresentation, and did not undeceive General Dayton, although she had many opportunities of doing so.

In support of these allegations the plaintiff annexed to his bill several letters written by the defendant, Joseph, in the city of Washington, to the plaintiff, in the city of New York, soliciting a commercial connection, and advances of goods on credit. The first of these letters was dated the 2d of September, 1809. The letters stated that the plaintiff's house had been recommended to the defendant by their mutual friend General Dayton; \*represented [**\*231** the defendant's fortune as considerable, spoke of the house in which he was to carry on business as his own, and held out the prospect of regular and ample remittances.

The bill farther stated that, upon the faith of these letters, and on the recommendation of General Dayton, the plaintiff advanced goods to the defendant, Joseph, to a considerable amount, who failed in making the promised remittances; and on the plaintiff's withholding farther supplies of goods, and pressing for payment, he avowed his inability to pay, declared himself to be insolvent, and then stated that the house in controversy was the property of his wife.

Some arrangements were made, by which the goods in the store, and the books of the defendant, Joseph, were delivered to the plaintiff; but, after paying some creditors who were preferred, a very small sum remained to be applied in discharge of a judgment which the plaintiff had obtained in January, 1812, for the sum of \$8,249.29. On this judgment an execution was issued, by which the life estate of Joseph Wheaton was taken and sold for \$300, the plaintiff being the purchaser.

The bill prayed that the property, subject to the plaintiff's interest therein under the said purchase, might be sold, and the proceeds of the sale applied to the payment of his judgment. It farther stated that improvements to a great amount had been made since the conveyance to Sally Wheaton, and prayed that, should the court sustain the said \*con- [**\*232** conveyance the defendant, Sally, might be decreed to account for the value of those improvements.

**NOTE.—Marriage Settlements.**

A deed to wife or child, for love and affection, is not always void as to creditors. The mere fact of indebtedness to a small amount, the grantor being in good circumstances and the gift reasonable, will not render the deed fraudulent. *Hinde's lessee v. Longworth*, 11 Wheat. 199.

To render an ante-nuptial settlement void as to creditors, both parties must concur in the fraud. *Maguiar v. Thompson*, 7 Pet. 348.

A voluntary conveyance by a person not indebted at the time, in favor of wife or children cannot be impeached by subsequent creditors upon the mere ground of its being voluntary. It must be shown to have been fraudulent, or made with a view to future debts. *Reade v. Livingston*, 3 Johns. Ch. 501; *Richardson v. Smallwood*, Jac. 552; *Bennett v. Bedford Bank*, 11 Mass. 421.

The want of valuable consideration may be a badge of fraud; but it is only presumptive, and not conclusive evidence of it, and may be met and rebutted by evidence on the other side, as that the grantor was in prosperous circumstances, indebted to only a small amount, and was unembarrassed,

and that the gift was a reasonable one, according to his state and condition in life, leaving enough for the payment of his debts.

*Verplank v. Sterry*, 12 John. 536, 554, 556, 557; *Partridge v. Gopp*, Ambler, 597, 598; S. C. 1 Eden, 167, 168, 169; *Gilmore v. N. A. L. Co.*, Pet. C. C. 461; *Cadogan v. Kennett*, Cowp. 432, 434; *Doc v. Routledge*, Cowp. 705; *Lush v. Wilkinson*, 5 Ves. 387; *Holloway v. Willard*, 1 Madd. 414; *Kidney v. Consmaker*, 12 Ves. 155; *Sagitary v. Hyde*, 2 Vern. 44; *Cathcart v. Robinson*, 5 Pet. 277.

In *Verplank v. Sterry*, 12 John., *supra*, it is said by Mr. Justice Spencer: "If the person making the settlement is insolvent, or in doubtful circumstances, the settlement comes within the statute (of 13th of Elizabeth, ch. 5.) But if the grantor be not indebted to such a degree, as that the settlement will deprive the creditors of an ample fund for the payment of their debts, the consideration of natural love and affection will support the deed, although a voluntary one, against his creditors; for, in the language of the decisions, it is free from the imputation of fraud." Mr. Newland maintains the same principle. *Newland on Contracts*, ch. 23, p.

Wheat. 8.

The answers denied that the house and lot in contest were purchased in the first instance by Joseph Wheaton, or conveyed to his wife with a view to his entering into commerce; and averred that they were purchased for Sally Wheaton, and chiefly paid for out of the profits made by her industry, and saved by her economy in the management of the affairs of the family while her husband was absent executing the duties of his office as sergeant-at-arms to the House of Representatives. The answers also stated that in January, 1807, when the conveyance was made, Joseph Wheaton was sergeant-at-arms to the House of Representatives, expected to continue in that office, had no intention of going into trade, and had no knowledge of the plaintiff. The design of going into commerce was first formed in the year 1809, when, being removed from his office, and having no hope of being re-instated in it, he turned his attention to that object as a means of supporting his family. He, then, in a letter dated the 24th of August, applied to General Dayton, as a friend, to recommend him to a house in New York, and received from that gentleman a letter dated the 29th of the same month, which is annexed to the answer. In this letter, General Dayton, says: "Pursuant to your request, I recommend to you the house of Messrs. Sexton & Williamson, with which to form the sort of connection which you propose, in New York. They have sufficient capital." &c. "The proper course **233\***] will be for \*you to write very particularly to them, stating your present advantageous situation, your prospects and plans of business, and describing the nature and extent of the connection which you propose to form with them, and then refer them to me for my knowledge of your capacity, industry, probity." &c., &c., &c.

The defendant, Joseph, in his answer, stated that in consequence of this letter, he wrote to the said house of Sexton & Williamson. He admitted that his account of his property was too favorable, but denied having made the statement for the purposes of fraud, but from having been himself deceived respecting its value. He denied having ever told General Dayton that the house was his, and thinks he declared it to be the property of his wife. Sally Wheaton denied that she ever heard her husband tell

General Dayton that the house was his property, that she ever in any manner contributed to impose on others the opinion that her husband was more opulent than he really was; or ever admitted that the house she claims was his. She admitted that she saw a letter prepared by him to be sent to Sexton & Williamson, in the autumn of 1809, which she thought made too flattering a representation of his property, and which she, therefore, dissuaded him from sending in its then form. She then hoped that her persuasions had been successful.

The answers of both defendants stated that Joseph Wheaton was free from debt when the conveyance was made, and insisted that it was made *bona fide*.

\*The court below dismissed the bill, [\***234** and from this decree the plaintiff appealed to this court.

Mr. Key, for the appellants, argued, 1. That the evidence in the cause was insufficient to prove the fact alleged, that the house in question was purchased with the funds of the wife. The case of *Slanning v. Style*,<sup>1</sup> which is the stronger, as it excepts creditors from the operation of the right where it exists, goes to show that it was not bought with funds which could be considered as hers. The fund accruing from the thrift and economy of the wife does not constitute her separate estate.<sup>2</sup> Still less could such an accumulation for her separate use, from the presents of her friends, or as a compensation for services rendered her husband, be warranted by any case or principle.

2. If, then, the purchase was not made with the separate property of the wife, were the circumstances of the husband such, at the time this settlement was made, as to justify him in making it, to the prejudice of subsequent creditors? All the cases concur in showing that he cannot do so, and that the subsequent creditors may impeach it.<sup>3</sup> And it makes no difference that it is the case of a settlement by a purchase,

1.—3 P. Wms. 335-337.

2.—1 Cas. in Ch. 117.

3.—Fletcher v. Sidley, 2 Vern. 490; Taylor v. Jones, 2 Atk. 600; Fitzer v. Fitzer, 2 Atk. 50; Stillman v. Ashdown, 2 Atk. 481; Hungerford v. Earle, 2 Vern. 261; Roberts on Fraud, Convey, 21-30; Atherly's Fam. Settlement, 212, 230-236.

384, 385. See also 1 Fonbl. Eq. B. 1, ch. 4, s. 12, note (a). To the same effect are Townsend v. Westcott, 2 Beav. 340, 345; Salmon v. Bennett, 1 Coun. 525, 548 to 551; Story Eq. Jur. s. 363, note 1.

Chancellor Kent says: "I have not been able to find the case, in which a mere voluntary conveyance to a wife or child has been plainly or directly held good against the creditor at the time. The cases appear to me to be, upon the point, uniformly in favor of the creditor." Reade v. Livingston, 3 John., Ch. 504.

The doctrine above stated in *Hinde's Lessee v. Longworth*, 11 Wheat, 109, is not easily reconcilable with that in *Reade v. Livingston*, 3 John. Ch., 500, 501. See also *Holloway v. Willard*, 1 Madd. R. 414; *Jones v. Boulter*, 1 Cox. 288, 294, 295; *Plank v. Schemerhorn*, 3 Barb., Ch. 644; *Townshend v. Windham*, 2 Ves. 10, 11; *Frazier v. Western*, 1 Barb., Ch. 220; *Jackson v. Post*, 15 Wend. 588; 1 Story Eq. Jur. s. 365; *Van Wyck v. Seward*, 18 Wend. 376; *Seward v. Jackson*, 8 Cow. 406; *Wickes v. Clark*, 8 Paige, 165.

To avoid a post-nuptial settlement insolveney need not be proved. It is enough if property sufficient to impair the means of the grantor, so as to Wheat. 8.

hinder creditors, is conveyed. *Parish v. Murphee*, 13 How. 92.

A post-nuptial settlement, not disproportionate to the husband's means, taking his debts and his situation into consideration, is valid. *Picquet v. Swan*, 4 Mas. 443; *Hopkirk v. Randolph*, 2 Brock. Marsh. 132.

A marriage settlement while husband is heavily indebted is invalid. *Kehr v. Smith*, 30 Wall. 31.

Mere indebtedness of the husband at the time, will not alone make the settlement void; it must be shown that he was insolvent, or that the settlement had a tendency to impair the rights of creditors. *Lloyd v. Fulton*, 1 Otto, 479; *Huner v. Scruggs*, 4 Otto, 28.

Settlement by husband, not in debt, of one sixth of his estate on his wife, valid. *Jones v. Clifton*, 17 Am. L. Reg. 713; 6 Reporter, 324.

The doctrine in regard to voluntary settlements seems to have vibrated, both in this country and in England, between that laid down in *Hinde's Lessee v. Longworth*, 11 Wheat. 109 (stated above) and the doctrine (stated above), as laid down by Chancellor Kent in *Reade v. Livingston*, 3 John. Ch. 504. See *Willards*, Eq. Jur., 230 to 237.



**235\***] and the deed taken \*to the wife. This notion of certain elementary writers<sup>1</sup> has been exploded, and the authorities are decisive against it.<sup>2</sup> Nor is there any difference between a deed to defraud subsequent creditors and one to defraud purchasers.<sup>3</sup> And a subsequent sale, after a voluntary settlement, creates the presumption of fraudulent intent in the previous settlement under the statute of 27 Eliz.<sup>4</sup> If so, there is the same ground for similar presumption where debts are contracted after a previous voluntary settlement. This must especially apply where the settlement is of all the settler's property, and the debts are large, and contracted almost immediately after the settlement.

3. But, supposing the settlement was fairly made, here is evidence of collusion of the wife in the misrepresentation which was made to the prejudice of creditors, and she is bound by it. The principle is well established that the property of a married woman, or that of an infant, may be rendered liable to creditors by their concurrence in acts of fraud.<sup>5</sup>

Mr. Jones, for the respondents, contra, insisted that many of the cases cited on the other **236\***] side \*might be disposed of upon their peculiar circumstances, without touching upon the general doctrine for which he contended. He admitted that whether a settlement was within the letter of the statutes relating to fraudulent conveyances or not, if there was actual fraud, a court of equity would lay hold upon it, and redress the injured party. But the settler must be indebted at the time of the execution of the deed, in order to set it aside on that ground. And there must be an allegation, and proof of that fact or the bill will be dismissed.<sup>6</sup> According to the original rudeness of the feudal system, the husband and wife were considered as one person, and all her rights of property were merged in his. But this is a doctrine wholly unknown to the civilized countries governed by the Roman code; and courts of equity have constantly struggled to mitigate its rigor. For this purpose they consider the husband as a trustee for the wife, in order to preserve her property to her separate use. It does not follow that because voluntary settlements are void against subsequent purchasers, that they are, therefore, void against subsequent creditors. There is a well-established and well-known distinction in this respect between the statute 13 Eliz. and the statute 27 Eliz. Taking the present case, then, as a mere voluntary conveyance on good consideration, independent of actual fraud, it must stand. Whatever discrepancy there may **237\***] be in some of the old cases, this \*is now the settled doctrine in England. Thus, in the case of a voluntary bond, and arrears under it, a conveyance to secure those arrears was sus-

tained against creditors.<sup>7</sup> So, also, the substitution of a voluntary bond by another is good.<sup>8</sup> And a post-nuptial settlement is only void as against creditors at the time.<sup>9</sup> A voluntary conveyance in favor of strangers is valid against subsequent creditors, the party making it not being indebted at the time.<sup>10</sup> And in a very recent case, a voluntary settlement by a husband, not indebted at the time, was established against subsequent creditors.<sup>11</sup> But this is not a mere voluntary conveyance on a moral obligation; it is for a valuable consideration in the wife's services.<sup>12</sup> The case cited from 1 Cas. in Ch., 117, has no bearing on the present question, and has been overruled since. Besides, the case of *Slanning v. Style*<sup>13</sup> is better vouched, more modern, and of greater authority in every respect. The pretext of collusion in actual fraud between the husband and wife, in the present case, is utterly devoid of any foundation in the evidence.

\*Mr. Chief Justice MARSHALL delivered [\***238** the opinion of the court, and, after stating the case, proceeded as follows:

The allegation that the house in question was purchased with a view to engaging in mercantile speculations, and conveyed to the wife for the purpose of protecting it from the debts which might be contracted in trade, being positively denied, and neither proved by testimony nor circumstances, may be put out of the case.

The allegation that the defendant, Sally, aided in practicing a fraud on the plaintiff, or in creating or giving countenance to the opinion that the defendant, Joseph, was more wealthy than in truth he was, is also expressly denied, nor is there any evidence in support of it, other than the admission in her answer that she had seen a letter written by him to the plaintiff, in the autumn of 1809, in which he gave, she thought, too flattering a picture of his circumstances. This admission is, however, to be taken with the accompanying explanation, in which she says that she had dissuaded him, she had hoped successfully, from sending the letter in its then form.

This fact does not, we think, fix upon the wife such a fraud as ought to impair her rights, whatever they may be.

The plaintiff could not know that this letter was seen by the wife, or in any manner sanctioned by, or known to her. He had, therefore, no right to suppose that there was any waiver of her interest, whatever it might be, nor had he a right to assume anything against her, or her claims, in consequence \*of [\***239** his receiving this letter. The case is very different from one in which the wife herself makes a misrepresentation, or hears and countenances the misrepresentation of her husband. The

1.—Fonbl. 275; Sugd. 424; Roberts, 463.

2.—Peacock v. Monk, 1 Ves. 127; Stillman v. Ashdown, 2 Atk. 481; 2 Vern. 683; 4 Munf. 251; Partridge v. Goss, Amb. 596; Atherly's Fam. Settle. 481.

3.—Anderson v. Roberts, 18 Johns. Rep. 515.

4.—Roberts on Fraud. Convey. 34.

5.—Roberts, 522; Sugd. 480; Fonbl. 161; 1 Bro. Ch. 358; 2 Eq. Cas. Abr. 488.

6.—Lush v. Wilkinson, 3 Ves. 384; Battersbee v. Farrington, Swanst. Rep. 106; Stevens v. Olive, 1 Bro. Ch. Cas. 90.

7.—Gillam v. Locke, 9 Ves. 612.

8.—Ex-parte Barry, 19 Ves. 218.

9.—Williams v. Kidney, 12 Ves. 136.

10.—Holloway v. Millard, 1 Madd. Rep. 414; Hobbs v. Hull, 1 Cox, 445; Jones v. Bolter, Id. 288.

11.—Batterseebe v. Farrington, 1 Swanst. Rep. 106; See, also, Jones v. Bolter, 1 Cox, 288.

12.—3 P. Wms. 337.

13.—3 P. Wms. 337.

person who acts under such a misrepresentation, acts under his confidence in the good faith of the wife herself. He has a right to consider that faith as pledged; and if he is deceived, he may complain that she has herself deceived him. But in this case, the plaintiff acted solely on his confidence in the husband. If he was deceived, the wife was not accessory to the deception. She contributed nothing towards it. When she saw and disapproved the letter written by her husband, what more could be required from her than to dissuade him from sending it in that form? Believing, as we are bound to suppose she did, that the letter would be altered, what was it incumbent on her to do? All know and feel, the plaintiff as well as others, the sacredness of the connection between husband and wife. All know that the sweetness of social intercourse, the harmony of society, the happiness of families, depend on that mutual partiality which they feel, or that delicate forbearance which they manifest towards each other. Will any man say that Mrs. Wheaton, seeing this letter, remonstrating against it, and believing that it would be altered before sending it, ought to have written to this stranger in New York, to inform him that her husband had misrepresented his circumstances, and that credit ought not to be given to his letters? No man will say so. Confiding, as it was natural **240\*** and \*amiable in her to confide, in his integrity, and believing that he had imposed on himself and meant no imposition on another, it was natural for her to suppose that his conduct would be influenced by her representations, and that his letter would be so modified as to give a less sanguine description of his circumstances. We cannot condemn her conduct.

A wife who is herself the instrument of deception, or who contributes to its success by countenancing it, may, with justice, be charged with the consequences of her conduct. But this is not such a case; and we consider the rights of Mrs. Wheaton as unimpaired by anything she is shown to have done.

Had the plaintiff heard this whole conversation, as stated in the answer; had he heard her express her disapprobation of the statements made in the letter, and dissuade her husband from sending it without changing its language; had he seen them separate, with a belief on her part that the proper alterations would be made in it he would have felt the injustice of charging her with participating in a fraud. That act cannot be criminal in a wife, because it was not communicated, which, if communicated, would be innocent. Admitting the representations of this letter to be untrue, they cannot be charged on the wife, since she disapproved of them, and believed that it would not be sent in its exceptionable form.

So much is a wife supposed to be under the control of her husband, that the law in this district will not permit her estate to pass by a conveyance executed by herself, until she has **241\*** been \*examined apart from her husband by persons in whom the law confides, and has declared to them that she has executed the deed freely, and without constraint. It would be a strange inconsistency, if a court of chancery were to decree that the mere knowledge of a letter containing a misrepresentation respecting

her property should produce a forfeiture of it, although she had not concurred in its statements, had dissuaded her husband from sending it, and believed he had not sent it.

Without discussing the conduct of Mr. Wheaton in this transaction, it is sufficient to say that it cannot affect the estate previously vested in the wife. The cause, therefore, must depend on the fairness and legality of the conveyance to her.

The allegation that the purchase money was derived from her private individual funds is supported by circumstances which may disclose fair motives for the conveyance, but which are not sufficient to prove that the consideration, in point of law, moved from her. It must, therefore, be considered as a voluntary conveyance; and, if sustained, must be sustained on the principle that it was made under circumstances which do not impeach its validity when so considered.

The bill does not charge Mr. Wheaton with having been indebted in January, 1807, when this conveyance was made. The fact that he was indebted cannot be assumed. Indeed, there is no ground in the record for assuming it. The answer avers that he was not indebted, and they are not contradicted by any testimony in the cause. \*His inability to pay his debts [**\*242** in 1811, or 1812, is no proof of his having been in the same situation in January, 1807. The debts with which he was then overwhelmed were contracted after that date. This conveyance, therefore, must be considered as a voluntary settlement made on his wife, by a man who was not indebted at the time. Can it be sustained against subsequent creditors?

It would seem to be a consequence of that absolute power which a man possesses over his own property, that he may make any disposition of it which does not interfere with the existing rights of others, and such disposition, if it be fair and real, will be valid. The limitations on this power are those only which are prescribed by law.

The law which is considered by the plaintiff's counsel as limiting this power in the case at bar, is the statute of 13 Eliz., ch. 5, against fraudulent conveyances, which is understood to be in force in the county of Washington. That statute enacts that "for the avoiding and abolishing of feigned, covenous and fraudulent feoffments," &c., "which feoffments," &c., "are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others of their just and lawful actions," &c., "not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all plain dealing, bargaining and chevisance between man and man. Be it, therefore, declared," &c., "that all and every feoffment," &c., "made to, or for, any intent or purpose before declared and expressed, shall be \*from henceforth deemed [**\*243** ed and taken (only as against that person," &c., "whose actions," &c., "shall or might be in any wise disturbed," &c.), "to be clearly and utterly void."

In construing this statute the courts have considered every conveyance, not made on consideration deemed valuable in law, as void against previous creditors. With respect to



subsequent creditors, the application of this statute appears to have admitted of some doubt.

In the case of *Shaw v. Standish* (2 Vern., 326), which was decided in 1695, it is said by counsel, in argument, "that there was a difference between purchasers and creditors, for the statute of 13 Eliz. makes not every voluntary conveyance, but only fraudulent conveyances, void as against creditors; so that, as to creditors, it is not sufficient to say the conveyance was voluntary, but must show they were creditors at the time of the conveyance made, or, by some other circumstances, make it appear that the conveyance was made with intent to deceive or defraud a creditor."

Although this distinction was taken in the case of a subsequent purchaser, and was, therefore, not essential in the cause which was before the court, and is advanced only by counsel in argument, yet it shows that the opinion that a voluntary conveyance was not absolutely void as to subsequent creditors, prevailed extensively.

In the case of *Taylor v. Jones* (2 Atk., 600), a bill was brought by creditors to be paid their debts out of stock vested by the husband, in trustees, for the benefit of himself for life, of his wife for life, and, afterwards for the benefit **244\*** of children. Lord *Hardwicke* decreed the deed of trust to be void against subsequent as well as preceding creditors.

There are circumstances in this case which appear to have influenced the chancellor, and to diminish its bearing on the naked question of a voluntary deed being absolutely void, merely because it is voluntary.

Lord *Hardwicke* said: "Now, in the present case, here is a trust left to the husband in the first place, under this deed; and his continuing in possession is fraudulent as to the creditors, the plaintiffs."

His lordship, afterwards, says: "And it is very probable that the creditors, after the settlement, trusted Edward Jones, the debtor, upon the supposition that he was the owner of this stock, upon seeing him in possession."

This case, undoubtedly, if standing alone, would go far in showing the opinion of Lord *Hardwicke* to have been that a voluntary conveyance would be void against subsequent, as well as preceding creditors; but the circumstances that the settler was indebted at the time, and remained in possession of the property as its apparent owner, were certainly material; and although they do not appear to have decided the cause, leave some doubt how far this opinion should apply to cases not attended by those circumstances.

This doubt is strengthened by observing Lord *Hardwicke's* language, in the case of *Russell v. Hammond*. His lordship said, "though he had hardly known one case where the person conveying was indebted at the time of the conveyance, **245\*** that the conveyance had not been fraudulent, yet that, to be sure, there were cases of voluntary settlement that were not fraudulent, and those were where the persons making them were not indebted at the time, in which case subsequent debts would not shake such settlements."

It would seem, from the opinion expressed in this case, that *Taylor v. Jones* must have been decided on its circumstances.

The case of *Stillman v. Ashdown*, and of *Fitzer v. Fitzer and Stephens*, reported in 2 Atk., have been much relied on by the appellant; but neither is thought to establish the principle for which he contends. In *Stillman v. Ashdown* the father had purchased an estate, which was conveyed jointly to himself and his son, and of which he remained in possession. After the death of the father, the son entered on the estate, and the bill was brought to subject it to the payment of a judgment against the father, in his life-time. The chancellor directed the estate to be sold, and one moiety to be paid to the creditor, and the residue to the son.

In giving his opinion, the chancellor put the case expressly on the ground that this, from its circumstances, was not to be considered as an advancement to the son. He says, too, "a father, here, was in possession of the whole estate, and must, necessarily, appear to be the visible owner of it; and the creditor, too, would have had a right, by virtue of an elegit, to have laid hold of a moiety, so that it differs extremely from all the other cases."

\*In the same case the chancellor lays **[\*246]** down the rules which he supposed to govern in the case of voluntary settlements. "It is not necessary," he says, "that a man should be actually indebted at the time of a voluntary settlement to make it fraudulent; for, if a man does it with a view to his being indebted at a future time, it is equally fraudulent, and ought to be set aside."

The real principle, then, of this case, is that a voluntary conveyance to a wife or child, made by a person not indebted at the time, is valid, unless it were made with a view to being indebted at a future time.

In the case of *Fitzer v. Fitzer and Stephens* the deed was set aside, because it was made for the benefit of the husband, and the principal point discussed was the consideration. The Lord Chancellor said: "It is certain that every conveyance of the husband that is voluntary, and for his own benefit, is fraudulent against creditors." After stating the operation of the deed, he added, "then consider it as an assignment which the husband himself may make use of to fence against creditors, and, consequently, it is fraudulent."

This case, then, does not decide that a conveyance to a wife or child is fraudulent against subsequent creditors because it is voluntary, but because it is made for the benefit of the settler, or with a view to the contracting of future debts.

The case of *Peacock v. Monk*, in 1 Vesey, turned on two points. The first was, that there was a proviso to the deed which amounted to a power of revocation, which, the chancellor said, \*had always been considered as a **[\*247]** mark of fraud; and, second, that, being executed on the same day with his will, it was to be considered as a testamentary act.

In the case of *Walker v. Burrows* (1 Atk., 94), Lord *Hardwicke*, adverting to the statute 13 Eliz., said that it was necessary to prove that the person conveying was indebted at the time of making the settlement, or immediately afterwards, in order to avoid the deed.

Lord *Hardwicke* maintained the same opinion in the case of *Townshend v. Windham*, reported in 2 Vesey. In that case he said: "If

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there is a voluntary conveyance of real estate, or chattel interest, by one not indebted at the time, though he afterwards becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good; but if any mark of fraud, collusion or intent to deceive subsequent creditors appears, that will make it void; otherwise not; but it will stand, though afterwards he becomes indebted."

A review of all the decisions of Lord Hardwicke will show his opinion to have been that a voluntary conveyance to a child by a man not indebted at the time, if a real and *bona fide* conveyance, not made with a fraudulent intent, is good against subsequent creditors.

The decisions made since the time of Lord Hardwicke maintain the same principle.

In *Stephens v. Olive* (2 Bro. Ch. Rep., 90), Edward Olive, by deed dated the 7th of May, 248\*] 1774, settled his real estate on himself for life, remainder to his wife for life, with remainders over for the benefit of his children. By another deed of the same date, he mortgaged the same estate to Philip Mighil, to secure the repayment of £500 with interest. On the 6th of March, 1775, he became indebted to George Stephens. This suit was brought by the executors of George Stephens to set aside the conveyance, because it was voluntary and fraudulent as to creditors. The master of the rolls held "that a settlement after marriage, in favor of the wife and children, by a person not indebted at the time, was good against subsequent creditors;" "and that, although the settler was indebted, yet, if the debt was secured by mortgage, the settlement was good."

In the case of *Lush v. Williamson* the husband conveyed leasehold estate in trust, to pay, after his decease, an annuity to his wife for life, and after her decease, the premises charged with the annuity for himself and his executors. A bill was brought by subsequent creditors to set aside this conveyance. The master of the rolls sustained the conveyance, and, after expressing his doubts of the right of the plaintiff to come into court without proving some antecedent debt, said, "a single debt will not do. Every man must be indebted for the common bills for his house, though he pays them every week. It must depend upon this whether he was in insolvent circumstances at the time."

In the case of *Glaister v. Hewer* (8 Ves., 199), where the husband, who was a trader, purchased lands, and took a conveyance to himself and wife, and afterwards became bankrupt and died, a suit was brought by the widow, against the assignees, to establish her interest. Two questions arose: 1. Whether the estate passed to the assignees under the statute of 1 James I., ch. 15.; and, if not, 2. Whether the conveyance to the wife was void as to creditors.

The master of the rolls decided both points in favor of the widow. Observing on the statute of the 13th of Eliz., he said that the conveyance would be good, supposing it to be perfectly voluntary; "for," he added, "though it is proved that the husband was a trader at the time of the settlement, there is no evidence that he was indebted at that time; and it is

quite settled, that, under that statute, the party must be indebted at the time."

On an appeal to the lord chancellor, this decree was reversed, because he was of opinion that the conveyance was within the statute of James, though not within that of Elizabeth.

In the case of *Battersbee v. Farrington and others* (1 Swanst., 106), where a bill was brought to establish a voluntary settlement in favor of a wife and children, the master of the rolls said "no doubt can be entertained on this case, if the settler was not indebted at the date of the deed. A voluntary conveyance by a person not indebted is clearly good against future creditors. That constitutes the distinction between the two statutes. Fraud vitiates the transaction; but a settlement not [\*250] fraudulent, by a party not indebted, is valid, though voluntary."

From these cases it appears that the construction of this statute is completely settled in England. We believe that the same construction has been maintained in the United States. A voluntary settlement in favor of a wife and children is not to be impeached by subsequent creditors, on the ground of its being voluntary.

We are to inquire, then, whether there are any badges of fraud attending this transaction which vitiate it.

What are those badges?

The appellant contends that the house and lot contained in this deed constituted the bulk of Joseph Wheaton's estate, and that the conveyance ought, on that account, to be deemed fraudulent.

This fact is not clearly proved. We do not know the amount of his estate in 1807; but if it were proved, it does not follow that the conveyance must be fraudulent. If a man, entirely unencumbered, has a right to make a voluntary settlement of a part of his estate, it is difficult to say how much of it he may settle. In the case of *Stephens v. Olive* the whole real estate appears to have been settled, subject to a mortgage for a debt of £500; yet that settlement was sustained. The proportional magnitude of the estate conveyed may awaken suspicion and strengthen other circumstances; but, taken alone, it cannot be considered as proof of fraud. A man who makes such a conveyance, necessarily impairs his credit, and, \*if openly done, warns those with whom [\*251] he deals not to trust him too far; but this is not fraud.

Another circumstance on which the appellant relies is the short period which intervened between the execution of this conveyance and the failure of Joseph Wheaton.

We admit that these two circumstances ought to be taken into view together; but do not think that, as this case stands, they establish a fraud.

There is no allegation in the bill, nor is there any reason to believe that any of the debts which pressed upon Wheaton at the time of his failure were contracted before he entered into commerce in 1809, which was more than two years after the execution of the deed. It appears that, at the date of its execution, he had no view to trade. Although his failure was not very remote from the date of the deed, yet the debts and the deed can in no manner be connected with each other; they are as dis-



tinct as if they had been a century apart. In the case of *Stephens v. Olive* the debt was contracted in less than twelve months after the settlement was made; yet it could not overreach the settlement.

These circumstances, then, both occurred in the case of *Stephens v. Olive*, and were not considered as affecting the validity of that deed. The reasons why they should not be considered in this case as indicating fraud, are stronger than in England. In this district every deed must be recorded in a place prescribed by law. All titles to land are placed upon the record. The person who trusts another on the faith of **252\*** his real property, \*knows where he may apply to ascertain the nature of the title held by the person to whom he is about to give credit. In this case, the title never was in Joseph Wheaton. His creditors, therefore, never had a right to trust him on the faith of this house and lot.

A circumstance much relied on by the appellant is the controversy which appears to have subsisted about that time between the post-office department and Wheaton. This circumstance may have had some influence on the transaction; but the court is not authorized to say that it had. The claim of the post-office department was not a debt. On its adjustment Wheaton was proved to be the creditor instead of debtor.

It would be going too far to say that this conveyance was fraudulent to avoid a claim made by a person who was, in truth, the debtor, where there is nothing on which to found the suspicion but the single fact that such a claim was understood to exist.

The claim for the improvements stands on the same footing with that for the lot. They appear to have been inconsiderable, and to have been made before these debts were contracted.

*Decree affirmed.*<sup>1</sup>

1.—Mr. Atherley, in his able treatise on the Law of Marriage and other Family Settlements, controverts, on principle, the doctrine that a voluntary settlement is good against subsequent creditors, if the settler was not indebted at the time he made it, although he admits that it is the law in England, as established by the decisions of the courts of equity, pp. 230-237, 175, 176, 209-220. See also Read v. Livingston, 3 Johns. Ch. Rep. 481.

2.—Which provides "that it shall be the duty of the sheriff of the several cities and counties of this state, and the duty of the keeper of the city prison of the city of New York, to receive into their respective gaols, and safely keep, all prisoners who shall be committed to the same by virtue of any process to be issued under the authority of the United States, until they shall be discharged by the due course of the laws thereof, the United States supporting such of the said prisoners as shall be committed for offenses against the said United States: Provided always, that persons committed in the city of New York on civil process only, be committed to the gaol in the custody of the sheriff of the said city; and persons committed in the said city charged with any offense whatever, be committed to the gaol in the custody of the keeper of the city prison of the said city; and in case any prisoner shall escape out of the custody of any sheriff or keeper to whom such prisoner may be committed as aforesaid, such sheriff or keeper shall be liable to the like actions and penalties as he would have been had such prisoner been committed by virtue of any process issuing under the authority of this state; and such sheriff or keeper into whose custody any such prisoner shall be so committed, is hereby authorized to take to his own use such sums of money as shall be payable by the United States for the use of the said gaols."

Cited—11 Wheat. 205; 12 Pet. 198; 7 How. 228; 13 How. 100; 2 Black. 534; 8 Wall., 372; 1 Otto, 125; 2 Otto, 183; 11 Otto, 227; 5 Bank. Reg. 168; 7 Bank. Reg. 104; 9 Bank. Reg. 559; 13 Bank. Reg. 433; 18 Bank. Reg. 128; Deady. 329, 330, 331; Bald. 357, 359, 364; 1 Wall. Jr. 112, 116, 118, 121; 2 Wood. & M. 357; 5 Ben. 185; 2 Brock. 144; 2 Dill. 59; 2 Cranch, C. C. 598; 4 Mason, 452.

[\*CONSTITUTIONAL LAW. PRACTICE.] [\*253]

## THE UNITED STATES v. WILSON.

An insolvent debtor who has received a certificate of discharge from arrest and imprisonment under a state insolvent law, is not entitled to be discharged from execution at the suit of the United States.

THIS cause was brought before this court upon a certificate of a division of opinion between the judges of the Circuit Court for the Southern District of New York.

The defendant was taken on the 16th of July, 1819, in execution by the marshal, upon a judgment obtained against him at the suit of the United States, in the District Court for the Southern District of New York, and committed to the custody of the sheriff of the city and county of New York, under an act of the legislature of the state of New York, passed April, 1813,<sup>2</sup> and subsequently received his \*certificate of discharge under the act [\*254 of the said state, passed April, 1819, entitled, "an act for abolishing imprisonment for debt."]<sup>3</sup> A motion was made in the court below for the defendant's discharge from custody on the *ca. sa.* issued against him at the suit of the United States; and on the question whether he was entitled to his discharge, the judges were divided in opinion, and the division was thereupon certified to this court.

The cause was briefly argued by the *Attorney-*

3.—Which provides, in substance, for the exemption of insolvent debtors from imprisonment, upon their making an assignment of their property for the benefit of their creditors.

4.—He referred to the act of Congress of June 6th, 1798, c. 66, s. 1, which provides, "that any person imprisoned upon execution issuing from any court of the United States, for a debt due to the United States which he shall be unable to pay, may, at any time after commitment, make application in writing to the Secretary of the Treasury, stating the circumstances of his case, and his inability to discharge the debt; and it shall, thereupon, be lawful for the said secretary to make, or require to be made, an examination and inquiry into the circumstances of the debtor, either by the oath or affirmation of the debtor (which the said secretary, or any other person by him specially appointed, are hereby authorized to administer), or otherwise, as the said secretary shall deem necessary and expedient, to ascertain the truth; and upon proof being made, to his satisfaction, that such debtor is unable to pay the debt for which he is imprisoned, and that he hath not concealed, or made any conveyance of his estate, in trust, for himself, or with an intent to defraud the United States, or deprive them of their legal priority, the said secretary is hereby authorized to receive from such debtor any deed, assignment or conveyance, of the real or personal estate of such debtor, if any he hath, or any collateral security, to the use of the United States; and upon a compliance, by the debtor, with such terms and conditions as the said secretary may judge reasonable and proper, under all the circumstances of the case, it shall be lawful for the said secretary to issue his order, under his hand, to the keeper of the prison, directing him to discharge such debtor from his imprisonment un-

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General for the United States, and by Mr. Wheaton<sup>1</sup> for the defendant.

**255**]\* The Court directed the following certificate to be sent to the Circuit Court:

CERTIFICATE.—This cause came on to be heard on the transcript of the record of the United States Court for the Second Circuit and Southern District of New York, on the question on which the judges of that court were divided, and which was certified to this court. On consideration whereof, this court is of opinion, that the said Joseph Wilson, who was in execution under a judgment obtained **256**]\* by the United States, is not entitled to a discharge of his person under the act of the state of New York, entitled, “an act abolishing imprisonment for debt,” passed April, 1819.

*All which is directed to be certified to the Circuit Court for the Second Circuit and Southern District of New York.*<sup>2</sup>

Cited—Crabbe, 317; 4 Wash. 425.

#### [CONSTRUCTION OF STATUTE.]

GREELEY ET AL.

v.

THE UNITED STATES.

Collusive captures and violations of the revenue laws, committed by a private armed vessel, are a breach of the condition of the bond given by the owners, under the prize act of June 26, 1812, c. 430, s. 3. If such breach appear upon demurrer, the defendants are not entitled to a hearing in equity under the judiciary act of 1789, c. 20, s. 26.

THIS cause came before the court upon a certificate of a division of opinion between the judges of the Circuit Court of Maine.

It was an action of debt, originally brought in the District Court of Maine, by the United States, against the defendants in that court,

Grceley and others, upon a bond executed by them on the 17th of December, 1813, under the prize act of June 26th, 1812, c. 430, s. 3, as owners of the private armed vessel called the Fly, conditioned that “the owners, officers and crew of the said armed vessel shall observe the laws and treaties of the United States [**\*258** and the instructions which shall be given according to law for the regulation of their conduct, and satisfy all damages and injuries which shall be done or committed contrary to the tenor thereof, by such vessel, during her commission, and deliver up the same when revoked by the President of the United States.” The defendants pleaded a performance of this condition; to which the district attorney replied that on the 15th day of December, 1813, at a place called St. Johns, the same being a colony and dependency of Great Britain, certain goods, &c., the same being of the growth, produce and manufacture of Great Britain, or some colony or dependency thereof, the importation whereof into the said states, then and for a long time afterwards, and at the time of bringing the same into the said district of Maine, was, by law, prohibited, were put on board a certain vessel or schooner called the George, with the intention to import the same into the said states, contrary to the true intent and meaning of the statute in such case made and provided, and with the knowledge of the master of the said schooner George; and afterwards, in pursuance of said intention, the said schooner did depart from the said place of lading, to wit, St. Johns, and there, afterwards, on the high seas, by way of collusion, and with intent to evade the statute aforesaid, and under color of capture by the private armed vessel called the Fly, aforesaid, to import the said goods, &c., into the said states, contrary to the true intent and meaning of the statute aforesaid, the said schooner George, so **\*laden** as aforesaid, was [**\*259** taken possession of by the said Dekoven, by and with the said private armed vessel called the Fly, whereof the said Dekoven then and there was master as aforesaid, on the high seas, and afterwards, on the 24th day of January,

der such execution, and he shall be accordingly discharged, and shall not be liable to be imprisoned again for the said debt; but the judgment shall remain good and sufficient in law, and may be satisfied out of any estate which may then, or at any time afterwards, belong to the debtor.”

1.—He cited *Sturges v. Crowninshield*, 4 Wheat. Rep. 136; *Houston v. Moore*, 5 Wheat. Rep. 1, and referred to the judiciary act of 1789, c. 20, s. 34; the bankrupt act of 1800, c. 173, s. 61, and the priority act of 1799, c. 128, s. 65.

2.—See the *United States v. Hoar*, 2 Mason’s Rep. 311, where it was determined, that the local statutes of limitations of the different states do not bind the United States in suits in the national courts, and cannot be pleaded in bar of an action by the United States against individuals. In that case it was held that the statutes of limitation of Massachusetts did not apply even to suits by the state government in the state courts, and that the 34th section of the judiciary act of 1789, c. 20, which provides, “that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply,” could not have meant to enlarge the construction of the statute of Massachusetts. “It is most manifest,” says Mr. Justice Story, in delivering the judgment of the Circuit Court in the case referred to, “that these terms

give the same efficacy, and none other, to those statutes, in the federal, that they have (*proprio vigore*) in the state courts. And yet, unless this doctrine of enlargement can be maintained, it is difficult to perceive on what ground the case of the defendant can be supported. The statutes of Massachusetts could not originally have contemplated suits by the United States, not because they were in substance enacted before the federal constitution was adopted, on which I lay no stress, but because it was not within the legitimate exercise of the powers of the state legislature. It is not to be presumed that a state legislature mean to transcend their constitutional powers; and, therefore, however general the words may be, they are always restrained to persons and things over which the jurisdiction of the state may be rightfully exerted. And if a construction could ever be justified, which should include the United States, at the same time that it excluded the state, it is not to be presumed that Congress could intend to sanction a usurpation of power by a [**\*257** state, to regulate and control the rights of the United States. In the language of the act of 1789, it could not be a case where the laws of the state could apply. The mischiefs, too, of such a construction, would be very great. The public rights, revenue and property, would be subject to the arbitrary limitations of the states; and the limitations are so various in these states that the government would hold its rights by a different tenure in each.” *Id.* p. 315.

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1814, the said schooner George, and the goods, &c., aforesaid, were brought into the port of Ellsworth, in the said district of Maine, and the goods, &c., were then and there, under color of capture by said Dekoven, his officers and crew, in and with said schooner Fly, imported, in manner aforesaid, into the said states, contrary to the true intent and meaning of the statute aforesaid. Other pleadings followed (which it is not necessary to state), ending with a demurrer, upon which the District Court was of opinion that the plaintiffs were entitled to judgment. The defendants thereupon moved for a hearing in chancery upon the making up of the judgment on the bond declared on, which motion was denied, and judgment rendered for the United States. The cause was then brought by writ of error to the Circuit Court, the judges of which were divided in opinion upon the following questions, which were thereupon certified to this court:

1. Whether an American private armed vessel, duly commissioned, making collusive captures of enemy's property during the late war with Great Britain, and under color of such capture introducing goods and merchandise into the United States, contrary to the provisions of the act of March 1, 1809, c. 195, revived and continued in force by the act of **260\*** March 2, 1811, c. 306, thereby \*broke the condition of the bond given pursuant to the third section of the statute of June 26, 1812, c. 430, requiring "that the owners, officers and crew, who shall be employed on board such commissioned vessel, shall and will observe the treaties and laws of the United States."

2. Whether, if such proceeding on the part of such private armed vessel be a breach of the condition of said bond, and such breach appear upon demurrer, the defendants can by law claim a hearing in chancery, under the judiciary act of September 24, 1789, c. 20, s. 26.

The cause was briefly argued by *Mr. Webster* for the plaintiffs in error, and by *Mr. Pitman* for the United States.

The court directed the following certificate to be sent to the Circuit Court:

CERTIFICATE.—This cause came on to be heard on the transcript of the record of the Court of the United States for the First Circuit in the District of Maine, on the points on which the judges of that court were divided in opinion, and was argued by counsel. On consideration whereof, this court is of opinion:

1. That an American private armed vessel, duly commissioned, making collusive captures of enemy's property during the late war with Great Britain, and under color of such captures introducing goods and merchandise into the United States, contrary to the provisions of the act of March 1, 1809, c. 195, revived and continued in \*force by the act of March 2, 1811, c. 306, thereby broke the condition of the bond given pursuant to the third section of the statute of June 26th, 1812, c. 430, requiring "that the owners, officers and crew, who shall be employed on board such commissioned vessel, shall and will observe the treaties and laws of the United States."

2. That where such breach appears upon demurrer, the defendants cannot, by law, claim

a hearing under the judiciary act of September 24th, 1789, c. 20, s. 26.

*All which is directed to be certified to the Circuit Court of the United States for the First Circuit and District of Maine.*

[PRIZE.]

## THE EXPERIMENT.

In cases of collusive capture, papers found on board one captured vessel may be invoked into the case of another captured on the same cruise.

A commission obtained by fraudulent misrepresentations, will not vest the interest of prize.

But collusive capture made under a commission is not, *per se*, evidence that the commission was fraudulently obtained.

A collusive capture vests no title in the captors, not because the commission is thereby made void, but because the captors thereby forfeit all title to the prize property.

**A**PPEAL from the decree of the Circuit Court of Massachusetts, affirming the decree of the District Court of Maine, by which the sloop Experiment and cargo were condemned to the United States, as having been collusively captured by \*the private armed [\***262** schooner Fly. The facts (so far as necessary) are stated in the opinion of this court.

*Mr. Webster*, for the appellants, argued, that this case was distinguishable in its circumstances from that of *The George*,<sup>1</sup> captured by the same privateer, and adjudged by this court to be a collusive capture.

*Mr. Pitman*, for the United States, argued upon the facts with great minuteness and ability, to show that the capture was made *mala fide*. He also contended that the captors, who had obtained their commission for the fraudulent purpose of violating the laws of the United States, and who had been detected by this court in an attempt to impose on it in a former case,<sup>2</sup> could not be entitled to derive any benefit from their commission, even supposing the capture in the present instance not to be collusive. The court had already settled certain principles analogous to that on which he insisted. Thus, it has been determined, that if a neutral ship-owner lend his name to cover a fraud with regard to the cargo, this will subject the ship to confiscation.<sup>3</sup> So, if a party attempt to impose upon the court by knowingly or fraudulently claiming as his own property belonging in part to others, he will not be entitled \*to restitution of that portion [\***263** which he may ultimately establish as his own.<sup>4</sup> And in the case of *The Anne*, the court distinctly recognize the principle that fraud will forfeit all rights to which captors might otherwise have been entitled under their commission.<sup>5</sup> He also cited authorities to show that the court would take notice of facts which came judicially into their view in the case with which this was

1.—1 Wheat. Rep. 408; 2 Wheat. Rep. 278.

2.—*Ib.*

3.—*The St. Nicholas*, 1 Wheat. Rep. 417; *The Fortuna*, 3 Wheat. Rep. 236.

4.—*The Dos Hermanos*, 2 Wheat. Rep. 76.

5.—3 Wheat. Rep. 448.

so closely associated, and would severely scrutinize the conduct of the same parties in a similar transaction.<sup>1</sup>

*Mr. Justice STORY* delivered the opinion of the court:

This is a prize cause, brought by appeal from the Circuit Court of Massachusetts, affirming, *pro forma*, the decree of the District Court of Maine. The sloop *Experiment* and cargo are confessedly British property, and were captured by the privateer *Fly* during the late war, and brought into port, and proceeded against by the captors in the proper court, for the purpose of being adjudged lawful prize. No claim was filed in behalf of the captured, but the United States interposed a claim, upon the ground that the capture was fraudulent and collusive, and the cargo was introduced into the country in violation of the non-importation acts then in force, which prohibited the importation of goods **264\*** of British manufacture, \*as the goods comprising this cargo certainly were. Upon the trial in the court below, the claim of the United States was sustained, and the capture being adjudged collusive, a condemnation was decreed to the government. From that decree the captors have appealed to this court, and the cause now stands for judgment as well upon the original evidence as the farther proofs which have been produced by the parties in this court.

The privateer is the same whose conduct came under consideration in the case of *The George*, reported in 1 Wheat. Rep., 408, and 2 Wheat. Rep., 278, and was there adjudged to have been collusive. The present capture was made during the same cruise, by the same crew, and about six days only before the capture of the *George*. Under an order of the court, the original papers and proceedings in the case of *The George* have been invoked into this cause; and after a long interval, during which the parties have had the most ample opportunities to clear the case of any unfounded suspicions, the decision of the court upon the arguments at the bar is finally to be pronounced.

At the threshold of the cause, we are met by the question whether a party claiming under a commission which he has obtained from the government by fraud, or has used in a fraudulent manner, can acquire any right to captures made in virtue of such commission. Undoubtedly a commission may be forfeited by grossly illegal conduct; and a commission fraudulently obtained is, as to vesting the interests of prize, utterly void. But a commission may be law-**265\*** fully obtained, although \*the parties intend to use it as a cover for illegal purposes. It is one thing to procure a commission by fraud, and another to abuse it for bad purposes. And if a commission is fairly obtained, without imposition or fraud upon the officers of government, it is not void merely because the parties privately intend to violate, under its protection, the laws of their country. The abuse, therefore, of the commission is not, *per se*, evidence that it was originally obtained by fraud and imposition. The illegal acts of the parties are sufficiently punished by depriving them

of the fruits of their unlawful enterprises. A collusive capture conveys no title to the captors. Not because the commission is thereby made void, but because the captors thereby forfeit all title to the prize property.

And after all, while the commission is unrevoked, it must still remain a question upon each distinct capture, upon the evidence regularly before the prize court, whether there be any fraud in the original concoction, or in the conduct of the cruise. We cannot draw in aid the evidence which exclusively belongs to another cause, to fix fraud upon the transaction, unless so far as, upon the general principles of prize proceedings, it may be properly invoked. The present case, then, must depend upon its own circumstances.

It cannot, however, escape the attention of the court, that this privateer has already been detected in a gross case of collusive capture, on the same cruise, and under the same commission. This is a fact, of which, sitting as a court of admiralty, \*we are bound to [**\*266** take notice; and it certainly raises a presumption of ill faith in other transactions of the same parties, which can be removed only by clear evidence of honest conduct. If the circumstances of other captures, during the same cruise, are such as lead to serious doubts of the fairness of their character, every presumption against them is greatly strengthened; and suspicions once justly excited in this way, ought not to be easily satisfied. The captors have had full notice of the difficulties of their case, and after an order for farther proof, which should awaken extraordinary diligence, they cannot complain that the court does not yield implicit belief to new testimony, when it comes laden with grave contradictions, or is opposed by other unsuspected proofs.

Many of the circumstances, which were thought by the court to be entitled to great weight in the decision of *The George*, have also occurred in the present case. The original equipment, ownership, shipping articles, and conduct of the cruiser, are of course the same. The stay at Machias, the absence of Lieut. Sebor, the very suspicious nature of his journey, the apparent connection of that journey with persons and objects in the immediate vicinity of the place where the voyage of the prize commenced, are distinctly in proof. The bad equipment of the prize, her indifferent condition, and small crew for the voyage, the nature of her cargo, and the flimsy pretenses set up for the enterprise, in the letters on board, are circumstances of suspicion, quite as strongly made \*out as in *The George*. The conduct [**\*267** of the prize during her ostensible voyage was still more striking. She was far out of the ordinary course of the voyage, without any necessity, or even plausible excuse. She chose voluntarily to sail along the American coast, out of the tract of her voyage, even at the moment when she affected to have notice that the *Fly* was on a cruise; and she exposed herself to capture in a manner that can scarcely be accounted for, except upon the supposition of collusion. The pretense set up for this conduct is exceedingly slight and unsatisfactory. The circumstances of the capture, too, as they come from the testimony of some of the captors, as well as from a disinterested witness, are not

1.—*The Argo*, 1 Rob. Rep. 158; *The Juffrow Elbrecht*, Id. 126.



calculated to allay any doubt. Here, as in *The George*, all of the prize crew, excepting one, were dismissed without any effort to hold them as prisoners, and without any apparent reason for the dismissal. And if the testimony of one of the captors is to be believed, there is entire proof that the prize was long expected, and came as a known friend under preconcerted signals. It may be added, that the testimony of the captors is, in some material respects, inconsistent; and if the testimony of two disinterested and respectable witnesses is to be credited, the master of the prize, in opposition to his present testimony, admitted, in the most explicit manner, that the capture was collusive.

We do not think that it would conduce to any useful purpose to review the evidence at large. It appears to us to be a case where the **268\*** circumstances \*of collusion are quite as strong, if not stronger, than in *The George*.

And we are therefore of opinion, that the decree of condemnation of the prize and her cargo, to the United States, ought to be affirmed, with costs.

Cited—7 Wall. 360; Blatchf. Pr. 443, 449.

[CHANCERY. LIEN. ASSIGNMENT.]

SETH SPRING AND SONS, *Appellants*,

*v.*

THE SOUTH CAROLINA INSURANCE COMPANY, GRAY & PINDAR, WILLIAM LINDSAY, AND JOHN HASLETT, *Respondents*.

An insolvent debtor has a right to prefer one creditor to another in paying an assignment *bona fide* made, and no subsequent attachment, or subsequently acquired lien, will avoid the assignment.

Such an assignment may include choses in action, as a policy of insurance, and will entitle the assignee to receive from the underwriters the amount insured in case of a loss. It is not necessary that the assignment should be accompanied by an actual delivery of the policy.

Upon a bill of interpleader, filed by underwriters against the different creditors of an insolvent debtor, claiming the fund proceeding from an insurance made for account of the debtor, some on the ground of special liens, and others under the assignment, the rights of the respective parties will be determined. But, on such a bill, those of the co-defendants who fail in establishing any right to the fund, are not entitled to an account from the defendant whose claims are allowed, of the amount and origin of those claims.

On a bill of interpleader, the plaintiffs are in general entitled to their costs out of the fund. Where the money is not brought into court, they must pay interest upon it.

**269\*** \*An insurance broker is entitled to a lien on the policy for premiums paid by him on account of his principal; and though he parts with the possession, if the policy afterwards comes into his hands again, his lien is revived, unless the manner of his parting with it manifests his intention to abandon the lien. In such a case, an intermediate assignee takes *cum onere*.

But in the case of other liens acquired on the policy, if it be assigned, *bona fide*, for a valuable consideration, while out of the possession of the person acquiring the lien, and afterwards return into his hands, the lien does not revive as against the assignee.

Evidence that a subscribing witness to a deed had been diligently inquired after, having gone to sea, and been absent for four years, without having been heard from, is sufficient to let in secondary proof of his handwriting.

**A** PPEAL from the Circuit Court of South Carolina.

This was a bill of interpleader, filed by the South Carolina Insurance Company in the court below, on the 25th of April, 1816, against the appellants, and Gray & Pindar, William Lindsay, and John Haslett; praying that they might file their answers, and interplead, so that it might be determined to whom the proceeds of a certain policy of insurance should be paid. It appeared by the pleadings, and the evidence in the cause, that this policy had been made on the 6th of May, 1811, by the respondents, the South Carolina Insurance Company, upon a vessel called the *Abigail Ann*, then lying at Savannah, on a voyage to Dublin, or a port in St. George's Channel, for account of John H. Dearborne, and the respondents, Gray & Pindar, the latter of whom were merchants residing at Charleston, South Carolina, and at that time part owners of the ship, but, on the 27th of May, 1811, sold their interest therein to \*Dearborne. On the 5th of July, 1811, [**\*270** the vessel sailed on the voyage insured. It appeared that the respondent, Lindsay, as the agent of the parties, had procured this policy to be underwritten. It also appeared that Lindsay had delivered the policy to Gray & Pindar, for the use of Gray & Pindar, and Dearborne, without at the same time expressly claiming any lien upon it.

After the sailing of the *Abigail Ann*, Dearborne, and Gray & Pindar, jointly purchased and loaded another ship, called the *Levi Dearborne*, of which vessel and cargo Dearborne owned two-thirds, and Gray & Pindar one-third. In September, 1811, this vessel sailed from Savannah for Europe, and Dearborne went in her. Before sailing, D. had drawn bills on England, some of which were indorsed and negotiated by Lindsay, which were returned protested for non-acceptance, and Lindsay was compelled to pay them. Haslett also made advances to Dearborne, and took his bills on England, secured by a bottomry bond on the ship *Levi Dearborne*. These bills also returned protested.

Before Dearborne left Savannah, certain misunderstanding arose between him and Gray & Pindar, which it was agreed should be referred to arbitrators. On the 21st of September, 1811, the arbitrators, and one Harford, as umpire, awarded that Gray & Pindar should execute a bill of sale of the ship *Abigail Ann* to Dearborne, and deliver to him the policy of insurance thereon, without unnecessary delay. Before he sailed, Dearborne directed Harford to transmit to his wife, in the \*district [**\*271** of Maine, to the care of Seth Spring & Sons, the bill of sale and policy of insurance which had been thus awarded to him. The policy was subsequently sent by Harford to Lindsay, to be put in suit against the South Carolina Insurance Company.

The ship *Levi Dearborne* was obliged to put into New York by stress of weather, and there Dearborne, on the 28th of October, 1811, made an assignment of the *Abigail Ann*, and of his

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NOTE.—As to right of debtor to make preferences in assignment, see note to *Marbury v. Brooks*, 7 Wheat. 556.

interest in the ship Levi Dearborne, and of the policies upon both vessels, to S. Spring & Sons, to secure the payment of a debt due by Dearborne to them, amounting to about \$16,000. The handwriting of Dearborne, and of the subscribing witness to the deed of assignment, were both proved; and one Maria Teubner, who testified to that of the subscribing witness, swore that she was one of his creditors, and had taken pains to obtain information of where he was, but without success. The last account of him was that he had entered on board of an American privateer, during the late war, and had not been heard of for four years. The assignment was made subject to pay out of the cargo of the Abigail Ann, if it reached the hands of his correspondents in England, certain bills which he had drawn on them, in the confidence that they would be paid out of the cargo of the Levi Dearborne. Nothing was realized from that vessel and cargo, and the Abigail Ann was lost at sea. An action was brought upon the policy on the Abigail Ann, in the names of Dearborne, and Gray & Pindar, \*against the South Carolina Insurance Company, and judgment obtained against the latter, in 1815, for the sum of \$9,800. Dearborne died in March, 1813. On the 24th of February, 1812, Lindsay, on the return of the bills indorsed by him, issued an attachment under the laws of South Carolina against Dearborne, who was then absent from that state, and served a copy upon the South Carolina Insurance Company. On the 21st of May, 1812, Haslett also issued an attachment against Dearborne, and served a copy on the South Carolina Insurance Company. No appearance was entered for Dearborne in these attachment suits, and judgment was obtained on Lindsay's on the 19th of April, 1813, and on Haslett's on the 10th of June, 1815.

At the hearing in the court below, after the depositions and regularly proved exhibits in the cause had been read, an order signed by Harford, as agent for Dearborne, and S. Spring & Sons, on Lindsay, in favor of Haslett, was read in evidence, without notice to the appellants, or an order for its being read at the hearing.

The Circuit Court decreed that the demand of Lindsay should be first satisfied, and paid out of the fund; that of Gray & Pindar next; that of S. Spring & Sons next; that Haslett was entitled to the surplus, if any; and that S. Spring & Sons should account, and prove their claims against Dearborne, either by filing a cross-bill, or by answering upon interrogatories.

From this decree an appeal was taken by S. Spring & Sons to this court.

**\*273\*** *M. Wheaton*, for the appellants, stated, 1. That he would first clear the case of all extraneous matters, and for this purpose would throw out of it both Haslett's and Lindsay's claim. The former was justly postponed to that of S. Spring & Sons, by the court below; he has not appealed, and could have no claim under the attachment suits, for Dearborne died before his suit was even commenced. The claim of Lindsay (so as it arises from his attachment), must also be rejected on two grounds: 1st. The policy of insurance on the Abigail Ann had been transferred long before

his suit. 2d. It was abated by the death of Dearborne. This was understood to be the local law as established by the decisions of the courts of South Carolina.<sup>1</sup> The order, dated the 23d of May, 1813, and signed by Harford, as Dearborne's agent, and read in evidence as an exhibit, must also be excluded from the cause. There is no evidence that he was the agent of Dearborne for this purpose; and even if he had been, the paper was irregularly introduced. It is the settled practice of the Court of Chancery, wherever anything like a regular practice prevails; that no exhibit can be proved at the hearing, without satisfactory reasons why it was not proved in the usual way before the examiner; and if proved at the hearing, a cross-examination of the witnesses is always allowed. And an order must be previously obtained, or, at least, notice given.<sup>2</sup>

\*The decree below seems to be mainly founded on Harford's order, thus irregularly interpolated into the cause. Before the pretended liens of Gray & Pindar, and of Lindsay, had attached, the assignment had vested the property in the appellants, S. Spring & Sons. Lindsay, after he had delivered up the policy, and an intermediate transfer of it to *bonæ fidei* purchasers, could not, by again obtaining possession of it, without the consent of such purchasers, regain his lien, even if he ever had one. His possession was wrongful; and if rightful, he had no right to retain for a general balance. The lien of a policy broker is confined to his general balance on policy transactions and does not extend to other debts.<sup>3</sup> Properly speaking, there is no such thing as a lien by contract. Liens are created by the law, and pledges by contract. But no express pledge is proved in this case. Neither can the analogy of the law of stoppage, *in transitu*, be applied where the property has already been transferred to a creditor or other *bonæ fidei* purchaser.

3. In a bill of interpleader, all the parties are actors. Each party states his own claim, and the admission of no one is evidence against another. The appellants are not bound by the admission of the other co-defendants. They do not admit any such liens as are set up by the other parties, and no evidence is produced of their existence, except the order of Harford, which cannot be admitted. *Non constat* when that order was executed. It \*might [**\*275** have been at the very moment before the hearing; and the bare possibility of this shows the danger of permitting it to be read in evidence without notice and without cross-examination.

4. There are, besides, several formal objections. The plaintiffs below do not offer to bring the money into court, nor is there any affidavit accompanying the bill, and showing that it was filed without collusion. The want of this was a ground of demurrer, and they are clearly not entitled to their costs out of the fund.<sup>4</sup> The appellants are the only parties who, in answering, insist on their rights; the others merely pray to be dismissed.

1.—*Crocker v. Radcliffe*, Constitutional Court S. C., 1812, MS.

2.—*Consequa v. Fanning*, 2 Johns. Ch. Rep. 481, and the cases there cited.

3.—*Olive v. Smith*, 5 Taunt. Rep. 57.

4.—1 Madd. Ch. 174, 181.



*Mr. Cheves*, contra, stated that there were four claims in this case.

1. That of Haslett.
2. That of Lindsay.
3. That of Gray & Pindar.
4. That of the appellants, S. Spring & Sons.

1. The decree adjudges the surplus, if any, to Haslett, after payment of the other claims. But he has no claim upon the fund in controversy, unless it arises under his attachment. The case of *Crocker v. Radcliffe*, referred to on the other side, is not before the court in a shape in which the precise point decided can be known. The point said to have been ruled in that case appears to have been determined otherwise in a previous case;<sup>1</sup> and the principle **276** of this last decision appears to be correct. The proceeding by attachment is a proceeding *in rem*, and, therefore, ought not to abate by the death of the party. It is probable that in *Crocker v. Radcliffe* nothing had been attached upon the process, and, therefore, the suit was adjudged to abate by the defendant's death; but in the present case the fund in question was attached and is bound by that attachment, subject only to the previous liens.

2. Lindsay's claim is supported by the law of liens.<sup>2</sup> Though he may have parted with possession of the policy for a time, upon regaining it his lien was re-established.<sup>3</sup> But if the lien of Gray & Pindar, to whom he parted with the possession, be established, that will cover his claim, they being prior indorsers on the bills which form his demand, and their claim also embracing those bills.

3. The claim of Gray & Pindar is supported by express contract, as well as the general law of lien. The express contract is supported by the testimony of Harford. The implied lien is supported by the possession of Lindsay, which was the possession of Gray & Pindar until he delivered it to them, and afterwards by the possession of Harford, whose possession also was their possession. Their lien embraces as well the bills which they indorsed for Dearborne, that were returned protested for non-payment, and were paid by Lindsay, as the **277** sums they have actually paid. \*The case of *Mann v. Shiffner*<sup>4</sup> covers the whole of this claim. Manual possession is not necessary. It is the power to control the possession which gives the lien.<sup>5</sup> The award did not impair the lien without the acquiescence of Gray & Pindar and the surrender of the possession of the policy. It did not even give a right to the possession. The only remedy was an action on the award.<sup>6</sup> But the award itself was not valid. The testimony of Harford proves that the indemnity of Gray & Pindar for their indorsement of Dearborne's bills was one of the points submitted, and as it was not determined, the award is void.<sup>7</sup>

4. The claim of the appellants, S. Spring & Sons, is not sufficiently proved. They have not proved either the deed of assignment under which they claim, or the debt for which they claim. The subscribing witness to the deed is not produced or examined.<sup>8</sup> The testimony to

prove his handwriting is doubtful and improbable. The assignment alleges a debt of about \$16,000. The evidence shows only that the appellants paid \$2,900 for the assignor, three or four years before, and that they became his surety for \$1,200 more at the time of the assignment. These, and many other circumstances, give good reason to doubt the integrity of the transaction.

The objections to the form of the bill, and to the answer of the three first-men- **278** tioned claimants, cannot be sustained. (1) The only consequences of not offering in the bill to bring the money into court were, that the parties interpleaded might have moved the court to order the complainants to pay it into court; or, perhaps, they might have demurred. They have done neither, and they are now too late with their objection. (2) The same answer is applicable to the objection for want of an affidavit that the bill was exhibited without fraud or collusion. They might have demurred, but they have not done so. (3) As to the omission of the answer (except that of the appellants) to pray for a decree other than their dismissal with costs; this is the common form prescribed by the books of practice, and will sustain a decree for the defendants other than a decree of dismissal with costs. And even though the objection were, in general, well founded, it could not affect this decree, if it can be sustained on the merits; because, as to the appellants, they can only be satisfied after payment of Lindsay, and of Gray & Pindar; and as to Haslett's claim, after the others are satisfied, his attachment will bind the surplus.

*Mr. Webster*, for the appellants, in reply, argued that in this form of suit, being a bill of interpleader, even if S. Spring & Sons made out no title, it did not follow that the decree must be affirmed. For aught that appeared, the right party might not yet be before the court. The personal representatives of Dearborne may be necessary parties. Every distinct claim stands on its own **279** merits; and even if Spring & Sons are not entitled, the fund cannot be decreed to others, unless they prove themselves to be entitled.

There are two questions: (1) Can the decree, so far as it allows Lindsay's and Gray & Pindar's claims, be maintained? (2) Can their claims be preferred to those of Spring & Sons?

And first, as to Lindsay's claim. So far as it is founded on the attachment suit, it cannot be supported. The judgment against Dearborne, who was dead at the time, is a mere nullity. Besides, the property in the fund had actually been transferred to Spring & Sons before the attachment was laid. If there was a previous lien, the party does not stand in need of the judgment. If there was not, the property was vested in others by the assignment, and the judgment came too late. But he could have acquired no such lien as that which is now set up. There is no rule of law which declares that if a creditor gets, by any means whatsoever, possession of the effects of his debtor, he has thereby a lien as of course. There is here no proof

1.—Kennedy v. Raguet, 1 Bay's Rep. 484.

2.—Whitaker's Law of Liens, 26, 103, 104.

3.—Id. 121, 122.

4.—2 East's Rep. 523.

5.—Whitaker's Law of Liens, 105, 106.

6.—Hunter v. Rice, 15 East's Rep. 100.

7.—Mitchell v. Stuvell, 16 East's Rep. 58.

8.—5 Cranch's Rep. 13; 4 Taunt. Rep. 46.



of an actual pledge; and a general lien he cannot have, because, although a broker has a lien for his general balance, on account of policy brokerage, it does not extend to other brokerage. The case cited from 5 Taunton is decisive to this point. If it be said that he is not a broker, then the case is so much stronger against him, for he can have no brokerage balance for which to retain. Besides, he having once parted with **280\***] the possession of the policy, \*without insisting on his lien, it does not revive by returning to his possession again.

As to Gray & Pindar's claim. It rests on two grounds. (1) A general lien. (2) A special agreement. But how can they claim a general lien? They are not insurance brokers. In order to make out a lien, they must show some course of trade, and some dealing and relation between the parties, to authorize it; a debt, and a liability are not alone sufficient. It is said they had a lien, because they have never been divested of possession. But possession does not create a lien. There must be a right to claim. The assignment operated on the policy in the hands of Gray & Pindar, just as if there had been an actual delivery to the assignees. A lien cannot exist by the party merely having the legal control. That control must be coupled with an interest in the thing. A trustee cannot set up a lien for debts generally, merely because the estate stands in his name.

But, even supposing Gray & Pindar once had such a lien, it was defeated by the award that the policy should be given up by them to the order of Dearborne. The award here pleaded is perfectly good on the face of it; it is completely binding on the parties and cannot be in in this way impeached. A party cannot claim, in equity, against an award, without impeaching it by bill.<sup>1</sup> There is here no proof of partiality, or corruption, or excess of power; and nothing **281\***] else will, in equity, \*set aside an award.<sup>2</sup> It is said the award does not bind, because the arbitrators did not award an indemnity; and to support this position, a case is cited where they would not act at all on the claim. That case is not this. There is no evidence that Gray & Pindar ever made any claim for indemnity before the arbitrators; and if they did, for aught that appears, it was rightly refused. The award, then, is clearly a bar to any claim existing before the time of the award. If there was any express agreement for a lien before the award, it is merged in the award; and there is no evidence of any such agreement subsequently made.

As to Harford's order, we do not object to its introduction in point of form, but of substance. It is not proved; and if proved, it is a mere nullity. Harford signs it as attorney to Dearborne, who was then dead, and of Spring & Sons, whose attorney he never was. He never was even Dearborne's agent for any other purpose than to transmit the policy to his wife.

As to the assignment to Spring & Sons, it is established by the decree, and that part of the decree is not appealed from. Spring & Sons have appealed, on account of the preference given to Lindsay, and Gray & Pindar; but they have a right to stand on that part of the

decree which declares the assignment to be well proved and valid. But the execution of the assignment is \*sufficiently proved by the [**282** evidence. It is a clear case for admitting secondary evidence.

*Mr. Justice* LIVINGSTON delivered the opinion of the court, and after stating the case, proceeded as follows:

In reviewing these proceedings the first question necessary to decide is, to whom the policy mentioned in the complainant's bill, belonged at the time of commencing the action on it. It does not appear that the names of the parties interested in the Abigail Ann were disclosed to the company at the time of applying for insurance, or that their names were inserted in the policy. There is, however, no doubt that when it was effected, Gray & Pindar, and John H. Dearborne, were the owners; but in what proportions does not appear, nor is it material now to be known, for whatever interest was held by Gray & Pindar was regularly transferred to Dearborne, by their bill of sale, dated the 27th of May, 1811. This bill of sale is for the whole ship, and its consideration is \$5,000. Some time after, in the same year, Gray & Pindar delivered to Henry Harford, as agent of Dearborne, the policy of insurance which had been made on it. Dearborne being thus sole proprietor of the Abigail Ann and policy, on the 28th of October, 1811, executed a bill of sale for the vessel, containing an assignment also of the policy, for valuable consideration, to John Spring, of the firm of Seth Spring & Sons. Some objections were made to the proof of the execution of the instrument, but \*they [**283** were not listened to below, nor are they regarded as well founded by this court. The proof was such as is required where a party to a deed and the subscribing witness are both dead. The handwriting of both was proved, and Maria Teubner, who testified to that of the witness, left no reasonable ground to doubt of his death. She was a creditor of this witness, and had taken some pains to obtain information where he was, but without success; her last account of him was that he had entered on board an American privateer and had not been heard of for four years. The credit of this witness, although the subject of some animadversion, is not impeached by any testimony in the cause, or by anything which she herself has testified. It follows, then, that on the 28th of October, 1811, Seth Spring & Sons became proprietors of the ship Abigail Ann, and of the policy mentioned in these pleadings, and *prima facie* entitled to the whole of the moneys recovered on it, although the policy itself was not, at the time, put into their hands. Our next inquiry will be, whether any of the other parties, who are now before us, have a lien on it, or any other title to these moneys, or to any part of them.

The claim of Haslett may be considered as out of the question—it having been postponed by the Circuit Court to that of the appellants, and there being no appeal from this part of the decree.

Lindsay's demand will first be examined. This is made up of the premium paid for effecting the insurance—of an indemnity claimed by him for \*indorsing two bills of ex- [**284** change for Dearborne, amounting to £400

1.—Dick. 474.

2.—3 Atk. 529; Ambl. 245; Dick. 474; 2 Ves., Jr., 15; 6 Ves. 282.

Wheat. 8.



sterling, and for having become his bail—of the customary commissions for his trouble and attention in conducting the suit against the underwriters, and of the amount of a judgment which he obtained on the 19th of April, 1813, against Dearborne, on an attachment issued out of the Common Pleas for the District of Charleston, and which had been served on the complainants. This attachment was sued out on the 24th of February, 1812.

No evidence is perceived in the proceedings in support of any one of these claims, except that which is founded on the judgment in the attachment. In his answer, Lindsay says that the policy was effected on his application, but nowhere pretends or alleges that he paid the premium for insuring the Abigail Ann, nor is there any proof *aliunde* of this fact. On the contrary, Gray & Pindar, in their answer, expressly state that it was paid by them, and was probably allowed in their account against Dearborne, in making up the award hereinafter mentioned. Haslett, in his answer, asserts that it was advanced by him. Now, although the answer of one defendant be no evidence against another, yet, in the absence of all proof to the contrary, and where a party observes a profound silence on a subject to which his attention could not but be excited, such answer, not varying from any allegation on his part, furnishes some evidence that he could not make the assertion, because the fact was, in reality, otherwise.

**285\*]** \*If this fact of the payment of the premium had been made out, the court would have been disposed to award Mr. Lindsay payment out of the proceeds of the policy, for although he had once parted with it, yet, coming to his hands again, to be put in suit, his lien for the premium would revive and be protected, unless the manner of his parting with it had manifested an intention in him altogether to abandon such lien. His claim for a commission for conducting the suit against the underwriters is inadmissible, it appearing from the testimony of Harford, who transmitted the policy to him, and who is the only witness on this subject, that he has no right to make any such charge. Harford considers himself entitled to this commission, and has accordingly charged it to Dearborne, in an account annexed to his deposition. Now, as this is the witness on whom all the defendants, except Seth Spring & Sons, principally rely, they cannot complain if his testimony, when unfavorable, is allowed its full operation against them. It is evident, then, from the declaration of this witness, that he considered himself as the merchant who was prosecuting the suit, and that Mr. Lindsay was only employed to deliver the policy to a professional gentleman to bring the action. There is another obstacle in the way of this claim, which is, that Lindsay, in the business of this suit, acted, as Harford himself says, as his (Harford's) agent. Now, there is not only no evidence of Harford himself being authorized by the owners of this policy to bring any action on it, but it appears that his detention of it was a **286\*]** violation of duty, \*and that the action he brought was more to answer his own purposes and those of the other defendants than to advance the interest of those whom he knew at the time to be assignees of the policy. In this

state of things, nothing would be more unjust than to permit this fund to be encumbered, as against Seth Spring & Sons, with the heavy charge of five per centum, in favor of any one of the parties, who, throughout the whole business, have had in view exclusively their own interest, and were acting in open hostility to those from whom they now demand this compensation. With what propriety can they now claim a commission from these gentlemen, when it is entirely or principally owing to their interference, that they have not to this day received any benefit from a judgment which was recovered for their use nearly eight years ago?

Lindsay's claim to receive any part of this fund, on account of the two bills of exchange for £200 each, is equally unfounded. That he would have had a lien on the policy for this transaction, without an express contract (and none appears), even if he had never parted with its possession, is a proposition which may well be controverted; but if such lien ever existed (which is not asserted), it is not like that for the premium advanced for an insurance; the latter may well revive, in some cases, on a broker's being restored to the possession of a policy, which had once been out of his hands; it being no more than reasonable that whoever acquires an interest in it should generally take it, subject to such a charge. It <sup>\*does</sup> **287** not, however, follow that liens which may once have existed for other advances, or on other accounts, whether by agreement of the parties, or by the operation of usage or of law, should be placed on the same favored footing. If, while a policy is out of the hands of the insurance broker, as was the case here, it is assigned for valuable consideration and *bona fide*, it would be unjust, on its returning to his possession, to revive encumbrances of which the assignee could have had no notice, nor no certain means of finding out; for he could not reasonably suspect that such liens had ever existed in favor of one who had parted with the possession of the only thing by which they could have been enforced. Nor can it make any difference whether the policy have been actually delivered to the assignee, provided the transfer were *bona fide* made, while out of the possession and power of the insurance broker. Upon the same principle it is that a consignor loses his right to stop goods *in transitu*, although the consignee have become insolvent, after such consignee, having power to sell, has disposed of them, before their arrival, to a third person unacquainted with any circumstance to taint the fairness of the transaction.

The next charge which Lindsay attempts to fix upon this fund, is an indemnification for becoming bail for Dearborne. Now, if a responsibility, so contingent and remote as one of this nature, could by any possibility, without a very positive and express agreement, be turned into a lien on a policy of insurance, it does not appear in what suits he <sup>\*has</sup> thus be- **288** come bail, nor whether he has not been released by the death of the principal of all liability; and of course any demand arising from such responsibility, if any ever existed, must be laid out of the question. And the answer which has already been given to his claim for indorsing certain bills of exchange will also apply here.



The judgment obtained in the attachment suit may be as easily disposed of. It is quite unnecessary to inquire whether these proceedings abated by the death of Dearborne, if he were dead at the time; for at the time of issuing the attachment, and of course long before judgment, Dearborne ceased to have any interest in this policy, the same having been already assigned to John Spring, of the firm of Seth Spring & Sons. No attachment, therefore, against Dearborne, although served on the company, could render the property of another liable for his debts. The attachment of Lindsay, it may incidentally be observed, furnishes some proof that he had no great confidence in the liens which he now asserts against this policy.

The title of Gray & Pindar remains to be examined. By their answer they claim five hundred and two dollars, as the premium paid for insurance on the Abigail Ann, and fifty dollars, paid as a commission for effecting the same. They likewise state that large advances were made by them, between the 5th of April and 7th of August, 1811, on account of the said ship, her cargo, pilotage and repairs; and they also, it seems, became the bail of Dearborne in **289** two several actions, amounting to one thousand dollars, which they have since become liable to pay; they were also indorsers of the two bills of exchange which were indorsed by Lindsay. After stating all these demands, they say that upon closing the account between Dearborne and themselves, there was a balance in their favor of \$1,430.16, for which Dearborne gave them a bill of exchange on Logan, Lenon & Co., of Liverpool; that feeling uneasy and insecure from the responsibility resting on them, and aware that they could be indemnified only by a specific lien, they would not deliver to Dearborne the policy, but put it for safe keeping into the hands of their friend, Henry Harford, for the express and avowed purpose of protecting them against all losses on the accounts aforesaid; the said policy being also intended as a security for certain debts due by Dearborne to Harford. Now, without looking any further than the answer of these gentlemen, it is most manifest that none of the demands or responsibilities which are stated in it, were contracted or entered into under any agreement or understanding with Dearborne himself, as Harford would have us believe, that they should be secured by a lien on this policy, but that such lien is set up solely on the ground of a subsequent understanding between them and Harford, to whom it was delivered, for the purpose of protecting them against loss. To derive any benefit from such a delivery, or such an assent on the part of Harford, it should appear (which is not the case) that they had a right to exact, and Harford a right to accept, **290** of the policy on these terms. Unfortunately for these gentlemen, the testimony of their friend and witness, Mr. Harford, most incontestably establishes that they were bound by the decision of persons of their own choice, of whom Harford himself was one, to deliver the policy, without annexing to such an act any condition or terms whatever; and also that the authority of Harford extended only to its receipt and transmission to Mrs. Dearborne, the wife of Mr. John H. Dearborne. On the 21st

of September, 1811, which is subsequent to all their advances, indorsements, and engagements for John H. Dearborne, he and Gray & Pindar submitted all their controversies to two arbitrators, who, in conjunction with Harford, as umpire, awarded that Gray & Pindar should pay to Dearborne \$66.77, and surrender to him the policy on the Abigail Ann, without unnecessary delay. Now, this award could not have been signed by Harford, if he knew of any lien to which Gray & Pindar were entitled on this policy. It was said that no notice could be taken of this award; but coming, as it does, from a witness of the party, who was himself umpire, and not being impeached, this court cannot without injustice, shut its eyes upon it. If a bill for its specific performance might have been entertained, which was not denied, what higher or better evidence can the court have of the rights of the respective parties, at the time of the transactions referred to in the answer of Gray & Pindar? If judges of their own selection have directed them, as they had a right to do, to surrender this policy without **291** delay, and unconditionally, to Dearborne, this court must now presume (and it is a presumption with which neither Gray & Pindar, nor Harford, can be justly offended) that the policy was delivered to the latter, pursuant to the award; and if not, that any condition with which they thought proper to accompany such delivery, if not a breach of the arbitration bond would at least be a trespass on good faith; and that no assent or understanding on the part of Harford, who was without authority for this purpose, could confer any validity, or give any sanction to such an act. This award is also of importance, to show how entirely mistaken Gray & Pindar are in supposing Dearborne, at the time they speak of, so largely in their debt, when it appears by this instrument that the balance, although not a large one, was in his favor.

As to Harford's power, it appears, from his own letters, that he had no other authority than to transmit the policy, when received, to the family of Dearborne. Accordingly, in a letter to Seth Spring & Sons, of the 26th of September, 1811, he transmits, for Mrs. Dearborne, the bill of sale for the Abigail Ann. And in another letter of the 3d of November following, to the same gentlemen, he apologizes for not sending on the policy, as it had not yet been received from Charleston. After this unequivocal evidence of what was his authority over this policy, it becomes quite unimportant to inquire what agreements he may have made, or what orders he gave Lindsay respecting the proceeds of it. It is not too much to say, that **292** the one of the 13th of May, 1813, in favor of Haslett, by which the whole proceeds, after Lindsay's retaining for himself his legal claim and expenses, was a palpable violation of duty, or breach of instruction, towards Dearborne; and it was properly said by the Circuit Court, "that to vest any interest, hostile to that of Seth Spring & Sons, was certainly not in his power." Gray & Pindar having been originally interested in this ship and policy, on which there was some reliance by their counsel, places them, as it regards a lien, in a condition less favorable than if such ownership had never existed; for by such overt acts, as the execu-



tion of a bill of sale of the vessel, and a delivery of the policy, pursuant to the award, to the agent of Dearborne, they have done all in their power to inform the world that they had no claim on either for any demands against Dearborne.

There is error, also, in that part of the decree which directs Seth Spring & Sons to account for their claims on Dearborne. The complainants have no right to an account; and the defendants being called here only to interplead, and having failed to establish any claim on this fund, have as little right to such an account. They cannot, at any rate, require it in the position in which they now stand as co-defendants with Seth Spring & Sons. It is but justice to remark, that for aught that appears in the present suit, there is no reason to suspect the integrity of the assignment to Seth Spring & Sons; they appear to be respectable merchants, and to have been large creditors of **293\*** Dearborne. It is the opinion of this court, that the decree of the Circuit Court be reversed, so far as it postponed the demand of the appellants to those of Lindsay and of Gray & Pindar, and directed them to account; and that instead thereof, a decree must be entered in their favor for the whole amount recovered on the policy, with interest (the money not having been brought into court) at the rate of six per cent. per annum, from the time of rendering the judgment, the complainants deducting therefrom their costs of suit. The defendants must pay their own costs.

**DECREE.**—This cause coming on to be heard, and being argued by counsel of the respective parties: It is ordered, adjudged and decreed, that the decree of the Circuit Court for the District of South Carolina, in this case be, and the same is hereby reversed and annulled; and this court, proceeding to pass such decree as the said Circuit Court for the District of South Carolina should have passed, doth further order and decree that the complainants pay to the defendant, John Spring, of the firm of Seth Spring & Sons, the whole amount of the judgment recovered against them on the policy on the ship Abigail Ann, mentioned in the pleadings in this cause, with interest, at the rate of six per centum per annum, from the time of rendering such judgment, after deducting therefrom their costs of suit, to be taxed.

And it is further ordered, adjudged and decreed, that the defendants in the said Circuit Court, respectively, pay their own costs.

Cited—2 Wood. & M. 58, 337; Gilp. 104, 105.

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[\*INSURANCE.]

HUGHES

v.

THE UNION INSURANCE COMPANY OF  
BALTIMORE.

Insurance for \$18,000 on vessel valued at that sum, and \$2,000 on freight valued at \$12,000, on the ship Henry, "at and from Teneriffe, and at and from thence to New York, with liberty to stop at Matanzas; the property warranted American." The pol-

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icy was executed in 1807; and in the same year another policy was made, by the same underwriters, on freight for the same voyage, to the amount of \$10,000, and the property was also warranted American, but there was no liberty to stop at Matanzas. The following representation was made to the underwriters on the part of the plaintiff, who was both owner and master of the ship: "We are to clear out for New Orleans, the property will be under cover of Mr. John Paul, of Baltimore, who goes supercargo on board, yet Mr. Paul will only have part of the cargo to his consignment. There will be three other persons on board that will have the remainder of the cargo in their care. We are to stop at the Matanzas, to know if there are any men-of-war off the Havanna." The vessel sailed from Teneriffe on the 17th of April, 1807, with a cargo belonging to Spanish subjects, but appearing to be the property of John Paul Dumeste, a citizen of the United States, and the same person called John Paul in the representation. The cargo was shipped under a charter-party executed by the plaintiff and Dumeste, representing New Orleans as the place of destination. The ship arrived at the Havanna on the 7th of July, having put into Matanzas to avoid British cruisers, and unladed the cargo, which was there received by the Spanish owners, and the freight, amounting to \$7,000, paid to the plaintiff, who received it, "in full of all demands, for freight or otherwise, under or by virtue of the aforesaid charter-party and cargo." At the Havanna the ship took in a new cargo, belonging to merchants in New York, and was lost, with the greater part of the cargo, on the voyage from Havanna to New York. An action of debt was brought on the first policy for the value of the ship and freight. The sum demanded in the writ was \$20,000, but the plaintiff limited his demand at the trial to [\*295] \$18,000 on the ship, and \$420 for the freight actually earned on the voyage from Havanna to New York. Held, that he was entitled to recover.

In debt, a less sum may be recovered than that demanded in the writ, where an entire sum is demanded, and it is shown by the counts to consist of several distinct accounts, or where the precise sum demanded is diminished by extrinsic circumstances.

**ERROR** to the Circuit Court of Maryland.

This was an action of debt, upon a policy of insurance, in the usual form, dated on the 27th of May, 1807, on the ship Henry, "lost or not lost," "at and from Teneriffe to Havanna, and at and from thence to New York, with liberty to stop at Matanzas." Eighteen thousand dollars were insured on the ship, valued at that sum, and two thousand dollars on the freight, valued at twelve thousand dollars; and the property was warranted American.

On the 1st of June, in the same year, a policy was executed on the freight of the ship Henry, by the same company, for the same voyage, to the amount of \$10,000; the whole freight being valued at \$12,000. In this policy also, the property was warranted American; but there was no liberty to stop or touch at Matanzas, or any other place.

Both these policies were effected under an order for insurance, by Henry Thompson, of Baltimore, as agent for the plaintiff, an American citizen, who was master for the voyage, as well as owner. The order bears date on the 18th of May, 1807, and is in the following words:

\*"BALTIMORE, May 18th, 1807. [\*296

"GENTLEMEN:

"Insurance is wanted on \$18,000, on the American ship Henry, Capt. Henry Hughes, and \$12,000 on her freight, each valued at the same; at and from Teneriffe to Havanna, and at and from thence to New York, against all risks.

"The Henry was expected to sail on or about the 12th ult.; she is a remarkably good vessel,

Wheat. 8.

about 270 tons burthen, and now on her first voyage. Said ship and freight are the sole property of Capt. Hughes, who gives the following particulars in his letter of instructions to N. Talcott, of New York.

"We are to clear out for New Orleans; the property will be under cover of Mr. John Paul, of Baltimore, who goes supercargo on board, yet Mr. Paul will only have part of the cargo to his consignment. There will be three other persons on board that will have the remainder of the cargo in their care. We are to stop at the Matanzas, to know if there are any men-of-war off the Havana.

"When you make insurance, which I expect will be done low, you will state the whole of this business, so that there will be a right understanding of the voyage."

"At what premium will you insure the above risks?"

(Signed) HENRY THOMPSON."

The Henry sailed from Teneriffe on the 17th of April, 1807, with a cargo for the Havana, **297\*** which belonged to Spaniards, but appeared as the property of John Paul Dumeste, (the person mentioned in the order for insurance by the name of John Paul), a citizen of the United States, who went as supercargo. She took a clearance for New Orleans. This cargo was laden at Teneriffe, under a charter party, which bore date the 10th of March, 1807, and represents New Orleans as the port of destination, without any mention or notice of the Havana. The parties to it were Dumeste, and Henry Hughes, the master. The freight mentioned was \$11,000; of which it was stipulated that \$5,000 should be paid at New Orleans, and the remaing \$6,000 at New York.

The ship proceeded to the Havanna, where she arrived on the 7th of July, having put into Matanzas on the 2d of June, to avoid British cruisers then in sight, and unladed the cargo, which was there delivered to the real Spanish owners. The real freight to the Havanna, amounting to \$7,000, was paid at Matanzas to the plaintiff, who received it "in full of all demands for freight or otherwise, under or by virtue of the aforesaid charter-party and cargo." It was proved that this unlading did not produce any additional delay or increase of risk; for the ship left Matanzas and proceeded to Havanna in ballast, as soon as there was any reasonable prospect of escaping the cruisers stationed in the way, and was enabled to proceed sooner and more safely, by being in ballast, which put it in her power to keep closer in shore. At the Havanna she took in a new car- **298\*** go, belonging to persons in New York, and consisting of 120 boxes of sugar, at a freight of \$3.50 the box. On the voyage she sprung a leak, soon after which she transhipped a part of her cargo, consisting of 60 boxes, into the Rising Sun, a vessel bound to Norfolk, where the property was safely landed. Within about two days after the transhipment, the Henry sunk and was totally lost, with the rest of the cargo. The master and crew escaped in their boat. In attempting to make their way to New York, they were taken up at sea in an almost desperate situation.

The freight was abandoned to the underwriters, and a demand was made of payment for Wheat. 8.

that and the ship; which being refused, this action was brought to recover both. The sum demanded by the writ and declaration was \$20,000, and the loss declared on was by the dangers of the seas, one of the perils mentioned in the policy. On the plea of *nil debet*, issue was joined, and the case went to trial.

At the trial, the plaintiff gave the charter-party in evidence, as one of the documents necessary or proper for establishing the neutral character of the vessel and freight; but there was no evidence of its having been at any time produced or mentioned to the defendants, or in any manner known to them. He also proved his own national character, and that of the ship, his interest in the ship and freight, the commencement and prosecution of the voyage, and the loss and abandonment. By an admission at the bar he expressly limited his demand of freight to that earned on the 120 boxes of \*sugar, amounting to \$420; and renounc- **\*299** ed all claim to any further or other sum on that account.

The defendants then gave in evidence the separate policy on the freight, which is mentioned above; and also produced evidence tending to show that the plaintiff, in his management respecting the said ship, after the leak was discovered, was guilty of gross negligence, in not using such means as were in his power for conducting the said ship into a place of safety in the Delaware; and that he might have conducted her into a place of safety there, had he used those means.

The plaintiff then gave evidence of the causes, nature and duration of the delay at the Matanzas, as stated above, and of the effect produced on the risk by unlading the cargo there. He also gave in evidence that after the said leak was discovered, the plaintiff did all in his power, according to his skill and ability, to save the said ship, and to conduct her safely to her port of destination; and that there was no place of safety in the Delaware to which the said ship could have been conducted, nearer, or more easily reached, in the state of the wind and weather at that time, than New York.

The defendants then prayed the opinion of the court, and their direction to the jury:

1. That if the jury should be of opinion, from the evidence, that the cargo shipped at Teneriffe, which the order for insurance of the 18th of May, 1807, mentions, and which the charter-party, and the policy of insurance upon freight of the 1st of June, 1807, read in evidence on this trial, also \*mentions, was [**\*300** landed, and finally separated from the ship at Matanzas, and was there delivered by the plaintiff, at the instance of the freighters, and accepted by the freighters, the plaintiff receiving from the said freighters \$7,000 in lieu of all demands upon the said charter-party, including the whole freight to the Havanna; and that a cargo of sugar, for an entirely new account and risk, to wit, for the account and risk of Le Roy, Bayard & M'Evors, of New York, was, by the plaintiff, taken in at the Havanna, with which the ship sailed upon her voyage to New York, as proved by the plaintiff's testimony, then the plaintiff is not entitled to a verdict for any freight, upon the issue and pleadings in this cause.



2. That if the jury should find, from the plaintiff's declaration and the evidence, that the cargo shipped at Teneriffe, which the order for insurance of the 18th of May, 1807, mentions, and which the charter-party, and the policy of insurance upon freight of the 1st of June, 1807, read in evidence on this trial, also mention, was landed, and finally separated from the ship, at the Matanzas, by the freighters and the plaintiff, and was there delivered by the plaintiff, and accepted by the freighters, and their contract of freightment abandoned, the plaintiff receiving from the said freighters the sum of \$7,000, in lieu of all demands upon the said charter-party, including the whole freight to the Havanna; and that a cargo for an entirely new account and risk, to wit, for the account and risk of Le Roy, Bayard & McEvers, of New York, was, by the plaintiff, **301**\*] taken in at the Havanna, \*with which the ship sailed to New York, as proved by the plaintiff's testimony; and further, that in the course of her said voyage to New York, a part of the said cargo was transhipped into the *Rising Sun*, as stated in the plaintiff's evidence; and if they also find, that the risk was increased by taking in the new cargo aforesaid, and the transhipment aforesaid, beyond what it would have been had the said ship proceeded in ballast from the Havanna to New York, then the policy was wholly discharged, and the plaintiff cannot recover as to the vessel, on the issue and proceedings in this case.

3. That if the jury should be of opinion, from the evidence, that the plaintiff had an opportunity of causing the said ship, after the discovery of the leak, to be carried into the Delaware, or elsewhere, and there saved from the total loss which afterwards happened, and that he did not act with proper and reasonable care, in forbearing to do so, he is not entitled to recover in this action.

These directions were given by the court, who further instructed the jury that this was a valued policy, on which an action of debt lies; the sum claimed being specified by an agreement of the parties. But the whole must be recovered, or no part of it can be recovered. In this suit, the action is for two distinct sums, \$18,000 on the ship, and \$2,000 on the freight. The party can recover either entire, and not the other; but not a portion of either, without accounting for the residue.

To these opinions and directions, the plaintiff **302**\*] took a bill of exceptions, on which, judgment was rendered for the defendants, and the cause was brought by writ of error to this court.

*Mr. Harper*, for the plaintiff, made the following points:

1. That there was no connection whatever between the policy and the charter-party, which, not having been made known to the underwriters, can make no part of the contract, nor in any manner affect it.

2. That the policy on the freight alone, however it might have been affected by the payment at the Havanna, had an action been brought on it, cannot affect the present case, the policy in which expressly declares that the whole freight on the whole voyage insured should be valued at \$12,000, of which only \$2,000 were to be covered by that policy; a

declaration entirely conformable to the order on which both policies were made.

3. That the receipt of \$7,000 at the Havanna, if it had been in full of all claims under the charter-party, could not affect the plaintiff's claim in this case; because the policy has no connection with the charter-party, and the freight now claimed arose on a voyage entirely different from the one described in that instrument.

4. That the receipt of the \$7,000 at the Havanna was not in full satisfaction of all claims and rights under the charter-party; but merely "in full of all demands for freight or otherwise, under or by virtue of the aforesaid charter-party and cargo;" that is, in full payment of the freight \*due, under the [**303** charter-party or otherwise, on the cargo brought from Teneriffe, and landed at Matanzas.

5. That although the action brought is debt, and the sum declared for on account of freight is \$2,000, yet less may be recovered in such a case as the present; where the right to recover depends not on the contract alone, but on matter *dehors* and independent.<sup>1</sup>

6. And consequently, that the first direction was wrong, and also the third, which applies to the form of the action; a point equally open under the first application.

And as to the second instruction:

1. That for the true construction and character of this contract, we are to look to the policy alone, or at most to that and the order for insurance. The charter-party not being referred to in the order, or in any manner made known to the defendants, cannot be taken into view.

2. That the policy and the order make two distinct voyages, or one voyage divided into two distinct parts; so that, at the termination of the first voyage, or of the first section, the first cargo might be discharged, and a new one taken in for the second section.

3. That the plaintiff thus having a right to take in a new cargo at the Havanna, for the residue of the voyage, it was his duty to use all proper means for the preservation of that cargo; and consequently, \*no delay, deviation [**304** or increase of risk, arising from the use of such means, can affect his claim on the underwriters on the ship.

4. And consequently, that the second direction also was erroneous.

*Mr. D. B. Ogden*, contra, argued, that the insurance was altogether restricted to the voyage mentioned and stipulated in the charter-party, and that the voluntary surrender of that contract at the Matanzas, annihilated the contract of insurance on the freight. That the receipt of a compensation by way of compromise for the freight, as stipulated, on the voyage from the Havanna to New York, was, in fact, the receipt of the whole freight for that voyage. And that taking in a cargo at the Havanna, not provided for by the charter-party, or mentioned in the representation to the underwriters, terminated the insurance on the vessel, and discharged the underwriters altogether.<sup>2</sup> He also insisted that

1.—*Incedon v. Crips*, 2 Salk. 658; S. C. under the name of *Ingledeu v. Crips*, 2 Lord Raym. 814.

2.—1 Marsh. on Ins. 92, 93; *Thompson v. Taylor*, 6 Term Rep. 478; *Horncastle v. Stewart*, 7 East's Rep. 400.

the direction of the court, as to the form of action, was correct.<sup>1</sup>

*Mr. Justice JOHNSON* delivered the opinion of the court:

This suit was instituted on a policy of insurance on the ship *Henry*, and on the freight to be earned by her, on a voyage from *Teneriffe* to *Havanna*, and thence to *New York*. Eighteen thousand dollars on the ship, and two **305\*** thousand \*dollars on the freight, were insured in this policy; and another sum of ten thousand dollars on the freight, was insured in a distinct policy by the same company. At the trial, the defendants prayed certain instructions to the jury, which the court gave, and added a further instruction in their favor, in pursuance of which the jury found for the defendants below. The question is, whether the instructions so given were conformable to the law of the case.

This must depend upon the construction of the policy, as modified by the representations made at the time of the contract.

The vessel, it appears, was at *Teneriffe* when the order for insurance was written, and had engaged in the transportation of Spanish property, to be covered as American, in the manner specified in the representation. By the charter-party, *John Paul Dumeste* appears as the owner and affreighter of the goods, and the voyage stipulated for is precisely that insured against, to wit, from *Teneriffe* to *Havanna* (under the disguise of *New Orleans*), with liberty to put into *Matanzas*, and from *Havanna* to *New York*. There is no imputation of unfairness; the nature of the voyage was distinctly understood between the parties; and the only question which goes to the negation of the right of recovery of freight altogether, is raised upon the supposed termination of the voyage insured against at *Matanzas*, and the actual receipt there of the whole freight insured. And as against the sum insured on the vessel, the defendants insist that **306\*** the act of taking in a cargo at \*the *Havanna*, which was not permitted by the contract of insurance, avoided the contract.

The argument is, that the insurance was altogether confined to the voyage stipulated for under the charter-party.

And it has been contended that the voluntary surrender of that contract at the *Matanzas* put an end to the voyage, or to the adventure insured.

That the receipt of a compensation, by way of compromise, for the \$7,000 freight, stipulated for on the voyage from *Havanna* to *New York*, was in fact the receipt of the whole freight on that voyage.

And lastly, that taking in a cargo at the *Havanna*, not in contemplation under the charter-party or representation, put an end to the insurance on the vessel, and discharged the underwriters altogether.

It is obvious that if this case be disposed of upon the contract, as exhibited on the face of the policy, the right of the plaintiff to recover would be unquestionable. The defendants, however, avail themselves of the right of insisting on the contract, such as it really was in

the intendment of the parties, whatever the policy might purport on the face of it.

The benefit of the same principle, therefore, cannot be withheld from their adversary; and, accordingly, the existence of a charter-party becomes altogether an immaterial circumstance in the case. No mention of it was made in the representation; and the voyage might have been prosecuted without it. The representation was \*the document to which the parties [**307** were referred for their respective undertakings. Engaging in a voyage different from that, whether with or without a charter-party, would have vitiated the contract. But a charter-party so strictly conforming to that representation, would only leave the parties where it found them; and answered no other purpose than to furnish the authentic evidence of freight engaged, in case of loss, while sailing under it. And this is the whole effect of the cases cited to sustain this supposed intimate and mutual dependence between policies and charter-parties.

Has, then, the representation been complied with substantially?

This depends upon the real nature of the voyage insured; in considering which, it is obvious that although it was indispensable that the American mantle should be thrown over the cargo, it was by no means so that the cargo should continue to need the protection of that mantle. It would be as reasonable to contend that, if Spain had ceased to be a belligerent, or *John Paul Dumeste*, instead of being the nominal, had become the real owner of the cargo, the contract of insurance would have been avoided. We consider a representation of property, being covered as American, as substantially complied with if the property be actually American. And as the presence and agency of *John Paul Dumeste*, had the cloaking of the property as their sole object, that his presence was dispensed with when the cargo became actually American.

So much for the national character of the shipper. And as to his identity, we see nothing in \*the contract to prevent the [**308** change which took place under the transactions at *Matanzas* and the *Havanna*. It is very clear that, provided *John Paul Dumeste* had continued in the capacity of supposed owner, the representation would have admitted of taking in a cargo from the *Havanna*, belonging to any other Spanish subjects than the shippers from *Teneriffe*. The plaintiff, then, was not bound by anything in the representation, to hold the original shippers to their contract, but was left at large, as in all such carrying voyages, to do the best he could for himself in earning freight; provided the cargo still continued covered as American. He was, then, at liberty to change the actual shipper; and he has done nothing more in compounding with the Spanish charterers, and putting his vessel up as a general ship at the *Havanna*.

But it is contended that by the composition made at the *Matanzas*, the plaintiff has actually received what he is now suing for, to wit, his freight from *Havanna* to *New York*.

Plausible as this argument appears, we are of opinion that the facts will not sustain it. The sum received in composition, to wit, \$7,000 (from which, we presume, was deducted both prime and specific compensation, as stipulated

1.—*The United States v. Colt*, 1 *Peter's Jr. Rep.* 145, and the authorities there cited.  
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for under the charter-party), could not have been for the hire of the vessel to New York. To say nothing of the difference in amount, what interest could the first charterers have had in sending her empty to New York? The true understanding of the arrangement is, that those **309\*** shippers purchased a release from the obligation to find a cargo for New York, and thus avoided paying the sum of \$7,000. The master, then, took the risk of not being able to procure a freight for the last port of his voyage. This was the consideration of the composition paid him, and events proved that he made a hard bargain for himself, and a very beneficial one for the underwriters. Had the vessel taken in full freight from the Havanna for New York, it might have been a question, upon the loss happening, whether the underwriters were entitled to deduct the \$7,000 so received; but in the present state of facts, no question can be raised upon it, but that which has been raised, to wit, whether it operated as a receipt in full to the underwriters for all freight that might, by possibility, be engaged on the remaining voyage. We have expressed our opinion that it did not.

With regard to that part of the instruction which was voluntarily given by the court, it is necessary to remark, that although it does not appear to have been moved by the defendants' counsel, yet it was on a point certainly presented by the case; and as it is one on which this cause may, by possibility, be again brought up to this court, it is proper now to decide it.

So far as relates to the policy on the ship, there can be no difficulty. The plaintiff is entitled to the whole, or nothing. We are of opinion that he was entitled to the whole. But as the plaintiff demands only the sum of \$420 for freight from the Havanna, the question arises whether, in this form of action, he could **310\*** recover less than the \$2,000 specified in the contract, and claimed by the writ. On this point the court charged the jury "that the whole must be recovered, or no part of it could be recovered; that the party could recover either of the two sums claimed, entire, without the other, but not a portion of either without accounting for the residue."

On this subject, this court is satisfied that the law of the action of debt is the same now that it has been for centuries past. That the judgment must be responsive to the writ, and must, therefore, either be given for the whole sum demanded, or exhibit the cause why it is given for a less sum. Otherwise *non constat*, but the difference still remains due. That this is the law where an entire sum is demanded in the writ, and shown by the counts to consist of several distinct debts is established by the case of *Andrews v. De la Hay* (Hobart, 178); that the law is the same where an entire sum is demanded, and only half of it established, is laid down expressly in the case of *Speak v. Richards*, in the same book (209, 210), and adjudged in the case of *Grobham v. Thornborough* (82), and in the more modern case of *Ingledeu v. Crips* (2 Lord Raym., 814, 816). Our own courts, in several of the states and districts, have also recognized and conformed to the same doctrine.

And the same cases establish that the requisite conformity between the writ and judgment,

in the action of debt, may be fully complied with, either by the pleadings, the finding of the jury, or a remitter entered by the **\*311** plaintiff, either before or after verdict, or even after demurrer.

If, therefore, the instruction to the jury on this point was intended to intimate that they could not find for the plaintiff any less sum than the \$2,000 valued on the freight, we deem it exceptionable; inasmuch as the plaintiff had a right to claim a verdict for the freight established by the evidence, and enter a remitter for the difference.<sup>1</sup>

There was another question made by the defendants' counsel, on the argument, which had relation to the quantum of the sum to be recovered for freight under this policy. It was contended that it ought to be reduced by reference to the ratio which it bears to the other policy executed on the same freight. But we decline deciding the point, as well because it is not brought up under the bill of exceptions, as because we cannot discover how it can affect the interests of the parties, since both policies were executed between the same parties upon the same representation.

*Judgment reversed, and a venire de novo awarded.*

**JUDGMENT.**—This cause came on to be heard on the transcript of the record of the Circuit **\*Court of the United States for the Dis-** **\*312** trict of Maryland, and was argued by counsel. On consideration whereof, this court is of opinion that the said Circuit Court erred in the first and second instructions given to the jury, as prayed for by the defendants' counsel, and in the voluntary opinion of said Circuit Court, so far as the said opinion was intended to instruct the jury, that they could not find any less sum than two thousand dollars valued on the freight.

It is therefore adjudged and ordered that the judgment of the said Circuit Court of the United States for the District of Maryland, in this case, be, and the same is hereby reversed and annulled; and it is further ordered, that said cause be remanded to said Circuit Court, with instructions to issue a *venire facias de novo*.

Cited—Hcomp. 182, 280.

#### [CONSTITUTIONAL LAW. PRACTICE.]

#### BUEL v. VAN NESS.

The appellate jurisdiction of this court, under the 25th sec. of the judiciary act of 1789, c. 20, may be exercised by a writ of error issued by the clerk of a circuit court, under the seal of that court, in the form prescribed by the act of the 8th of May, 1792, c. 137, s. 9; and the writ itself need not state that it is directed to a final judgment of the State Court,

1.—This question respecting the action of debt is so fully discussed and settled in the case of the *United States v. Colt*, 1 Peters, Jr., Rep. 145, that the editor has taken the liberty of subjoining, in the Appendix to the present volume, Note II., the very able judgment of Mr. Justice Washington in that case.

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or that the court is the highest court of law or equity of the state.

The appellate jurisdiction of this Court, in cases brought from the state courts, arising under the constitution, laws, and treaties of the Union, is not limited by the value of the matter in dispute.

**313\*** Its jurisdiction in such cases extends to a case where both parties claim a right or title under the same act of Congress, and the decision is against the right or title claimed by either party.

Under the 91st section of the duty act of 1799, c. 128, the share of a forfeiture to which the collector, &c., of the district is entitled, is to be paid to the person who was the collector, &c., in office at the time the seizure was made, and not to his successor in office at the time of condemnation and the receipt of the money.

**E**rror to the Supreme Court of Vermont, for the County of Chittenden, being the highest court of law in that state.

The plaintiff in error, Buel, brought an action of *assumpsit* against the defendant in error, Van Ness, in the State Court. The declaration was for money had and received, and money lent and advanced, to which defendant pleaded the general issue, and upon the trial the jury found the following special verdict:

That for the space of two years preceding the fifteenth day of February, in the year 1813, the said Samuel Buel was collector of the customs for the district of Vermont, having been theretofore duly appointed and commissioned by the President of the United States to that office, and sworn according to law, and taken upon himself the discharge of the duties of the office aforesaid; that during the time the said Buel was collector of the customs aforesaid, a certain quantity of fur and wine was seized in the said district, by one Joshua Peckham, an inspector of the customs within the said district, acting under the authority of the said Buel, as collector as aforesaid, as forfeited to the United States, for having been imported **314\*** contrary to law; that the said fur and wine, during the time the said Buel was collector as aforesaid, were duly libeled in the District Court of the United States for the District of Vermont; that at the term of said court, in which the said fur and wine were libeled, as aforesaid, one Zehnon Atwood preferred his claim to the said fur and wine, in due form, in the said court, and then and there executed to the said United States, a bond in the sum of \$1,202.64, being the value of the said fur and wine, as appraised according to law, and conditioned for the payment of the said sum to the United States, in case the said fur and wine should be condemned; that afterwards, and while the said Buel was collector as aforesaid, to wit, at the term of the said court holden at Rutland, within and for said district, on the tenth day of October, in the year 1812, such proceedings were had on said libel, that the said fur and wine were regularly condemned as forfeited to the United States; that on the said fifteenth day of February, in the year 1813, the said Samuel Buel was, by the President of the United States, removed from the said office of collector for the district of Vermont; that on the same day the said Cornelius P. Van Ness was duly appointed to the said office, and commissioned and sworn accordingly, and still continues to hold said office; that on the tenth day of May, in the year 1813, the said sum of \$1,202.64 was paid into court, in discharge of the said bond, into the hands of

Jesse Gore, Esq., clerk of the said court; that on the same day the said sum of money was, \*by the said Jesse Gore, paid into the [\***315** hands of the said Cornelius P. Van Ness, Esq., collector as aforesaid, to be by him distributed according to the laws of the United States; that the said Cornelius P. Van Ness, on the first day of July, in the year last aforesaid, paid into the treasury of the United States one moiety of the said sum of \$1,202.64, and that the said Cornelius P. Van Ness retains the remainder of the said sum as belonging to him as collector as aforesaid, and to the inspector who seized the said goods, and to the person who first informed of the said offense, notwithstanding the said Buel, before the commencement of the said action, to wit, on the fifth day of June, in the year 1813, at Burlington aforesaid, did demand the same of the said Van Ness. And if upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, it shall seem to the Court here that the said Cornelius P. Van Ness is liable in law for the non-performance of the promises in said declaration contained, in manner and form as the said Samuel Buel complains against him, then the said jurors further upon their oath say, that the said Cornelius did assume and promise, in manner and form as the said plaintiff, in his said declaration hath alleged, and they assess the damages of him, the said Samuel, by the occasion of the non-performance of the said promises and undertakings, at the sum of \$672.47, and find for him to recover the said sum, with his costs; but if upon the whole matters aforesaid, by the jurors aforesaid, in form aforesaid found, \*it shall seem to the Court here, that the [\***316** said Cornelius P. Van Ness is not liable in law, in manner and form as the said Samuel complains against him, then the jurors aforesaid, upon their oath say, that the said Cornelius P. Van Ness did not assume and promise, in manner and form as the said Samuel hath alleged against him, and find for him to recover his costs.

Upon which, judgment was rendered by the State Court for the defendant; and the cause was brought by writ of error to this Court. The writ of error was issued by the clerk of the Circuit Court of Vermont, under the seal of that court, and in the usual form of writs of error to the judgments of the circuit courts of the United States.

*Mr. Sergeant*, for the plaintiff, argued, that the judgment of the State Court was erroneous upon the settled decisions of this court. The collector, under whose authority the seizure was made, was clearly entitled to the moiety of the forfeiture given by the collection act of 1799, ch. 122, sec. 89, 91, and not the collector who was in office at the time condemnation was pronounced, and the money actually received.<sup>1</sup>

The *Attorney-General*, contra, argued, (1) That the writ of error, in this case, was not, upon its face, to a final judgment of the highest court of law of the state. This Court is a court of a \*limited and special jurisdiction, [\***317** both by the constitution, and by the act of Congress giving it appellate jurisdiction over the state courts in certain cases. All persons

1.—Jones v. Shore, 1 Wheat. Rep. 462.



who appear before it must bring themselves within the jurisdiction, either by the nature of the controversy, or the character of the parties.<sup>1</sup> The writ of error is the instrument by which the record is to be brought into this Court, and it must, therefore, exhibit on its face, the appellate jurisdiction. (2) The writ does not appear to have emanated from the office of the clerk of this Court, nor from any office authorized to issue it. The writ was issued by the clerk of the Circuit Court of Vermont. The act of May, 1792, ch. 137, sec. 9, directs the clerk of this Court to send to the clerks of the circuit courts the form of a writ of error to be issued by the latter under the seal of the Circuit Court. But this provision cannot apply to writs of error to judgments of the state courts. (3) It is not stated in the writ of error, nor does it appear, that the Supreme Court of the state of Vermont is the highest court of law or equity in the state, in which a decision could be had. *Non constat*, but there may be another still higher appellate tribunal, where the cause might have been carried. (4) The amount of the judgment is not sufficient to support a writ of error to this Court. The 25th section of the judiciary act of 1789, ch. 20, provides that in all cases where this Court has appellate jurisdiction \*from the judgments or decrees of the state courts, they may be re-examined on a writ of error "in the same manner, and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court." One of those regulations is that the matter in dispute must be of the value of \$2,000. And the policy of the law, or the supposed intention of the law-makers, cannot give jurisdiction by implication. (5) But if these formal objections should be overruled, he insisted that the decision of the State Court was not against a right claimed under a statute of the United States, within the 25th section of the judiciary act of 1789, ch. 20, since both parties claimed the sum of money in controversy under the same act of Congress. If the State Court has committed any error, it is merely in misconstruing an act of Congress, and not in deciding against any right, title, privilege or exemption claimed by the plaintiff under it. The decision is in favor of a party so claiming, and where that is the case, this Court has no jurisdiction.<sup>2</sup> (6) The plaintiff was not entitled to judgment on the special verdict, because the inspector, who appears by it to have acted as seizing officer, must have been entitled by law to a proportion of the forfeiture, and therefore the plaintiff could not have been entitled to the whole amount found by the jury. **319\*** *Mr. Sergeant*, in reply, insisted, that it sufficiently appeared upon the record that the judgment was final. The word *judgment* implies that it was final, unless something appears to the contrary. The Supreme Court of Vermont is, in point of fact, the highest court of law or equity of that state. This Court cannot compel a state court to represent itself as the highest court. It appears so to be by the state

constitution and laws. They are not foreign laws, and this Court is bound to take notice of them. They are expressly made rules of decision in the national courts, by the judiciary act. As to the amount in controversy, it is immaterial. The object of the provision was to produce perfect uniformity in the decisions upon the laws, treaties, and constitution of the Union. It stands upon different grounds from that where the character of the parties alone gives jurisdiction. There the sole object was to secure impartial tribunals, in controversies between citizens of different states, and between aliens and citizens. The case is within the very letter of the act. It does not appear how the defendant claimed. It appears that the plaintiff claimed under a statute of Congress. The decision was against his claim, and that is sufficient. To determine otherwise, would be to defeat the whole object of the provision, which was intended to secure uniformity in the construction of the statutes of Congress throughout the Union.

*Mr. Justice JOHNSON* delivered the opinion of the Court:

This suit was instituted by the plaintiff in \*error, late collector of the district [**\*320** of Vermont, against the collector, his successor in office. The sum sued for is one-half the proceeds of a seizure made while Buel was in office, but not recovered until after he was superseded by the defendant.

The right of Buel to the sum sued for is not now to be questioned. It has already obtained the sanction of this Court. (*Jones v. Shore*, 1 Wheat. Rep., 462.) But before the question was agitated here, a decision had already taken place in the State Court in favor of Van Ness, and the cause being now brought up under the 25th section of the judiciary act, a number of exceptions have been taken to the plaintiff's right of recovery, which have no bearing whatever upon the right of action.

The first of the points made by the defendant's counsel is, "that the writ of error does not, upon its face, purport to be issued upon a final judgment of the highest court in the state.

We see no reason why it should be so expressed. The writ of error is the act of the court; its object is to cite the parties to this court, and to bring up the record. How else is this court to ascertain whether the judgment be final? Nor can there be any danger of its being hastily or erroneously used, since it must be allowed either by the presiding judge of the State Court, or a judge of the Supreme Court of the United States.

2d. "That the writ does not appear to have emanated from the office of the Supreme Court, nor from any office authorized to issue it."

\*This is answered by reference to the [**\*321** seal on the face of the writ, which appears to be that of the Circuit Court of Vermont, and the signature of the clerk. A form of a writ of error has been designed by the judges of this Court, and transmitted to the clerks of the respective circuits, by the clerk of this Court, according to law. And this writ has duly issued from the Circuit Court, after being allowed by the circuit judge. What more does the law require? (See s. 8, act of May 8th, 1792.)

1.—*Durousseau v. The United States*, 6 Cranch's Rep. 307; *Turner v. Bank of North America*, 4 Dall. Rep. 8.

2.—*Gordon v. Caldeleugh*, 3 Cranch's Rep. 268; *Matthews v. Zane*, 4 Cranch's Rep. 382.

3. It is objected, "That it is not stated, nor does it appear, that the Supreme Court of the state of Vermont is the highest court in the state in which a decision in the suit could be had, and therefore the jurisdiction of this Court is not shown."

Nor was it necessary, at this stage of the proceedings, that it should have been shown. It has been before observed, that this writ is the act of the court, and if it has issued improvidently, the question is open on a motion to quash it. No one is precluded by the emanation of the writ; and the right of the party who demands it, ought not to be finally passed upon by a judge at his chambers. It is a writ of common right in the cases to which the jurisdiction of an appellate court extends, and the abuse of it is sufficiently guarded against, as suggested to the first exception.

4. It is contended, "That the amount of the judgment is not sufficient to ground an appeal or writ of error to this Court."

This is a new question. Thirty-four years **322\*** has \*this Court been adjudicating under the 25th section of the act of 1789, and familiarly known to have passed in judgment upon cases of very small amount, without having before had its attention called to the construction of the 25th section now contended for. Nevertheless, if the received construction has been erroneously adopted, without examination, it is not too late to correct it now.

But we think that it is not necessary to sustain our practice upon contemporaneous and long protracted exposition; that as well the words of the two sections under which we exercise appellate jurisdiction, as the reasons and policy on which those clauses were enacted, will sustain the received distinction between the cases to which those sections extend.

The argument on this part of the case is, that the appellate jurisdiction conferred by the 25th section of the judiciary act of 1789, is restricted within the same limits, as to amount, with that conferred by the 22d section, under the influence of those words which enact, as to the cases comprised within the 25th section, "that they may be re-examined, and reversed, or affirmed, in the Supreme Court of the United States upon a writ of error, the citation being signed, &c., in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered in a circuit court," &c.

The fallacy of the argument consists in attaching too enlarged an application to the meaning of the word "regulation," as here used. It **323\*** is obvious \*from the context, as well as from its ordinary meaning and use, that its proper bearing is altogether confined to the writ of error, citation, &c., to be issued in a case which has been before fully defined, and not that it should itself enter into the descriptive circumstances by which those cases are to be identified, to which the appellate jurisdiction of the court is to be extended. By reference to the 22d section, it will be seen that the sum to which the appellate power is confined in that section is in every case the specific difference by which it is distinguished from every other case; and that the regulations under which the jurisdiction, in those cases, is to be

exercised, constitute the subject of the remaining part of that section, and the whole of the 23d, as it does of various other sections scattered through the laws passed upon the same subject.

And this construction is fully supported by reference to the political object of the two sections, as has been forcibly insisted upon by the defendant's counsel. Questions of mere *meum* and *tuum*, are those to which the 22d section relates; but those intended to be provided for by the 25th section are noticed only for their national importance, and are deemed proper for an appellate tribunal, from the principles, not the sums, that they involve. Practically, we know that experience has vindicated the foresight of the legislature in making this distinction.

The fifth point submitted by the defendant's counsel is "that the decision of the State Court was not against a right claimed under a statute of \*the United States, within the pro- [**324**visions of the 25th section of the judiciary act; since both parties claimed the money in contest under the same act of congress."

This point we consider as already decided in the case of *Matthews v. Zane* (4 Cranch's Rep., 382); nor do we feel any difficulty in again deciding that the principle which it asserts cannot be sustained. The simplest mode of meeting the proposition is to negative it in its own terms. The decision of the State Court was "against a right claimed under a statute of the United States." Buel's claim was altogether founded upon a statute of the United States. Nor was he a volunteer in the State Court; for, being a citizen of the same state with the defendant, he could not, under the judiciary act of the United States, come, in the first instance, into the courts of the United States. Had it been otherwise, however, it would seem to be a question of expediency with the legislature, rather than one of construction for a court. The literal meaning of the terms of the 25th section embraces the plaintiff's case; as it would also have embraced that of the defendant, had the State Court decided against his claim under the same act. If the United States have jurisdiction over all causes arising under their own laws, Congress must possess the power of determining to what extent that jurisdiction shall be vested in this court.

The sixth and last point made for the defendant, is that the plaintiff was not entitled to judgment on the verdict according to the facts found by the \*jury. And under this [**325**head it is contended "that the inspector, acting as seizing officer, or informer, who appears in the special verdict, must have been entitled by law to a proportion of this forfeiture, and, therefore, the plaintiff could not have been entitled to the whole amount awarded him by the jury in the alternative finding."

It is not now necessary, nor are we in possession of the facts necessary to determine the relative rights of the collector and the supposed informer. If Peckham was entitled in that character to share with this plaintiff, he is not precluded by this decision. He was no party to the action. And if his rights were intended to be set up against this plaintiff, they should have been distinctly found by the jury. Under the finding, as it actually exists, there is



no right definitively ascertained but those of the two parties to the suit. The 6th section of the collection law requires no officer to be appointed for the district of Vermont but a collector. The presumption therefore is that he is the only individual entitled to forfeitures in that district until the contrary be shown. The 91st section, which vests the interests on which this suit is sustained, gives the whole to any one of the three distributees of the moiety, when there is but one officer for the district in which the seizure is made.

We are therefore of opinion that the judgment be reversed and a judgment entered for the plaintiff upon the other alternative of the verdict.

Cited—6 Pet. 537; 9 Pet. 530; 14 Pet. 607, 612.

### 326\*] [\*PROMISSORY NOTE. EVIDENCE.]

NICHOLLS, *Plaintiff in Error*,  
v.

WEBB, *Defendant in Error*.

No demand of payment, or notice of non-payment, by a notary public, is necessary in the case of promissory notes. A protest is (strictly speaking) evidence in the case of foreign bills of exchange only.

But it is a principle that memorandums made by a person in the ordinary course of his business of acts which his duty, in such business, requires him to do for others, are, in case of his death, admissible evidence of acts so done. *A fortiori*, the acts of a public officer are so admissible, though they may not be strictly official, if they are according to general usage and the ordinary course of his office.

Therefore, the books of a notary public, proved to have been regularly kept, are admissible in evidence, after his decease, to prove a demand of payment, and notice of non-payment, of a promissory note.

**E**RROR to the District Court of Louisiana.

This was a suit brought by petition, according to the course of proceedings in Louisiana,<sup>1</sup> by Webb, the defendant in error, against Nicholls, the plaintiff in error, upon a promissory note dated the 15th of January, 1819, made by one Fletcher, for the sum of \$4,880, payable to the order of Nicholls, at the Nashville Bank, and indorsed by Nicholls, by his agent, to Webb. The answer of the defendant below denied such a demand and notice of non-payment, as were necessary to render **327\*]** him liable as indorser. At the trial it appeared in evidence that the note became due on the 18th of July, which was Sunday. The demand of payment of the maker was made and notice of non-payment to the indorser was given at the request of the plaintiff below, by one Washington Perkins, a notary public, who died before the trial. The original protest was annexed to the plaintiff's petition, and was drawn up according to the usual formula of that instrument, stating a demand and refusal of payment at the Nashville Bank, on Saturday, the 17th of July, the 18th being Sunday, and that he, the notary, "duly notified the indorsers of the non-payment." The plaintiff

offered this protest, among other evidence, to support his cause, together with the deposition of Sophia Perkins, the daughter of the notary. This witness stated, in her deposition, that her father kept a regular record of his notarial acts, and uniformly entered, in a book kept by himself, or caused the deponent to enter, exact copies of the notes, bills, &c., which he protested; and in the margin opposite to the copy of the protest, made memorandums after notification to indorsers, if any, of the fact of such notification and the manner; and that his notarial records had been, ever since his death, in the house where she lived. And to her deposition she annexed, and verified as true, a copy of the protest in this case. The copy of the protest stated the demand (as supposed by mistake) to have been made on the 19th, instead of the 17th of July, 1819, and contained the following memorandum on the margin: "Indorser duly notified in writing [**328** 19th of July, 1819, the last day of grace being Sunday, the 18th. Washington Perkins." In other respects the protest was in the same form with that annexed as the original to the plaintiff's petition. The defendant below objected to the admission of this protest and deposition in evidence, but his objection was overruled by the court. Whereupon the defendant excepted, and the jury returned a verdict for the plaintiff; upon which, the court, according to the usual practice in Louisiana, ascertained the sum due, and rendered judgment. The cause was then brought by writ of error to this Court.

This cause was argued by *Mr. Eaton* and *Mr. C. J. Ingersoll*<sup>2</sup> for the plaintiff in error, and by *Mr. Sergeant*<sup>3</sup> for the defendant in error. But as the grounds of argument and the authorities are so fully stated in the opinion of the Court, it has not been thought necessary to report their arguments.

*Mr. Justice Story* delivered the opinion of the Court:

This is a writ of error to the District Court of Louisiana. The suit was [**329** brought by Mr. Webb, as indorsee, against Mr. Nicholls, as indorser of a promissory note, dated the 15th of January, 1819, and made by Thomas H. Fletcher, for the sum of \$4,880, payable to Nicholls or order, at the Nashville Bank, and indorsed by Nicholls, by his agent, to the plaintiff. The note became due on the 18th of July, which being Sunday, the note, of course, was payable on the preceding Saturday. The cause came on for trial upon petition and answer, according to the usual course of proceedings in Louisiana, the answer setting up, among other things, a denial of due demand and notice of non-payment; and upon the trial the jury returned a verdict for the plaintiff. The court, thereupon ascertained the sum due, and entered judgment for the plaintiff accord-

2.—They cited *Hingham v. Ridgway*, 10 East's Rep. 109; 1 Salk. 205; 2 Strange, 1129; 7 East's Rep. 279; 3 Burr. 1065, 1072; *Chitty on Bills*, 240, 273; 2 Camp. Rep. 177; 2 Caines' Rep. 343; 12 Mass. Rep. 89; 2 Johns. Rep. 423; 2 Wash. Rep. 281.

3.—He cited *Pritt v. Fairclough*, 3 Camp. Rep. 305; *Price v. Torrington*, Salk. 285; S. C. 2 Lord Rayn. 873; *Pitman v. Maddox*, Salk. 690; *Hagedorn v. Reid*, 3 Camp. Rep. 379; *Welch v. Barrett*, 15 Mass. Rep. 381.

1.—*Vide ante* Vol. III., p. 202, note a.

ing to what is understood to be the usual practice of that state.

Several questions have been argued at the bar which may be at once laid out of the case, since they do not arise upon the record; and we may therefore proceed to examine that alone upon which any judgment was pronounced in the court below.

From the issue in the cause, the burthen of proof of due demand of payment and due notice of the non-payment to Nicholls rested on the plaintiff. It appears that the demand was made and notice given, at the request of the plaintiff, by one Washington Perkins, a notary public, who died before the trial. The original protest was annexed to the plaintiff's **330\*** petition, and contained the usual language in this instrument, stating a demand and refusal of payment at the Nashville Bank, on the 17th of July, the 18th being Sunday, and that he, the notary, "duly notified the indorsers of the non-payment." Among other evidence to support the plaintiff's case, he offered this protest, together with the deposition of Sophia Perkins, the daughter of the notary. She stated, in her deposition, that her father kept a regular record of his notarial acts, and uniformly entered, in a book kept by himself, or caused the deponent to do it, exact copies of the notes, bills, &c.; and in the margin opposite to the copy of the protest made memorandums after notification to indorsers, if any, of the fact of such notification, and the manner; and that his notarial records had been, ever since his death, in the house where she lived. And to her deposition she annexed and verified as true, a copy of the protest in this case. The copy of the protest states the demand (most probably by mistake) to have been made on the 19th, instead of the 17th of July, 1819, and contains a memorandum on the margin: "Indorser duly notified in writing 19th of July, 1819, the last day of grace being Sunday, the 18th. Washington Perkins." In other respects the protest is the same in form as that annexed to the petition. To the introduction of this deposition, as well as of the protest, as evidence, the defendant, Nicholls, objected, and his objection was overruled by the court and the papers were laid before the jury. A bill of exceptions was taken to the decision of the court in so admitting this evidence; and the sole **331\*** question now before us is, whether that decision was right. What that evidence might legally conduce to prove, or what its effect might be if properly admitted, is not now a question before us. It was left to the jury to draw such inferences of fact as they might justly draw from it; and whether they were right or wrong in their inferences we cannot now inquire.

It does not appear that by the laws of Tennessee, a demand of the payment of promissory notes is required to be made by a notary public, or a protest made for non-payment, or notice given by a notary to the indorsers. And by the general commercial law it is perfectly clear that the intervention of a notary is unnecessary in these cases. The notarial protest is not, therefore, evidence of itself, in chief, of the fact of demand, as it would be in cases of foreign bills of exchange; and in strictness of law it is not an official act. But we all know

Wheat. 8.

that in point of fact notaries are very commonly employed in this business; and in some of the states it is a general usage so to protest all dishonored notes which are lodged in, or have been discounted by the bank. The practice has doubtless grown up from a sense of its convenience, and the just confidence placed in men who, from their habits and character, are likely to perform these important duties with punctuality and accuracy. We may therefore safely take it to be true in this case, that the protesting of notes, if not strictly the duty of the notary, was in conformity to general practice, and was an employment in which he was usually engaged. If \*he had been alive [**332** at the trial, there is no question that the protest could not have been given in evidence, except with his deposition, or personal examination, to support it. His death gives rise to the question, whether it is not, connected with other evidence, and particularly with that of his daughter, admissible secondary evidence for the purpose of conducing to prove due demand and notice.<sup>1</sup>

The rules of evidence are of great importance, and cannot be departed from without endangering private as well as public rights. Courts of law are therefore extremely cautious in the introduction of any new doctrines of evidence which trench upon old and established principles. Still, however, it is obvious that as the rules of evidence are founded upon general interest and convenience, they must, from time to time, admit of modifications to adapt them to the actual condition and business of men, or they would work manifest injustice; and Lord Ellenborough has very justly observed that they must expand according to the exigencies of society. (*Pritt v. Fairclough*, 3 Camp. Rep., 305.) The present case affords a striking proof of the correctness of this remark. Much of the business of the commercial world is done through the medium of bills of exchange and promissory notes. The rules of law require that due notice \*and demand shall be proved, to [**333** charge the indorser. What would be the consequence, if, in no instance, secondary evidence could be admitted, of a nature like the present? It would materially impair the negotiability and circulation of these important facilities to commerce, since few persons would be disposed to risk so much property upon the chance of a single life; and the attempt to multiply witnesses would be attended with serious inconveniences and expenses. There is no doubt that, upon the principles of law, protests of foreign bills of exchange are admissible evidence of a demand upon the drawee; and upon what foundation does this doctrine rest, but upon the usage of merchants and the universal convenience of mankind? There is not even the plea of absolute necessity to justify its introduction, since it is equally evidence, whether the notary be living or dead. The law, indeed, places a confidence in public officers; but it is here extended to foreign officers acting as the agents and instruments of private parties.

1.—By the French law, inland bills of exchange and promissory notes, as well as foreign bills, are required to be protested; and the protest is the only evidence of demand, and refusal of payment, and notice of non-payment. Code de Commerce, liv. 1, tit. 8, art. 187, 175.



The general objection to evidence, of the character of that now before the Court, is that it is in the nature of hearsay, and the party is deprived of the benefit of cross-examination. That principle also applies to the case of foreign protests. But the answer is that it is the best evidence the nature of the case admits of. If the party is dead we cannot have his personal examination on oath; and the question then arises, whether there shall be a total failure of justice, or secondary evidence shall be admitted to prove **334\*** facts, where ordinary prudence cannot guard us against the effects of human mortality. Vast sums of money depend upon the evidence of notaries and messengers of banks; and if their memorandums, in the ordinary discharge of their duty and employment, are not admissible in evidence after their death, the mischiefs must be very extensive.

But how stand the authorities upon this subject? Do they as inflexibly lay down the general rule as the objection seems to imply? The written declarations of deceased persons, and entries in their books, have been for a long time admitted as evidence, upon the general ground that they were made against the interest of the parties. Of this nature are the entries made by receivers of money charging themselves, rentals of parties, and bills of lading signed by masters of vessels. More than a century ago it was decided that the entries in the books of a tradesman, made by a deceased shopman, were admissible as evidence of the delivery of the goods, and of other matters there stated within his own knowledge.<sup>1</sup> So, in an action on a tailor's bill, a shop-book was allowed as evidence, it being proved that the servant who wrote the book was dead, and that this was his hand, and he was accustomed to make the entries.<sup>2</sup> In the case of *Higham v. Ridgeway* (10 East's Rep., 109), it was held that the entry of a midwife in his books in the ordinary **335\*** course of his business, of the birth of a child, accompanied by another entry in his ledger of the charge for the service and a memorandum of payment at a subsequent date, was admissible evidence of the time of the birth. It is true that Lord Ellenborough, in giving his own opinion, laid stress upon the circumstance that the entry admitting payment was to the prejudice of the party, and, therefore, like the case of a receiver. But this seems very artificial reasoning, and could not apply to the original entry in the day-book, which was made before payment; and even in the ledger the payment was alleged to have been made six months after the service. So that, in truth, at the time of the entry, it was not against the party's interest. And Mr. Justice LeBlanc, in the same case, after observing that he did not mean to give any opinion as to the mere declarations or entries of a midwife who is dead, respecting the time of a person's birth, being made in a matter peculiarly within the knowledge of such a person, as it was not necessary then to determine that question, significantly said: "I would not be bound at present to say that they are not evidence." In the recent case of *Hagedorn v. Reid* (3 Camp. Rep., 379), in a suit on a policy of insurance where a license was necessary, the original not being found, it was proved that it was the in-

variable practice of the plaintiff's office (he being a policy broker), that the clerk, who copies any license, sends it off by post and makes a memorandum on the copy of his having done so; and a copy of the license in question was produced from the plaintiff's letter-book, in the handwriting of a deceased clerk, with **[\*336]** a memorandum on it, stating that the original was sent to Doorman; and a witness, acquainted with the plaintiff's mode of transacting business, swore that he had no doubt the original was sent according to the statement in the memorandum. Lord Ellenborough held this to be sufficient evidence of the license. And in *Pritt v. Fairclough* (3 Camp. Rep., 305), the same learned judge held that the entry of a copy of a letter in the letter book of a party, made by a deceased clerk, and sent to the other party, was admissible in evidence, the letter-book being punctually kept to prove the contents of the letter so sent. And he observed on that occasion, that if it were not so there would be no way in which the most careful merchant could prove the contents of a letter after the death of his entering clerk. The case of *Welsh v. Barrett*, which has been cited at the bar from the Massachusetts reports,<sup>3</sup> is still more directly in point. It was there held that the memorandums of a messenger of a bank, made in the usual course of his employment, of demands on promissors, and notices to indorsers, in respect to notes left for collection in the bank, were, after his decease, admissible evidence to establish such demands and notices. And the learned chief justice of the court, on that occasion, went into an examination of the grounds of the doctrine, and put the very case of a notarial demand and protest of notes which had been suggested at the bar as a more correct course, as not distinguishable in principle, and **[\*337]** liable to the same objections as the evidence then before the court. We are entirely satisfied with that decision, and think it is founded in good sense, and public convenience. We think it a safe principle, that memorandums made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done. It is of course liable to be impugned by other evidence, and to be encountered by any presumptions or facts which diminish its credibility or certainty. *A fortiori* we think the acts of a public officer, like a notary public, admissible, although they may not be strictly official, if they are according to the customary business of his office, since he acts as a sworn officer, and is clothed with public authority and confidence.

It is, therefore, the opinion of the court, that the evidence excepted to in this case was rightly admitted. The variance between the copy and the original protest, as to the time of the demand, might have been explained to the satisfaction of the jury at the trial, but it forms no ground upon which this court is called upon to express any opinion.

*Judgment affirmed with costs.*

Cited—10 Pet. 580, 582; 4 How. 279, 282, 283, 285; 18 Wall. 541; 1 McLean, 318, 335; 2 McLean, 471; Crabbe, 299; 1 Wood. & M. 226.

2.—Pittman v. Maddox, Salk. 690.

3.—15 Mass. Rep. 381.

1.—Price v. Lord Torrington, 1 Salk. 285; S. C. 2 Lord Raym. 873.

**338\***] [\*PROMISSORY NOTE. USURY. LOCAL LAW.]

FLECKNER, *Plaintiff in Error*,  
v.

THE PRESIDENT, DIRECTORS, AND  
COMPANY OF THE BANK OF THE  
UNITED STATES, *Defendants in Error*.

The act of the 10th of April, 1816, c. 44, incorporating the Bank of the United States, does not, by the 9th rule of the fundamental articles, prohibit the bank from discounting promissory notes, or receiving a transfer of notes in payment of a debt due the bank.

The Bank of the United States, and every other bank, not restrained by its charter, and also private bankers, on discounting notes and bills, have a right to deduct the legal interest from the amount of the note or bill at the time it is discounted.

The Bank of the United States is not restrained by the 9th rule of the fundamental articles of its charter from thus deducting interest, at the rate of six per cent., on notes or bills discounted by it.

Banks, and other commercial corporations, may bind themselves by the acts of their authorized officers and agents without the corporate seal.

The negotiability of a promissory note, payable to order, is not restrained by the circumstance of its being given for the purchase of real property in Louisiana, and the notary, before whom the contract of sale is executed, writing upon it the words "*ne varietur*," according to the laws and usages of that state, and other countries governed by the civil law.

The statutes of usury of England, and of the states of the Union, expressly provide, that usurious contracts shall be utterly void; but, without such a provision, they are not void as against parties who are strangers to the usury.

The statute incorporating the Bank of the United States does not avoid securities on which usurious interest may have been taken, and the usury cannot be set up as a defense to a note on which it is taken. It is merely a violation of the charter, for which a remedy may be applied by the government.

**E**RROR to the District Court for the District of Louisiana.

This was a suit brought by the defendants **339\***] in error against the plaintiff in error, in the court below, upon a promissory note drawn by him, dated the 26th of March, 1818, for the sum of \$10,000, payable to the order of one John Nelder, on the first of March, 1820. The plaintiffs below, in their petition, made title to the note through several mesne indorsements, the last of which was that of the president, &c., of the Planters' Bank of New Orleans, through their cashier, as agent. The answer of the defendant below set up several grounds of defense: (1) That the Bank of the United States purchased the note in question from the Planters' Bank, which was a trading within the prohibitions of the charter of the Bank of the United States. (2) That the transfer was usurious, it having been made in consideration of a loan or discount to the Planters' Bank, upon which more than at the rate of six

per centum per annum was taken by the Bank of the United States. (3) That the cashier of the Planters' Bank had no authority to make the transfer. (4) That the making the promissory note by the defendant below was not a mercantile transaction, or governed by mercantile usages or laws, because it was given as the part consideration of the purchase by him of a plantation and slaves, from the said Nelder, and that the notary, before whom the contract of sale was executed and recorded, wrote on the note the words "*ne varietur*," by which every holder of the note might know it was not a mercantile transaction, and could obtain knowledge of the circumstances under which it was given. And the answer proceeded \*to state that Nelder had no title to **[\*340]** a part of the plantation and slaves, and that the note ought not to be paid until the title was made good; and prayed, that the matters thus alleged and put in issue might be inquired of by a jury.

The issue was joined, and it appeared in evidence on the trial that the note in question was discounted for the Planters' Bank, by the Bank of the United States, and, after deducting for the time the note was to run a sum equal to the rate of six per cent. per annum, the residue was carried to the credit of the Planters' Bank, which was at that time indebted to the Bank of the United States in a large sum of money. The counsel for the defendant below moved the Court to instruct the jury, upon this evidence, "that the receiving the transfer of the said promissory note, and the payment of the amount in account, as stated in the evidence, was a dealing in notes, and such dealing was contrary to the provisions of the act incorporating the said bank." The court refused to give the instruction prayed for, but did instruct the jury, "that the acceptance of an indorsed note, in payment of a debt due, is not a trading in things prohibited by the act."

The Court also instructed the jury, that the discount taken by the Bank of the United States was not usurious, and would not defeat their right to recover the amount of the note.

It also appeared in evidence that the board of directors of the Planters' Bank, on the 21st of October, 1818, passed a resolution, "That the president and cashier be authorized to adopt the \*most effectual measures to liqui- **[\*341]** date, the soonest possible, the balance due to the office of discount and deposit in this city (New Orleans), as well as all others presently due, and which may in the future become due to any banks of the city." The indorsement of the note was made to the Bank of the United States on the 5th of September, 1819, and before the commencement of the present suit, to wit, on the 27th of June, 1820, the board of

NOTE.—Usury.—See note to *Levy v. Gadsby*, 3 Cranch, 180.

The taking of interest in advance upon the discount of a note in the usual course of business by a banker, is not usury. *Thornton v. Bk. of Wash.*, 3 Pet. 36; *Moore v. Bk. of Met.*, 13 Pet. 302; 5 Cranch, C. C. 518; *Manhattan Co. v. Osgood*, 15 John. 162; *N. Y. Ins. Co. v. Sturgess*, 2 Cow. 664; *N. Y. Ins. Co. v. Ely*, 2 Cow. 678; *Bk. of Utica v. Wager*, 2 Cow. 712; *Maine Bk. v. Butts*, 9 Mass. 49, 54; *Agricultural Bk. v. Bissell*, 12 Pick. 586; *Lyman v. Morse*, 1 Pick. 295, note.

The rule that taking interest in advance, on discounting mercantile paper, does not render the loan usurious, is not confined to discount by bankers. Anyone may take interest in advance on discounting mercantile paper. *N. Y. Ins. Co. v. Ely*, 2 Cow. 678; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652; *Anderson v. Schenck*, 1 N. Y. Leg. Obs. 107; *Marvine v. Hymers*, 12 N. Y. 2 Kern. 223; *International Bk. v. Bradley*, 19 N. Y. 245.

That corporations may be bound by acts of their agents, and contracts not under the corporate seal, and parol contracts of agents, see note to *Mechs. Bk. of Alexandria v. Bk. of Columbia*, 5 Wheat. 326.

*Wheat*. 8.



directors of the Planters' Bank passed another resolution, to which the corporate seal was annexed, declaring that the two notes of the defendant below (of which the note now in question was one) "were indorsed by the late cashier of the Planters' Bank, by authority of the president and directors, and delivered to the office of discount and deposit of the Bank of the United States, and the amount passed to the credit of the Planters' Bank;" and that "the said board of directors do hereby ratify and confirm the said act of their said cashier, as the act of the president, directors, and company of the Planters' Bank." Upon this evidence, the Court instructed the jury that the cashier had authority to indorse the note, and that his indorsement operated a valid transfer.

It further appeared in evidence, that the said note was originally given as a part consideration for the purchase money of a plantation and slaves, purchased by the defendant below, of Nelder, with a covenant to warrant and defend. The contract of sale was drawn up, executed, and recorded, before a notary, according to the laws and usages of the state of Louisiana. The notary, upon the giving of this note, and other notes, for the purchase money, by the defendant below, wrote on each note the words "*ne varietur*." The Court instructed the jury that the writing of these words did not affect the negotiability of the note.

The defendant below excepted to these several instructions, and the jury found a verdict for the plaintiffs, on which judgment was rendered by the court below; and the cause was brought by writ of error to this Court.

Mr. Harper, for the plaintiff in error, argued, (1) That the purchase of the note in question, by the Bank of the United States, from the Planters' Bank, was a dealing or trading within the 9th rule of the fundamental articles of the charter of the Bank of the United States, which provides, "that the said corporation shall not directly or indirectly deal or trade in anything except bills of exchange, gold or silver bullion, or in the sale of goods really and truly pledged for money lent, and not redeemed in due time, or goods which shall be the proceeds of its lands." (2) He insisted that the transfer of the note was usurious, as it was made in consideration of a discount, on which the interest was deducted at the time of making the discount, contrary to the provision of the same 9th rule, which declares, that the Bank shall not "take more than at the rate of six per centum per annum, for or upon its loans or discounts." He admitted that this practice of deducting the interest from the sum advanced, at the time the discount was made, was according to the general usage of banks and private bankers. But he denied that this usage was lawful, since it was plain, that by this means more than at the rate of six per cent. per annum was received by the bank upon the sum actually advanced. (3) The cashier of the Planters' Bank had no authority to transfer the note. The transfer must have been made by the corporation, either under its common seal—which is the appropriate legal mode in which these artificial persons are to act—or under the resolution of the 21st of October, 1818, which was supposed to constitute a special authority to the

cashier to make the transfer. Upon this resolution there were two questions: 1st. Whether it empowered the cashier to transfer the note by indorsement; and, if not, 2d. Whether the vote of the 27th of June, 1820, ratified the act so as to give it validity. Upon the first question, it should be observed that the power, whatever its extent might be, was joint to the president and cashier, and could not be exercised by either of these officers separately. But the power itself was merely to liquidate the debts due to the bank, which imports no more than an authority to ascertain and settle the amount of the debts. As to the supposed ratification, that which is void in its inception cannot be made good by a subsequent act. If an attorney, not duly appointed, exceeds his authority, his acts cannot receive validity from a subsequent confirmation. The confirmation cannot relate back to, and connect itself with, an act absolutely void. The Planters' Bank could make no contract respecting its corporate property but under its corporate seal, or through the instrumentality of an agent or attorney appointed under that seal. And a contract otherwise made, cannot be confirmed by a subsequent act, which is itself not under seal. (4) The note, in its inception, was not a commercial transaction; it was given for the purchase of real property, and connected by the form of the contract, as executed before the notary, with the sale itself; so that its negotiability was partially restrained by this circumstance, and the title of the vendor to the property having failed, that fact affords a sufficient defense to the maker of the note, into whose hands soever it may have come. And the inscription made by the notary upon the note itself, was intended to give notice to all the world of the origin and nature of the transaction by which its negotiability was restrained.

Mr. Cheves and Mr. Sergeant, contra, contended, (1) That this note was either discounted for the Planters' Bank, or taken as security for, or in payment of a debt, deducting the discount, which is the same thing. The Bank of the United States is not prohibited from buying notes, nor from taking anything whatever in payment, or as security for debts *bona fide* due.<sup>1</sup> And the great object of the trade of banking, as it is carried on by the private bankers and incorporated companies, is to discount bills and notes. (2) Even if the transfer were usurious, it would not follow that the contract was void. If usurious between the indorser and indorsee, it would not avoid the contract of the drawer, or any previous indorser.<sup>2</sup> The state law, whatever it may be, does not affect the Bank of the United States, or its contracts, which are to be governed by the act of Congress alone. That expressly authorizes the taking discounts on loans, and does not avoid the securities given even for usury. Nor is this contract usurious by the state law, by which the legal rate of interest is 8 per cent., where the parties have not contracted for a greater rate. Not only is it the universal practice of the commercial world, to take discount in advance, but the law has constantly sanctioned

1.—Act of 1816, incorporating the bank, ch. 44, sec. 7, 9, 11.

2.—Chitty on Bills, 105, 106.

this practice, both in England and in this country.<sup>1</sup> (3) As to the indorsement by the cashier it was within the scope of his general authority.<sup>2</sup> A written or parol authority is sufficient to authorize a person to make a simple contract, as agent or attorney, and to bind his principal to the performance of it, without a formal letter of attorney under seal.<sup>3</sup> So, the authority may be implied from certain relations proved to exist between the person who acts as agent and the party for whom he undertakes; and it may sometimes be inferred from the subsequent ratification or acquiescence of the party who is **346**\*) to be \*charged by the writing.<sup>4</sup> But, even supposing the general official character and authority of the cashier were not sufficient, the resolution of the 21st of October, 1818, delegated a sufficient special authority, and was fully ratified and confirmed by the subsequent resolution. The notion that such acts of commercial corporations must be under seal, is exploded in this court.<sup>5</sup> (4) The note being negotiable on the face of it, some circumstance must be shown to restrain its negotiability. The character of the instrument does not depend upon the particular transaction out of which it arises, but upon the general nature of the instrument itself. If that be in itself a negotiable paper, it is equally so in whatever service it may be employed; and if connected with a sale of lands, has all the same incidents as if given upon a purchase of a ship or goods. One of these incidents is, to pass freely by indorsement, transferring the legal and equitable right; and another is, that the indorsee, without notice, takes it free from every equity. But here the circumstances relied on would not constitute a legal defense even in a suit brought by the payee. Here was a mere covenant to warrant and defend, and no actual eviction.<sup>6</sup> Where the purchaser has a covenant in his deed, equity will not relieve him from the payment of a bond **347**\*) given for the purchase money, \*there being no eviction, but will leave him to his remedy at law upon the covenant.<sup>7</sup> And, at law, the damages will be according to the injury actually sustained.<sup>8</sup> There was therefore no defense, either at law or in equity. And if the covenant were actually broken, the recovery would be in damages, which could not be settled in an action on the note. Consequently, the breach of covenant, as to part, at all events, would be no defense.<sup>9</sup> So, if there be a partial failure of consideration, it will not constitute a defense.<sup>10</sup> The words "*ne varietur*," inscribed by the notary, were merely intended to identify the notes as being those given on the contract of sale.

*Mr. Justice STORY* delivered the opinion of the court:

The Bank of the United States brought an

action in the District Court for Louisiana District, against William Fleckner (the plaintiff in error), upon a promissory note of Fleckner, dated the 26th of March, 1818, for the sum of \$10,000, payable to one John Nelder, or order, on the 1st of March, 1820, for value received; and the bank, in their declaration by petition, made title to the same note through several incense indorsements, \*the last of which [**348** was that of the president, &c., of the Planters' Bank of New Orleans, through their cashier, as agent. The answer of Fleckner sets up several grounds of defense. First, that the Bank of the United States purchased the note in question from the Planters' Bank, which was a trading within the prohibitions of its charter; secondly, that the transfer was usurious, it having been made in consideration of a loan or discount to the Planters' Bank, upon which more than at the rate of six per cent. per annum was taken by the Bank of the United States; thirdly, that the cashier of the Planters' Bank had no authority to make the transfer; fourthly, that the making of the promissory note was not a mercantile transaction, or governed by mercantile usages or laws, because it was given as a part consideration for the purchase by Fleckner of a plantation and slaves from Nelder, and that the notary before whom the sale was executed and recorded wrote on the note, "*ne varietur*," by which every holder of the note might know it was not a mercantile transaction, and could obtain knowledge of the circumstances under which it was given. And the answer proceeds to state, that Nelder had no title to a part of the plantation and slaves, and that the note ought not to be paid until the title was made good; and it then prays, that the matters thus alleged and put in issue may be inquired of by a jury. The issue was joined, and on trial the jury found a verdict for the Bank of the United States; and the cause now comes before \*us upon a writ of error, [**349** and a bill of exceptions taken at the trial.

The various grounds assumed by the answer, which are substantially the same as taken by the exceptions, will be considered by the court in the order in which they have been mentioned.

And, first, as to the alleged violation of the charter by the Bank of the United States, in purchasing the note in question. The act of Congress of the 10th of April, 1816, ch. 44, incorporating the bank, in the ninth rule of the fundamental articles, declares (s. 11, art. 9), that "the said corporation shall not, directly or indirectly, deal or trade in anything except bills of exchange, gold or silver bullion, or in the sale of goods really and truly pledged for money lent, and not redeemed in due time, or goods which shall be the proceeds of its lands. It shall not be at liberty to purchase any public

1.—Chitty, 107, 108; 4 Yates' Rep. 223.

2.—Meehanics' Bank v. Bank of Columbia, 5 Wheat. Rep. 327.

3.—Stackpole v. Arnold, 11 Mass. Rep. 27; Long v. Colburn, Id. 97; Northampton Bank v. Pepoon, Id. 288.

4.—Long v. Colburn, 11 Mass. Rep. 97; Emerson v. The Providence Hat Manufact. Co., Id. 237; Erieck v. Johnson, 6 Mass. Rep. 193.

5.—Bank of Columbia v. Patterson, 7 Cranch, 299. Wheat. 8.

6.—See Bender v. Fromberger, 4 Dall. Rep. 441.

7.—Abbott v. Allen, 2 Johns. Ch. Rep. 519; See also 1 Johns. Ch. Rep. 213.

8.—7 Johns. Rep. 358; 2 Wheat. Rep. 62, note 1.

9.—Sugd. Vend. 214, 215; Chitty on Bills, 92, 93; Moggridge v. Jones, 3 Camp. Rep. 38; 14 East's Rep. 486.

10.—Cook v. Greenleaf, 2 Wheat. Rep. 13; Morgan v. Richardson, 1 Camp. Rep. 40, note; Tye v. Gwynne, 2 Camp. Rep. 346; Solomon v. Turner, 1 Starkie's Rep. 51.



debt whatsoever, nor shall it take more than at the rate of six per centum per annum for or upon its loans or discounts." It certainly cannot be a just interpretation of this clause, that it prohibits the bank from purchasing anything but the enumerated articles, for that would defeat the powers given in other parts of the act. The 7th section declares, that the bank shall have capacity to purchase, receive, &c., lands, &c., goods, chattels and effects, of whatsoever kind, nature, and quality, to an amount not exceeding fifty-five millions of dollars, and the same to sell, grant, demise, alien and dispose of. And where the act means to prohibit purchases of any particular thing, it uses the very term, **350\***] as in the prohibition \*of purchasing any public debt, in this very clause. And certainly there is no pretense to say that if discounting promissory notes be a purchase in point of law, it could have been the legislative intention to include such an act in the prohibition. It is notorious that banking operations are always carried on in our country by discounting notes. The late Bank of the United States conducted, and all the state banks now conduct, their business in this way. The principal profits of banks and, indeed, the only thing which makes them more valuable than private stock, arises from this source. The legislature cannot be presumed ignorant of these facts; and it would be absurd to suppose that it meant to create a bank without any powers to carry on the usual business of a bank. The act contemplates throughout, an authority to make loans and discounts. It provides expressly for the establishment of offices of discount and deposit; and the very clause now under consideration recognizes the power of the bank to make loans and discounts, and restricts it from taking more than six per cent. on such loans or discounts. But in what manner is the bank to loan? What is it to discount? Has it not a right to take an evidence of the debt, which arises from the loan? If it is to discount must there not be some chose in action, or written evidence of a debt, payable at a future time, which is to be the subject of the discount? Nothing can be clearer than that, by the language of the commercial world and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or draw-**351\***] back \*made upon its advances or loans of money, upon negotiable paper, or other evidences of debt, payable at a future day, which are transferred to the bank. We must suppose that the legislature used the language in this, its appropriate sense; and if we depart from this settled construction, there is none other which can be adopted which would not defeat the great objects for which the charter was granted, and make it, as to the stockholders, a mere mockery. If, therefore, the discounting of a promissory note, according to the usage of banks, be a purchase, within the meaning of the 9th rule above stated (upon which serious doubts may well be entertained), it is a purchase by way of discount, and permitted by necessary inference from the last clause in that rule.

The true interpretations, however, of that rule is, not that it prohibits purchases generally, but that it prohibits buying and selling for the purposes of gain. It aims to interdict the bank from doing the ordinary business of a trader or

merchant, in buying and selling goods, &c., for profit, and uses the words "deal" and "trade" in contradistinction to purchases, made for the accommodation or use of the bank, or resulting from its ordinary banking operations. And that this is the true sense of the rule, is strongly evinced by the 12th section of the act, which enforces a penalty for the violation of this very rule. It enacts, that if the bank, "or any person or persons for, or to the use of the same, shall deal or trade in buying or selling goods, wares, merchandise or commodities whatsoever, \*contrary to the provisions [**352** of this act, all and every person, &c., shall forfeit, &c., treble the value of the goods, &c., in which such dealing and trading shall have been." The words *dealing and trading*, are used as equivalent in meaning, and they are connected with "goods, wares, merchandises, and commodities," which words, in mercantile language, are always used with reference to corporeal substances, and never to mere choses in action. And as there is no reason to suppose that the penalty was not intended to be co-extensive with the prohibitions of the 9th rule, the exception of bills of exchange in that rule was either inserted *ex majori cautela*, or designed to authorize the purchase and sale of bills of exchange, at a price above their par value. At all events, doubtful phraseology of this sort cannot be admitted to overrule a clear legislative intention of authorizing discounts; and if so, as there are no words restricting the discounts to any particular kind of paper, the right must equally apply to all kinds.

The evidence in the case shows that the note in question was discounted for the Planters' Bank by the Bank of the United States, and after deducting, for the time the note was to run, a sum equal to the rate of six per cent. per annum, the residue was carried to the credit of the Planters' Bank, which it seems was then indebted to the Bank of the United States in a large sum of money. It is immaterial to the decision of the point now under consideration, whether the discount was for this purpose or not, for whether the \*proceeds were to [**353** be paid over, or carried to the general credit of the party, or applied to the payment of a pre-existing debt, the transaction was still in substance a discount, and therefore not within the prohibitions of the ninth rule of the charter. The district judge, therefore, who sat at the trial, was perfectly correct in refusing to charge the jury, as the counsel for Fleckner requested, "that the receiving the transfer of the said promissory note, and the payment of the amount in account as stated in the evidence, was a dealing in notes, and such dealing was contrary to the provisions of the act incorporating the said bank." And he was equally correct in charging the jury "that the acceptance of an indorsed note, in payment of a debt due, is not a trading in things prohibited by the act." And this was the whole of his charge on this point brought up by the exceptions.

It may be added upon this point that even if the bank had violated the rule above stated, by this particular transaction, it is not easy to perceive how that objection could be available in favor of Fleckner. The act has not pronounced that such a violation makes the transaction or contract *ipso facto* void; but has punished it by

a specific penalty of treble the value. It would therefore remain to be shown how, if the bank had a general right to discount notes, a contract not made void by the act itself could, on this account, be avoided by a party to the original contract, who was not a party to the subsequent transfer.

**354\*]** \*The next point arising on the record is whether the discount taken in this case was usurious. It is not pretended that interest was deducted for a greater length of time than the note had to run, or for more than at the rate of six per cent. per annum on the sum due by the note. The sole objection is the deduction of the interest from the amount of the note at the time it was discounted; and this, it is said, gives the bank at the rate of more than six per cent. upon the sum actually carried to the credit of the Planters' Bank. If a transaction of this sort is to be deemed usurious, the same principle must apply with equal force to bank discounts generally, for the practice is believed to be universal; and probably few, if any, charters contain an express provision authorizing, in terms, the deduction of the interest in advance upon making loans or discounts. It has always been supposed that an authority to discount, or make discounts, did, from the very force of the terms, necessarily include an authority to take the interest in advance. And this is not only the settled opinion among professional and commercial men, but stands approved by the soundest principles of legal construction. Indeed, we do not know in what other sense the word discount is to be interpreted. Even in England, where no statute authorizes bankers to make discounts, it has been solemnly adjudged that the taking of interest in advance by bankers, upon loans, in the ordinary course of business, is not usurious.

If, indeed, the law were otherwise, it would not follow that the transfer to the bank of the **355\*]** present \*note would be void, so that the maker of the note could set it up in his defense. The statutes of usury of the states, as well as of England, contain an express provision that usurious contracts shall be utterly void; and without such an enactment the contracts would be valid, at least in respect to persons who were strangers to the usury. The taking of interest by the bank beyond the sum authorized by the charter would, doubtless, be a violation of its charter, for which a remedy might be applied by the government; but as the act of Congress does not declare that it shall avoid the contract, it is not perceived how the original defendant could avail himself of this ground to defeat a recovery. The opinion of the district judge, that the discount taken in this case was not usurious, and would not defeat the right of recovery of the plaintiffs, was, therefore, unexceptionable in point of law.

The next point is whether the indorsement of the note by the cashier of the Planters' Bank, was sufficient to transfer the property to the original plaintiffs. The evidence on this point was that the board of directors of the Planters' Bank, on the 21st of October, 1818, passed a resolution "that the president and cashier be authorized to adopt the most effectual measures to liquidate, the soonest possible, the balance due to the office of discount and deposit in this city (New Orleans), as well as all others presently due, and Wheat. 8.

which may in the future become due to any banks of the city." The indorsement was made to the Bank of the United States on the 5th of September, \*1819; and before the [**356** commencement of this suit, viz., on the 27th of June, 1820, the board of directors of the Planters' Bank passed a resolution, to which the corporate seal was annexed, declaring that the two notes of the defendant (of which the present note was one) "were indorsed by the late cashier of the Planters' Bank, by authority of the president and directors, and delivered to the office of discount and deposit of the Bank of the United States, and the amount passed to the credit of the Planters' Bank, and that the said board of directors do hereby ratify and confirm said act of their said cashier, as the act of the president, directors and company of the Planters' Bank." The act incorporating the Planters' Bank has been examined by the Court; and as to the appointment of the cashier and the authority of the board of directors, it does not differ materially from acts incorporating other banks.

It authorizes the president and directors to appoint a cashier and other officers of the bank, and gives the president and directors, or a majority of them, "full power and authority to make all such rules and regulations for the government of the affairs and conducting the business of the said bank, as shall not be contrary to this act of incorporation." It contains no regulations as to the duties of the cashier, nor any express authority for the corporation to make by-laws. The whole business of the bank is confided entirely to \*the directors; and, [**357** of course, with them it would rest to fix the duties of the cashier or other officers. Whether they have in fact made any regulations on this subject does not appear; but the acts of the cashier, done in the ordinary course of the business actually confided to such an officer, may well be deemed *prima facie* evidence that they fell within the scope of his duty.

The first objection urged against this evidence is that the corporation could not authorize any act to be done by an agent, by a mere vote of the directors, but only by an appointment under its corporate seal. And the ancient doctrine of the common law, that a corporation can only act through the instrumentality of its common seal, has been relied upon for this purpose. Whatever may be the original correctness of this doctrine, as applied to corporations existing by the common law, in respect even to which it has been certainly broken in upon in modern times, it has no application to corporations created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a special body or board of directors. And the acts of such body or board, evidenced by a written vote, are as completely binding upon the corporation and as complete authority to their agents, as the most solemn acts done under the corporate seal. In respect to banks, from the very nature of their operations in discounting notes, in receiving deposits, in paying checks, and other ordinary and daily contracts, it would be impracticable to affix the corporate seal as a confirma-

1.—Act of 15th April, 1811; 1 Martin's Dig. 568, et seq.



**358**\*) tion of each individual act. And if a general authority for such purposes, under the corporate seal, would be binding upon the corporation because it is the mode prescribed by the common law, must not the like authority, exercised by agents appointed in the mode prescribed by the charter, and to whom it is exclusively given by the charter, be of as high and solemn a nature to bind the corporation? To suppose otherwise, is to suppose that the common law is superior to the legislative authority; and that the legislature cannot dispense with forms, or confer authorities, which the common law attaches to general corporations. Where corporations have no specific mode of acting prescribed, the common law mode of acting may be properly inferred; but every corporation created by statute may act as the statute prescribes, and the common law cannot control by implication that which the legislature has expressly sanctioned. Indeed, this very point has been repeatedly under the consideration of this court; and in the case of *The Bank of Columbia v. Patterson* (7 Cranch's Rep., 299), and *The Mechanics' Bank of Alexandria v. The Bank of Columbia* (5 Wheat. Rep., 326), principles were established which settle the point that the corporation may be bound by contracts not authorized or executed under its corporate seal, and by contracts made in the ordinary discharge of the official duty of its agents and officers. We have no doubt, therefore, upon the principles of the common law, that a vote of the board of directors of the **359**\*) *Planters' Bank* was as full authority for any act of this nature, to bind the corporation, as if it had passed under the common seal.

But it is to be recollected that the rights and authorities, and mode of transacting business, of the *Planters' Bank* depend, not upon the common law, but upon the charter of incorporation, and, where that is silent, upon the principles of interpretation and doctrines of the civil law which has been adopted in Louisiana. The civil code of that state declares, that as corporations cannot personally transact all that they have a right legally to do, wherefore it becomes necessary for every corporation to appoint some of their members, to whom they may intrust the direction and care of their affairs, under the name of mayor, president, syndics, directors, or others, according to the statutes and qualities of such corporations; it further declares that the attorneys in fact, or officers thus appointed, have their respective duties pointed out by their nomination, and exercise them according to the general regulations and particular statutes of the corporation; that these officers, by contracting, bind the communities to which they belong in such things as do not exceed the limits of the administration which is intrusted to them; and that if the powers of such officers have not been expressly fixed, they are regulated in the same manner as those of other mandatories.<sup>1</sup> This is all that is contained upon the subject now under consideration in the title of the code professing to treat of corporations, and their **360**\*) rights, powers and privileges. There is nothing which, in the slightest degree, points to the necessity of using a corporate seal in ap-

pointing agents, or authorizing corporate acts; and the fair inference deducible from the silence of the code is that it does not contemplate any such formality as essential to the validity of any official acts done by the officers of the corporation, and gives such acts a binding authority if evidenced by a vote. We may, then, dismiss this point, as to the necessity of the corporate seal, and proceed to consider another objection stated by the counsel for the original defendant. It is, that the cashier had no authority to make this transfer; that the resolution of the 21st of October, 1818, did not confer it originally, and that the subsequent ratification, by the resolution of the 27th of June, 1820, does not give any validity to an ineffectual and unauthorized transfer. We are very much inclined to think that the indorsement of notes, like the present, for the use of the bank, falls within the ordinary duties and rights belonging to the cashier of the bank, at least if his office be like that of similar institutions and his rights and duties are not otherwise restricted. The cashier is usually intrusted with all the funds of the bank, in cash, notes, bills, &c., to be used, from time to time, for the ordinary and extraordinary exigencies of the bank. He receives directly, or through the subordinate officers, all moneys and notes. He delivers up all discounted notes and other property, when payments have been duly made. He draws checks, from time to time, for **361** moneys, wherever the bank has deposits. In short, he is considered the executive officer, through whom, and by whom, the whole moneyed operations of the bank in paying or receiving debts, or discharging or transferring securities, are to be conducted. It does not seem too much, then, to infer, in the absence of all positive restrictions, that it is his duty as well to apply the negotiable funds as the moneyed capital of the bank, to discharge its debts and obligations. And under these circumstances the provision of the civil code already cited may be justly applied, that where his powers are not otherwise fixed, they are to be regulated as other mandatories, or rather, as other agents and factors. In point of practice, it is understood, and was so stated by one of the learned counsel, whose knowledge and experience upon this subject entitle his statement to the highest credit, that these duties are ordinarily performed by the cashiers of banks. And general convenience and policy would dictate this arrangement as most salutary to the interests of the banks. And it may be added that the very act done by the cashier, in this case, with the approbation of the bank, affords some presumption that it was not a usurped authority.

But waiving this consideration, let us attend to the actual features of this case upon the evidence. It is true that the resolution of the 21st of October does not directly, and in terms, authorize this transfer. It is not a resolution conferring a joint authority to the president and cashier, to indorse any note for the bank. It simply requires them to **362** take measures to liquidate the balance due to the original plaintiffs, and other banks. It is merely directory to them, and leaves them to decide as to the time, the mode and the means. As they were not restricted in these respects, they had a resulting right to employ any of the funds of

1.—Civil Code Louisiana, tit. 10, ch. 12, art. 13 and 14.

the bank for this purpose, and the negotiable paper of the bank was equally within the scope of the authority as the cash funds, if they should deem it proper to use them. They were at liberty to raise money for this purpose from the general funds, in any way which the ordinary course of business would justify, and which they should deem the most effectual measures. They might, therefore, agree that the cashier should indorse the note in question, and should procure it to be discounted at the Bank of the United States, and the proceeds to be carried to their credit. The presumption that this was an exercise of authority sanctioned by the president, as well as contemplated by the directors, is almost irresistibly proved by the fact that the Planters' Bank has never complained of, but ratified and approved the whole transaction. Some criticism has been employed on the meaning of the word "liquidate," in the resolution above stated. It is said to mean, not a payment, but an ascertainment of the debts of the bank. We think otherwise. Its ordinary sense, as given by lexicographers, is to clear away, to lessen debts. And in common parlance, especially among merchants, to liquidate a balance means to pay it; and this, we are satisfied, was the sense in which the words **363** were used in this resolution, and, consequently, that the appropriation of this note to the payment of the debt was within the scope of the authority given to the president and cashier.

But if this were susceptible of doubt, we think that the subsequent resolution of the directors, of the 27th of June, 1820, is conclusive. That resolution is not a mere ratification of the transfer, but declares that the indorsement was made by the cashier on the 4th of September, 1819, by authority of the president and directors. It is therefore a direct and positive acknowledgment of its original validity, binding on the bank; and if so, it is binding upon all other persons who have not an adverse interest. But if it were only a ratification, it would be equally decisive. No maxim is better settled in reason and law than the maxim *omnis ratihabitio retrotrahitur, et mandato priori equiparatur*; at all events, where it does not prejudice the rights of strangers. And the civil law does not, it is believed, differ from the common law on this subject.<sup>1</sup>

We think, then, that the transfer in this case was made upon sufficient authority; and that, therefore, the opinion of the district judge, affirming the same doctrine, was perfectly correct.

The next point made by the counsel for the original defendant, is that the writing of the words "*ne varietur*" upon the note, restricted its negotiability. It appeared in evidence that the note in question was given as a part consideration for the purchase money of a plantation and slaves, purchased by Fleckner of Nelder. The instrument of conveyance was drawn, executed and recorded before a notary public, according to the usage in countries governed by the civil law. The notary, upon the giving of this and other notes, for the purchase money by Fleckner, wrote on each note the words in question. There is not

the slightest evidence that, by the law or custom of Louisiana, the introduction of these words affects the negotiability of these notes; and, without proof of such law or usage, this court certainly cannot infer the existence of such an extraordinary and inconvenient doctrine. Upon the face of the transaction we should suppose that the words were written merely for the purpose of ascertaining the identity of the notes; and the statement at the bar that this is the explanation given by a very learned notary, confirms this supposition. The opinion of the district judge upon this point also, asserting that the words did not create any restriction upon the negotiability of the note, is, as far as we have any knowledge, a true exposition of the law.

It is unnecessary to pursue this subject farther.

*The judgment of the court below is affirmed, with interest and costs.*

JUDGMENT.—This cause came on to be heard on the transcript of the record of the District Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is adjudged and ordered, that the judgment of the said **\*365** District Court for the District of Louisiana, in this case, be, and the same is hereby affirmed with costs and damages, at the rate of eight per centum per annum, including interest on the amount of the judgment of the said District Court.

Cited—12 Wheat. 102; 9 Pet. 399; 14 Pet. 27; 6 How. 322; 19 How. 323; 21 How. 363; 5 Wall. 781; 10 Wall. 650; 2 Otto, 128; 2 Bond, 180; 9 Bank. Reg. 80; 1 Dill. 149; Pat. O. Gaz. 1882, p. 712.

#### [CHANCERY. LOCAL LAW.]

PHILIP NORBORNE NICHOLAS,  
ATTORNEY-GENERAL OF VIRGINIA,

v.

RICHARD C. ANDERSON,  
SURVEYOR, &c.

Under the act of assembly of Virginia, of October, 1783, for the better locating and surveying the lands given to the officers and soldiers on continental and state establishments, the state of Virginia has no right to call upon the person who was appointed one of the principal surveyors to account for the fees received by him, of one dollar for every hundred acres, on delivering the warrants, towards raising a fund for the purpose of supporting all contingent expenses; the bill filed by the Attorney-General of the state, to compel an account, not sufficiently averring the want of any proper private parties *in esse* to claim it.

*Quere*, Whether, in such a case, the assignees of the warrants, or a part of them, suing in behalf of the whole, could maintain a suit, in equity for an account.

APPEAL from the Circuit Court of Kentucky.

This was a bill in equity, filed by, and in the name of the Attorney-General of Virginia, under the authority of a special act of the legislature of that state, passed on the 15th of February, 1813. The bill charged **\*366** that the legislature of Virginia, by an act passed in October session, 1783, among other

1.—See Civil Code of Louisiana, tit. 3, ch. 6, s. 4. Wheat. 8.



things, provided that all persons holding officers' or soldiers' warrants by assignment, should pay down to the principal surveyor, at the time of the delivery of such warrants, one dollar for every hundred acres thereof, exclusive of the legal surveyor's fees, towards raising a fund for the purpose of paying all contingent expenses, &c., as will appear by reference to the act. That the deputations of officers, in pursuance of the said act, appointed two principal surveyors, one of whom was the defendant, and who immediately took upon himself the duties of the office, and exacted, in virtue of the act of 1783, from all the holders of the military warrants, the one dollar per one hundred acres above provided for. That the defendant had received a large sum of money in this way and had refused to account for the same to the complainant, and the agents and attorneys appointed for this purpose under the act of 1813. It further charged a misapplication of the money; and that the deputations of officers, under the act of 1783, did appoint superintendents, &c., but that most of them are long since dead, and the survivors have declined to act for many years. It proceeded to state the substance of the act of 1813, which authorized Colonel John Watts, the surviving superintendent, agent to settle with the defendant, and to receive the moneys remaining unappropriated in his hands, and if not paid, to sue for and recover the same, in the name of the Attorney-General of Virginia; and then **367**\*) charged \*that the defendant refused to account with Watts, and concluded with a prayer for an account, discovery and general relief. To this bill the defendant demurred; and the Circuit Court of Kentucky, upon argument of the demurrer, held it valid, and dismissed the bill. The cause was then brought by appeal to this Court.

The *Attorney-General*, for the plaintiff, argued that the state of Virginia still considered the defendant as an officer of that state, and he was so styled in the bill.<sup>1</sup> The demurrer also admitted the fact. The authority given to the superintendent has expired. The defendant, who, as surveyor, has received large sums of money, under an act of the legislature of Virginia, is now called on to account for it. A special act has also been passed to authorize the Attorney-General to proceed in equity, under which the present bill was filed. The argument on the part of the defendant must be that, the deputations of officer no longer existing, the money belongs to him. The state, however, does not claim this money as beneficially entitled to it, but as a trustee for those who are so entitled. She claims, in virtue of her sovereignty, a right to superintend the execution of the law by her own officer. And it is a familiar and well-established principle, that wherever a trust fails, there is a resulting trust in the grantor for the benefit of the *cestui que trusts*. So, if a corporation **368**\*) dowed for a particular purpose, \*which fails, the funds revert back to the grantor by whom it was created or endowed.<sup>2</sup>

*Mr. Talbot*, contra, insisted, (1) That the fees in question were for the exclusive benefit,

and belonged of right to the owners of the warrants, under whose control, or that of the superintendents, it must always remain; and that consequently the state of Virginia had no authority, such as that pretended to be exercised by the special act of 1813, to vest in the Attorney-General of that state, or any other person, a right to sue for the recovery of the sums of money supposed to be due from the defendant. The plaintiff has not shown any interest in the subject, entitling him to sue; nor can there be a resulting trust, where it is not shown that the original trustees are no longer *in esse*. (2) That the state of Virginia having, previous to the passage of the act, authorized the erection of the district of Kentucky into an independent state, within the limits of which the defendant resided, and where he was to perform his official duties, he was no longer accountable to the state of Virginia, from whom he had not even derived his original appointment; nor could that state, by any legislative act, impose upon him the duty of answering the complaint stated in the bill.

*Mr. Justice Story* delivered the opinion of the court, and after stating the case, proceeded as follows:

\*The question in this case is, whether [**369** the demurrer was well taken. In support of the decree, two points are stated at the bar: 1st, that the plaintiff has not shown any interest in the subject, entitling the state of Virginia to maintain the bill; 2d, that if there was originally any resulting authority to the state to compel an account, that power, by the erection of Kentucky into an independent state, devolved on the latter state, the defendant having been, and still continuing to be, a citizen of that state; and that it was not competent for the legislature of Virginia, in 1813, to pass a law which should bind a citizen of Kentucky to account for official duties which were not performed in virtue of any appointment made by the government of Virginia.

It is unnecessary to consider the last objection, because we are of opinion that the first is fatal to the bill. The act of 1783, for the better locating and surveying the lands given to the officers and soldiers on continental and state establishments, authorizes the deputations of officers, therein named, to appoint superintendents, in behalf of their respective lines, for the purpose of surveying the lands; and also to appoint two principal surveyors, and contract with them for their fees, &c. The third section of the act then provides, "that every person or persons holding officers' or soldiers' warrants, by assignment, shall pay down to the principal surveyors, at the time of the delivering such warrant or warrants, one dollar for every hundred acres thereof, exclusive of the legal surveyor's fees, towards raising a fund for the purpose \*of supporting all con- [**370** tinent expenses; or, at the option of such holder or holders, the same may be held up until the warrants of all the original grantees have been surveyed; the said surveyors to account for all the money so received, to such person or persons as the said deputations may direct." This is the clause upon which the bill is founded. And it is apparent, that in terms it

1.—Laws of Virg., Ch. Rev. 210.

2.—Co. Litt. 13 b; Godb. 211.

provides for an accountability, not to the state, but to persons to be appointed by the deputations of officers; to those for whose benefit the fund was raised, and was to be applied, and not to the state, which had no interest whatsoever in it. Even then, if, by the death of all the deputations of officers, without making any appointment, the authority intended by the act became incapable of being executed, there is no averment in the bill to that effect; on the contrary, the bill does admit that superintendents were appointed, of whom some are dead, and the survivors decline to act. If, therefore, under any circumstances, a resulting power could arise to the state to enforce an account, from the want of any proper private parties *in esse* to claim it, such a case is not stated by the bill. Whether, in such a case, the assignees of the warrants, or a part of them, suing in behalf of the whole, might not maintain a suit in equity for an account, is not for us now to determine. It is sufficient that the state of Virginia, by the very terms of the act, has delegated to other persons, whose existence is not denied, the authority to call the surveyors to account.

*Decree affirmed with costs.*

**371\*]** [\*INSTANCE COURT. NON-INTERCOURSE ACT.]

THE PITT. M'NUTT, *Claimant.*

The non-intercourse act of the 18th of April, 1818, c. 65, prohibits the coming of British vessels to the ports of the United States, from a British port closed against the commerce of the United States, either directly or through an open British port; but it does not prohibit the coming of such vessels from a British closed port, through a foreign port (not British), where the continuity of the voyage is fairly broken.

**A**PPEAL from the Circuit Court of Delaware.

This was an allegation of forfeiture in the District Court of Delaware, against the British sloop Pitt, under the non-intercourse act of April 18th, 1818, c. 65, the first section of which provides, "that, from and after the 30th of September next, the ports of the United States shall be and remained closed against every vessel, owned wholly, or in part, by a subject or subjects of His Britannic Majesty, coming, or arriving from, any port or place in a colony or territory of His Britannic Majesty, that is, or shall be, by the ordinary laws of navigation and trade, closed against vessels owned by citizens of the United States; and such vessel that, in the course of the voyage, shall have touched at, or cleared out from, any port or place in a colony or territory of Great Britain, which shall, or may, by the laws of navigation and trade aforesaid, be open to vessels owned by citizens of the United States, shall, nevertheless, be deemed to have **372\*]** \*come from the port or place in the colony or territory of Great Britain, closed as aforesaid against vessels owned by citizens of the United States, from which such vessel cleared out and sailed, before touching and clearing out from an intermediate and open Wheat. 8.

port or place as aforesaid; and every such vessel, so excluded from the ports of the United States, that shall enter, or attempt to enter, the same, in violation of this act, shall, with her tackle, apparel and furniture, together with the cargo on board such vessel, be forfeited to the United States."

The vessel in question, belonging to British subjects in the Island of Jamaica, departed from the port of Kingston, in that island, on the 16th of August, 1818, with a cargo belonging to the same owners, and a clearance for San Blas, and arrived at Old Providence, a small Spanish island on the coast of Honduras, on the 22d of the same month. At this island the cargo was discharged, and another taken in, consisting principally of Caraccas cocoa, fustic, and Spanish hides. She sailed from thence on the 6th of September following, with orders to come to anchor off the light-house at Cape Henlopen, the western cape of the Delaware Bay, and there wait instructions from the agents of the owners at Philadelphia. The vessel arrived off Fenwick's island, about 30 miles south of the Delaware, on the 29th of September, 1818, when a pilot boarded her, and delivered to the master written instructions from the agents of the owners, not to enter the Delaware, but to proceed to Halifax or Bermuda. But the master \*stated that his bread [\***373** and water were insufficient for the voyage, and proceeded off the capes of the Delaware to procure a supply of those articles, but was compelled (as alleged) by stress of weather, on the 1st of October, 1818, to put into the Whorekiln Roads opposite to Lewistown, where the vessel was seized by the officers of the revenue for a breach of the act before mentioned.

The District Court pronounced a decree of condemnation, which was reversed in the Circuit Court, and the cause was then brought by appeal to this court.

*Mr. Jones*, for the appellants, made the following points:

1. That the vessel, together with the cargo on board, was liable to forfeiture, as coming from Kingston, a closed and prohibited British port, within the true intent and meaning of the act of Congress; and that it is immaterial whether the voyage were direct or a circuitous and trading voyage; whether it were a passage upon the seas from one port to another or to several ports; in either case, Kingston was the *terminus a quo*. That she entered a port of the United States after the 30th of September, 1818, which consummated the forfeiture.

2. That the plea of distress, under which the entryway made, was wholly fictitious.

*Mr. Sergeant* and *Mr. M'Lane*, contra, argued, (1) That the act excluded a vessel from the ports of the United States only, 1st. When she is \*coming directly from a prohibited [\***374** port, in a colony or territory of Great Britain, to the United States; and 2d. When she is coming from such prohibited port, and touches at, and clears out from, a port in a colony or territory of Great Britain, which may be open to the vessels of the United States; and the voyage of the Pitt was of neither character. If she had sailed from Jamaica, which was closed against vessels of the United States, and had touched at, and cleared out from, any intermediate port in a colony or territory of



Great Britain, open to vessels of the United States, she would have been excluded by the law; but, having sailed from Jamaica to a Spanish port, and thence, with a new cargo, to the United States, conditionally, her voyage was not prohibited. The object of the navigation act was to deprive British vessels of an indirect trade with the United States, through certain of their own ports, which they might leave open for that purpose, but it never designed to interfere with the direct or indirect trade with Spain or her colonies.

The commercial convention concluded between the United States and Great Britain, on the 3d of July, 1815, did not extend to the British colonies in the West Indies; but, as to them, the navigation laws and colonial system of Great Britain continued in full force, which the United States were at liberty to counteract by any regulations in their power. It was for this purpose the act of Congress was passed. It contemplated a partial, not a general, non-intercourse system. It did not, of course, exclude the entrance of an English vessel, whether documented at home or in a colony, **375\*** ing \*with a cargo of British manufactures or colonial produce, from any other than a prohibited place, without having touched at, in the course of her voyage, any free port in the British colonies. Any article produced in the interdicted colony, may be imported into the United States, in a lawful way, from permitted ports in England, or her colonies, and, *a fortiori*, from the ports of any other foreign state. Such was the case of the Pitt; she cleared from Kingston for San Blas, and arrived at Old Providence, a Spanish island; there she discharged her cargo, took in another of a different character, and sailed thence to proceed to Philadelphia or Halifax, as circumstances might warrant. Her ultimate destination was not to be determined until her arrival off the coast of the United States, whither she could lawfully come. She was not on a direct voyage from a prohibited port to the United States, nor had she touched at and cleared out from a free port in the British colonies; nor was she even laden with a cargo of the growth or produce of the prohibited colonies.

2. The vessel did not enter, or attempt to enter, the ports of the United States, in violation of the act of Congress.

This is a penal law, and is therefore to be construed strictly. Its general scope and design is to prohibit the trade between the United States and the British ports, in British vessels; but where the entrance into the waters of the United States is not for the purpose of trade, or where it is compulsory and not voluntary, or where it is \*occasioned by necessity or stress of weather, it is not a violation of the law.<sup>1</sup> There was evidently no intention, in any part of the voyage, to violate the law; and every reasonable precaution was taken to conform to and respect its provisions. The object of the vessel, in coming off the coast of Delaware, was not to enter the waters of the United States, but to receive instructions as to her ulterior destination. This it was lawful to do. This court has decided, that even un-

der the rigorous non-intercourse system of 1809, a vessel from Great Britain had a right to lay off the coast of the United States to receive instructions from her owners in New York, and, if necessary, to drop anchor; and in case of a storm, to make a harbor, and if prevented by her crew from putting to sea again, might wait in the waters of the United States for provisions.<sup>2</sup> This is the case, therefore, of a vessel bound from a Spanish to a British port, accidentally forced into the waters of the United States, for lawful purposes, and there prevented, by the officers of the United States, from prosecuting her voyage. The testimony in the case proves the necessity to be sufficiently urgent to authorize the entrance of the Pitt into the waters of the United States, under all circumstances, without violating the law; and though the act of Congress designed to prohibit the trading of British vessels with the United States, from the colonies of Great Britain, it could not have \*intended to [**377** deny the ordinary offices of humanity to such vessels trading with other nations.

Mr. Jones, in reply, insisted that the case was one of a fraudulent evasion of the act. The moment the *onus probandi* is thrown on a claimant, who, in a revenue cause, sets up a plea of distress to excuse the infraction of the law, he must show by the clearest evidence, that the necessity, under the compulsion of which he professes to have acted, was real.<sup>3</sup> Entering the port, *infra fauces portus*, is not necessary; and there is more danger to the revenue laws in vessels coming into these by-places, than of their entering ports which are made such by statute. The present voyage is within the mischiefs intended to be guarded against by the prohibition of an indirect voyage, which are as great where the voyage is through a foreign port (not British) as through a British port not closed against our trade.

Mr. Justice JOHNSON delivered the opinion of the court:

This vessel, with her cargo, was condemned in the District Court of Delaware, for a violation of the act of April, 1818, entitled, "an act concerning navigation." That decree having been reversed in the Circuit Court, the cause is now brought up by appeal to this court.

Several grounds, in support of the latter adjudication, have been insisted on in the argument; but \*the court deem it unnecessary to advert to more than one, as that will dispose of the case finally, and fix the most important point which it presents, to wit, the correct construction of the first section of the act in question.

We are unanimously of opinion that the construction insisted on by the claimant's counsel is the only correct construction. It is perfectly clear that the case of this vessel is not literally comprised within the provisions of this act, for it only prohibits a voyage from a closed port of Great Britain to a port of the United States; and the purport and effect of the latter part of the first clause amounts to no more than a declaration that the continuity of

1.—The Concord, 9 Cranch's Rep. 387.

2.—The Fanny, 9 Cranch's Rep. 181.

3.—The Josefa Segunda, 5 Wheat. Rep. 354; The New York, 3 Wheat. Rep. 65.

such a voyage shall not be broken by the act of touching at, or clearing out from, any port of a colony or territory of Great Britain which may be open to American shipping.

But it has been contended, in behalf of the appellants, that although not within the letter, it is within the mischief intended to be obviated by the statute, and, therefore, subject to the penalty.

If by this argument it be intended to maintain that acts done in fraud of a law are acts in violation of the law, the principle may be conceded; but we fully concur in the views of the policy of this law, as explained by the claimant's counsel, and are satisfied that the latter provisions of the first clause were solely intended to guard against the effects which the permission of a general trade at one or more of the British colonial ports may have had in defeating the policy of the act altogether. The **379\*** legislature had not in view a fair \*unaffected trade through the ports of any other nation. It is obvious that attempts might have been made to evade the law by an affected trade through an intermediate port, and it is not to be supposed that this government, or its courts, would have failed to check such an attempt; but we are fully satisfied that this was not such a case. The evidence of fairness is full and unequivocal. There was time, even upon ordinary calculation, to have completed the voyage from Jamaica to Old Providence, and thence to Philadelphia, before the prohibition was by law to take effect, as is proved by the fact of her having arrived in the Delaware at a time which left it doubtful whether she was or was not within the period specified for its suspension. The cargo, too, was taken in at the port of Old Providence, and was of a description well known to belong to the trade of that port, from its having been the depot of captures, and probably of a covered trade from the continent of South America. Everything conspires to exempt the vessel from the charge of fraudulent intention, and, therefore, leaves no ground for the condemnation.

*Decree of the Circuit Court affirmed.*

Cited—5 Mason, 469, 472, 475.

### **380\*** [\*INSTANCE COURT. SLAVE TRADE ACT.]

#### THE MARY ANN. PLUMER, *Claimant.*

A libel of information, under the 9th section of the slave trade act of March 2d, 1807, c. 77, alleging that the vessel sailed from the ports of New York and Perth Amboy, without the captain's having delivered the manifests required by law to the col-

lector or surveyor of New York and Perth Amboy, is defective; the act requiring the manifest to be delivered to the collector or surveyor of a single port.

Under the same section, the libel must charge the vessel to be of the burthen of 40 tons or more. In general, it is sufficient to charge the offense in the words directing the forfeiture; but if the words are general, embracing a whole class of individual subjects, but must necessarily be so construed as to embrace only a subdivision of that class, the allegation must conform to the legislative sense and meaning.

Where the libel is so informal and defective that the court cannot enter up a decree upon it, and the evidence discloses a case of forfeiture, this court will not amend the libel itself, but will remand the cause to the court below, with directions to permit it to be amended.

### **A** PPEAL from the District Court of Louisiana.

This was an allegation of forfeiture in the court below, against the brig Mary Ann, for a violation of the act of March 2d, 1807, c. 77, prohibiting the importation of slaves into any port or place within the jurisdiction of the United States from and after the 1st day of January, 1808. The libel contained two counts: The first alleged that the brig Mary Ann, on the 10th of March, 1818, sailing coastwise from a port in the United States, to wit, the ports of New York and Perth Amboy, \*to a port or place within the jurisdic- [\***381** tion of the same, to wit, the port of New Orleans, and having on board certain negroes, mulattoes, or persons of color, for the purpose of transporting them to be sold or disposed of as slaves, or to be held to service or labor, to wit, No. 1, Lydia, &c., did, laden and destined as aforesaid, depart from the ports of New York and Perth Amboy, where she then was, without the captain or commander having first made out and subscribed duplicate manifests of every negro, mulatto, and person of color, on board said brig Mary Ann, and without having previously delivered the same to the collectors or surveyors of the ports of New York and Perth Amboy, and obtained a permit, in manner as required by the act of Congress, in such case made and provided, contrary to the form of said act. The second count was, for taking on board thirty-six negroes, mulattoes, or persons of color, previous to her arrival at her said port of destination, contrary to the act, &c.<sup>1</sup>

\*The court below condemned the [\***382** vessel, as liable to forfeiture under the act referred to, and the claimant appealed to this court.

\**Mr. D. B. Ogden*, for the appellant, [\***383** argued, (1) That the libel was insufficient in its allegations to sustain the sentence which had been rendered by the court below. It alleges, that the vessel sailed from the ports of New York and Perth Amboy, without the captain's

1.—The ninth section of the act, on which this proceeding was grounded, provides, "that the captain, master, or commander of any ship or vessel, of the burthen of forty tons or more, from and after the first day of January, one thousand eight hundred and eight, sailing coastwise, from any port in the United States to any port or place within the jurisdiction of the same, having on board any negro, mulatto, or person of color, for the purpose of transporting them, to be sold or disposed of as slaves, or to be held to service or labor, shall, previous to the departure of such ship or vessel, make out and subscribe duplicate manifests of every such negro, mulatto, or person of color, on Wheat. 8. U. S., Book 5.

board such ship or vessel, therein specifying the name and sex of each person, their age and stature, as near as may be, and the class to which they respectively belong, whether negro, mulatto, or person of color, with the name and place of residence of every owner or shipper of the same, and shall deliver such manifests to the collector of the port, if there be one, otherwise to the surveyor, before whom the captain, master, or commander, together with the owner, or shipper, shall severally swear or affirm, to the best of their knowledge and belief, that the persons therein specified were not imported or brought into the United States from and after the first day of January, one thousand eight



having made out the duplicate manifests required by law, and without his having previously delivered the same to the collectors or surveyors of the ports of New York and Perth Amboy. This is too vague and general. The act directs the manifest to be delivered to the collector or surveyor of a single port. (2) The libel alleges that the manifest required by law was not made out and delivered before the vessel sailed. But this allegation, as laid, is disproved by the manifest itself, which is in evidence; and if the prosecutor intended to have availed himself of any defects in the manifest, those defects ought to have been specified in the libel. It ought to have charged the not specifying the names, &c., if it was intended to rely on that objection. (3) The libel does not bring the case within the ninth section of the act, on which it is founded, by stating that the vessel was "of the burthen of forty tons, or more." The clause of forfeiture, in the latter part of that section, although it is in general terms, "any vessel," &c., ought, upon every just principle of interpretation, to be restricted to the vessels of forty tons or more, which are mentioned in the first part of the section. It is not sufficient to charge the offense in the very words of the statute, but the sense and effect of those words must be looked to, so as to **384\*** give the party notice of the precise offense meant to be charged.<sup>1</sup>

The *Attorney-General*, contra, insisted that this case did not at all resemble that of *The Hoppet*, where the ship and the innocent goods were held not to be forfeited, because there was no charge applicable to them, inasmuch as they were not alleged to belong to the owner of the prohibited articles—the French wines. This libel of information does not merely contain a general reference to the law; it gives the party precise notice of the charge, and secures him against any other prosecution for the same offense, which is all that can reasonably be required. In the case of *The Samuel*,<sup>2</sup> there was a more serious objection to the form of the allegation, which, however, did not prevail. Those technical niceties, which were once insisted on in criminal informations at common law, are not regarded in admiralty informations, which are modeled upon the more liberal and rational principles of the civil law. A libel may even allege the offense in the alternative of several facts, if each alternative constitute a substantive offense and cause of forfeiture.<sup>3</sup> Here it charges the non-delivery of a manifest, as required by the act, and the proof is a deliv-

ery of a manifest totally defective in every particular required by the act.

\**Mr. Chief Justice MARSHALL* delivered the opinion of the court, and, after stating the case, proceeded as follows:

Several objections have been made to the libel in this case. The first is, that it alleges the brig *Mary Ann* to have sailed from the ports of New York and Perth Amboy, without the captain's having first made out and subscribed the duplicate manifests required by law, and without his having previously delivered the same to the collectors or surveyors of the ports of New York and Perth Amboy, whereas the act of Congress directs the manifest to be delivered to the collector or surveyor of a single port.

This objection is thought fatal. The libel either requires more than the law requires, and charges, as the cause of forfeiture, that the manifest was not delivered to the collectors or surveyors of two ports, while the law directs that it should be delivered to the collector or surveyor only of one; or it is too vague and uncertain, in not alleging, with precision, the port where the offense was committed.

It is probable that the district attorney might be uncertain whether the brig sailed from the port of Perth Amboy or of New York; but this circumstance ought to produce no difficulty, since the offense might have been laid singly in each port, and charged expressly, in separate counts.

The second objection is this:

The libel charges that the manifest required by law was not made out and delivered before the vessel sailed.

\*The counsel contends that a manifest was delivered; that this charge is therefore disproved by the fact; and that if the libellant would avail himself of any defects in the manifest, they ought to be specified in the libel.

Whether a libel, charging, generally, that manifests have not been made out and delivered, as required by the act of Congress, would be considered as sufficiently disproved by producing a manifest not strictly conformable to law, is a question which belongs certainly to the merits of the cause, and which would deserve consideration on the inquiry how far the defectiveness of the manifest was put in issue by such a libel. But certainly no particular defect can be alleged when there is no manifest; and, of consequence, the allegation that the manifests required by law were not made

hundred and eight, and that, under the laws of the state, they are held to service or labor; whereupon the said collector or surveyor shall certify the same on the said manifests, one of which he shall return to the said captain, master, or commander, with a permit, specifying thereon the number, names, and general description of such persons, and authorizing him to proceed to the port of his destination. And if any ship or vessel, being laden and destined as aforesaid, shall depart from the port where she may then be, without the captain, master, or commander, having first made out and subscribed duplicate manifests of every negro, mulatto, and person of color, on board such ship or vessel as aforesaid, and without having previously delivered the same to the said collector or surveyor, and obtained a permit, in manner as herein required, or shall, previous to her arrival at the port of her destination, take on board any negro, mulatto, or person of color, other than those speci-

fied in the manifests, as aforesaid, every such ship or vessel, together with her tackle, apparel, and furniture, shall be forfeited to the use of the United States, and may be seized, prosecuted, and condemned, in any court of the United States having jurisdiction thereof: and the captain, master, or commander of every such ship or vessel, shall, moreover, forfeit, for every such negro, mulatto, or person of color, so transported, or taken on board, contrary to the provisions of this act, the sum of one thousand dollars, one moiety thereof to the United States, and the other moiety to the use of any person or persons who shall sue for and prosecute the same to effect."

1.—*The Hoppet*, 7 Cranch's Rep. 389.

2.—*1 Wheat*, Rep. 9.

3.—*The Caroline*, 7 Cranch's Rep. 496, and note of errata to the same volume in reporter's edition.

out, would be sufficient on a demurrer. They are, of course, sufficient for the present inquiry.

Another objection, on which the court has felt great difficulty is, that the libel does not state that the brig Mary Ann was "of the burthen of forty tons or more."

The ninth section of the act of Congress, on which this prosecution was founded, enacts that "the captain," &c., "of any ship or vessel of the burthen of forty tons or more," and "sailing coastwise," &c., "having on board any negro," &c., "shall, previous to the departure of such ship or vessel, make out and deliver duplicate manifests," &c. "And if any ship or vessel, being laden and destined as aforesaid, **387**"] shall depart from \*the port where she may then be, without the captain, master or commander, having first made out and subscribed duplicate manifests of every negro, mulatto and person of color on board such ship or vessel as aforesaid, and without having previously delivered the same to the said collector or surveyor and obtained a permit, in manner as herein required," "every such ship or vessel," &c., "shall be forfeited to the use of the United States."

The first step in this inquiry respects the extent of the clause of forfeiture. Does it comprehend vessels under forty tons burthen?

Although the language of the sentence is general, yet those rules for construing statutes, which are dictated by good sense and sanctioned by immemorial usage, which require that the intent of the legislature shall have effect, which intent is to be collected from the context, restrain, we think, the meaning of those terms to vessels of the burthen of forty tons and upwards.

The burthen enters essentially into the description of those vessels which can commit the offense prohibited by this section. Only vessels of forty tons or more are directed to make out and deliver the manifests prescribed by the act; and only such vessels could obtain the permit. The whole provision must have been intended for vessels of that burthen only, or the words would have been omitted. When, then, the act proceeds, after prescribing the duty, to punish the violation of it, the words, "any ship **388**"] or vessel," must be applied \*to those ships or vessels only to which the duty had been prescribed. We understand the clause in the same sense as if the word "such" had been introduced.

The construction of this section may receive some illustration from the eighth and the tenth.

The eighth section prohibits the commander of any ship or vessel of less burthen than forty tons to take on board any negro, mulatto or person of color, for the purposes described in the ninth section, on penalty of forfeiting, for every such negro, &c., the sum of \$800. But no forfeiture of the vessel is inflicted in this section. The words imposing forfeiture are, "and if any ship or vessel, being laden and destined as aforesaid." Now, the preceding part of the section, to which these words refer, is confined to vessels of forty tons and more. The act proceeds, "shall depart," "without the commander having first made out," &c., "duplicate manifests, as aforesaid;" showing that the general words, "any ship or vessel," meant those ships or vessels only which had

been directed to make out these manifests, and without having obtained a permit "in manner as herein prescribed." Now, only a vessel of forty tons and more could obtain the permit directed. The section proceeds to enact that every such ship or vessel shall be forfeited, and the commander thereof shall moreover forfeit, for every such negro, &c., the sum of one thousand dollars.

It is perfectly clear that this pecuniary penalty is co-extensive with the forfeiture of the vessel. But it cannot extend to the commanders of vessels \*under forty tons, because **\*389** the eighth section has inflicted on the commanders of such vessels, for the same offense, the penalty of eight hundred dollars.

The tenth section inflicts a penalty of \$10,000 on the commander who shall land negroes, &c., transported coastwise, without delivering to the collector the duplicate manifests prescribed by the ninth section. This section was unquestionably intended to be co-extensive with the ninth, and is, in terms, confined to vessels of the burthen of forty tons or more.

We think that the legislature has inflicted forfeiture for the failure to make out, subscribe and deliver a manifest on those vessels only which are directed to perform those acts; that is, only on vessels of the burthen of forty tons or more.

The question then recurs, is the omission to charge that the brig Mary Ann was a vessel of the burthen of forty tons or more, fatal to this libel?

It is, in general, true that it is sufficient for a libel to charge the offense in the very words which direct the forfeiture; but this proposition is not, we think, universally true. If the words which describe the subject of the law are general, embracing a whole class of individuals, but must necessarily be so construed as to embrace only a subdivision of that class, we think the charge in the libel ought to conform to the true sense and meaning of those words as used by the legislature. In this case, if the brig Mary Ann be a vessel under forty tons, her commander is liable to a pecuniary penalty, but the court cannot pronounce \*a sentence of forfeiture against **\*390** her. If she be of the burthen of forty tons or more, the commander is liable to a heavier pecuniary penalty, and the vessel is forfeited. The libel ought to inform the court that the vessel is of that description which may incur forfeiture.

We think, therefore, that the sentence of the District Court of Louisiana must be reversed for these defects in the libel; but as there is much reason to believe that the offense for which the forfeiture is claimed has been committed, the cause is remanded to the District Court of Louisiana, with directions to permit the libel to be amended.

*Decree reversed.*

DECREE.—This cause came on to be heard on the transcript of the record of the District Court of Louisiana, and was argued by counsel. On consideration whereof, this court is of opinion that the libel filed in the said cause is insufficient to sustain the sentence pronounced by the District Court, because it does not state, with sufficient certainty, the port in which the



offense charged therein was committed; and because, also, it does not allege that the brig Mary Ann was of the burthen of forty tons or more. This court is of opinion, that the sentence of the District Court of Louisiana, condemning the brig Mary Ann, her tackle, apparel and furniture, as forfeited to the United States, is erroneous, and doth reverse and annul the same; and this court doth further adjudge, order and decree, that the cause be remanded **391\*** to the Court of the United States for the District of Louisiana, with directions to allow the libel to be amended, and to take such further proceedings in the said cause as law and justice may require.

Cited—5 Wall. 69; 10 Wall. 420; 16 Wall. 431; 2 Otto, 233; 5 Otto, 586; 2 Curt. 268; Blatchf. & H. 166; 5 Cranch, C. C. 580.

#### [INSTANCE COURT. JURISDICTION.]

#### THE SARAH. HAZARD, *Claimant*.

In cases of seizures made on land under the revenue laws, the District Court proceeds as a court of common law, according to the course of the exchequer on informations *in rem*, and the trial of issues of fact is to be by jury; but in cases of seizures on waters navigable from the sea by vessels of ten or more tons burthen, it proceeds as an instance court of admiralty, by libel, and the trial is to be by the court.

A libel charging the seizure to have been made on water, when in fact it was made on land, will not support a verdict, and judgment or sentence thereon; but must be amended or dismissed. The two jurisdictions, and the proceedings under them, are to be kept entirely distinct.

#### APPEAL from the District Court of Louisiana.

This was a libel of information in the court below, against 422 casks of wine, imported in the brig Sarah, and afterwards seized at New Orleans, alleging a forfeiture to the United States by a false entry in the office of the collector of the port of New York, made for the benefit of drawback, on re-exportation, and stating that the seizure was made on waters **392\*** navigable from the sea by vessels of ten or more tons burthen. In the progress of the cause, it appeared that the seizure was in fact made on land; which fact was suggested to the court by the claimant's proctor, who moved that the cause should be tried by a jury. The court accordingly directed a jury, which was sworn, and found a verdict for the United States. On this verdict, a sentence of condemnation was pronounced by the court; and the cause was brought to this court by appeal on the part of the claimant.

Mr. D. B. Ogden, for the appellant, argued that the decree must be reversed, on account of the multiplied irregularities in the proceedings. It was, in the words of the judiciary act of 1789, c. 20, s. 9, "a civil cause of admiralty and maritime jurisdiction," according to the allegation of the libel, which stated the seizure to be on water. But it afterwards assumed the shape of an exchequer cause, and the trial was by jury, upon which the court rendered, not a judgment, but a sentence of condemnation. The district court is both a court of admiralty, and a court of common law. In the former branch of its

jurisdiction, it proceeds as an instance court, by a libel *in rem*, which is to be tried by the court;<sup>1</sup> in the latter, it proceeds, in revenue causes, by an information *in rem*, which is to be tried by the jury. \*The two juris- **393** dictions, and the proceedings under each, are to be kept entirely distinct. One consequence of blending them together is apparent. Where the seizure is on water, the claimant has a right to further proof in this court, under certain circumstances; which he will be entirely deprived of if the proceedings are to be according to the course of the common law, as the facts could not be reviewed by writ of error.

The *Attorney-General*, contra, insisted that a libel and an information were convertible terms. This was a libel of information, on which, as the seizure was on land, the party had a right to a trial by jury. That right was secured by the constitution, in all cases at common law, where the value in controversy exceeds twenty dollars; and in such cases, the facts tried by a jury cannot be re-examined, otherwise than according to the course of the common law.<sup>2</sup> Here an attempt is made to re-examine them by an appeal, and the cause may be dismissed from this court on that ground. Supposing the proceeding, however, to have been according to the course of the civil law, there is nothing to prevent the instance court of admiralty from trying facts by a jury, in the same manner as the court of chancery directs an issue. The *judices selecti*, of ancient Rome, were a sort of jury who acted under the superintendence of the prætor, as his assessors in the determination of questions of fact.

\*Mr. Chief Justice MARSHALL delivered **394** the opinion of the court, and after stating the case, proceeded as follows:

By the act constituting the judicial system of the United States, the district courts are courts both of common law and admiralty jurisdiction. In the trial of all cases of seizure, on land, the court sits as a court of common law. In cases of seizure made on waters navigable by vessels of ten tons burthen and upwards, the court sits as a court of admiralty. In all cases at common law, the trial must be by jury. In cases of admiralty and maritime jurisdiction, it has been settled, in the cases of *The Vengeance* (reported in 3 Dallas' Rep., 297), *The Sally* (in 2 Cranch's Rep., 406), and *The Betsy and Charlotte* (in 4 Cranch's Rep., 443), that the trial is to be by the court.

Although the two jurisdictions are vested in the same tribunal, they are as distinct from each other as if they were vested in different tribunals, and can no more be blended than a court of chancery with a court of common law.

The court for the Louisiana district, was sitting as a court of admiralty; and when it was shown that the seizure was made on land, its jurisdiction ceased. The libel ought to have been dismissed, or amended, by charging that the seizure was made on land.

The direction of a jury, in a case where the

1.—*The Vengeance*, 3 Dall. Rep. 297; *The Sally*, of Norfolk, 2 Cranch's Rep. 406; *The Betsy*, 4 Cranch's Rep. 443; *Whelan v. United States*, 7 Cranch's Rep. 112; *The Samuel*, 1 Wheat. Rep. 9.

2.—Amendments, art. 7.

libel charged a seizure on water, was irregular; and any proceeding of the court, as a court of admiralty, after the fact that the seizure was **395\*** made on land \*appeared, would have been a proceeding without jurisdiction.

The court felt some disposition to consider this empaneling of a jury, at the instance of the claimants, as amounting to a consent that the libel should stand amended; but, on reflection, that idea was rejected.

If this is considered as a case at common law, it would be necessary to dismiss this appeal, because the judgment could not be brought before this court but by writ of error. If it be considered as a case of admiralty jurisdiction, the sentence ought to be reversed, because it could not be pronounced by a court of admiralty, on a seizure made on land.

As the libel charges a seizure on water, it is thought most advisable to reverse all the proceedings to the libel, and to remand the cause to the District Court for farther proceedings, with directions to permit the libel to be amended.

DECREE.—This cause came on to be heard on the transcript of the record of the District Court of Louisiana, and was argued by counsel. On consideration whereof, it is decreed and ordered that the sentence of the District Court for the District of Louisiana, condemning the said 422 casks of wine as forfeited to the United States, be, and the same hereby is reversed and annulled. And it is further decreed and ordered that the cause be remanded to the said District Court of Louisiana, with directions to allow the libel in this case to be amended, and **396\*** to take such farther proceedings\* in the said cause as law and justice may require.<sup>1</sup>

1.—It is stated in the Life of Sir Leoline Jenkins, Vol. I., p. lxxxvii, that the admiralty in England had an original inherent jurisdiction of seizures for a breach of the navigation laws. See also his charge at the admiralty sessions for the cinque ports. Id. p. xcv, *et seq.* Charge at the Old Bailey Sessions. Again, Sir L. Jenkins says: "Nor is there anything granted to the lord admiral in this commission, but what he was possessed of long before these commissions grounded upon the statute of piracy were known; for, by the inquisition taken at Queenborough (49 Edw. III.), and by the statutes of the Black Book in the admiralty, much ancients than that inquisition, the transporting of prohibited goods particularly, and so of other offenses, was to be inquired of, and tried before the lord admiral; and in the articles usually given in charge at the admiralty sessions of England, to this day, the inquiry after transporters of prohibited goods is given in charge to the jury," &c. Id., Vol. II., p. 746. So, also, he says, in a letter to Sir Thomas Exton, July 2, 1675, "the course would be the same in every other case; for instance, in carrying prohibited goods, such as would confiscate the ship, where the judgment" (jurisdiction) "remains in the admiralty, as some you know do this day, though such judgments, in many cases, have been of late transferred to other courts by act of Parliament. Id., Vol. II., p. 708. But Sir James Marriot says, in the case of the Columbia, in 1782, that "the court of admiralty derives no jurisdiction in cases of revenue (appropriated by the common law to the court of exchequer), from the patent of its judge, or the ancient jurisdiction of the crown in the person of its lord high admiral. The first statute which places judgment of revenue in the plantations with the courts of admiralty, is the 12th of Charles II." 2 Bro. Civ. & Adm. Law, 492, Note 3. But in Great Britain, all appeals from the colonial vice-admiralty courts in those causes, are to the High Court of Admiralty, and not to the privy council, which is the appellate tribunal in other plantation causes. This point was determined in 1754, in the case of The Vrow Dorothea, before the High Court of Delegates, which was an appeal from the vice-ad-

Cited—9 Wheat. 429; 5 How. 455, 483, 486; 6 Wall. 764, 765, 766; 7 Wall. 462; 8 Wall. 26; 10 Wall. 543; 16 Wall. 165; 20 Wall. 113; 23 Wall. 164; 8 Otto, 376, 379; 9 Otto, 374; Blatchf. & H. 240; 2 Wood. & M. 109; 1 Bond, 590; 11 Bank. Reg. 107; 1 Paine, 437; 2 Abb. U. S. 138.

[\*INSTANCE COURT. NON-INTERCOURSE ACT.]  
[\*398]

## THE FRANCES AND ELIZA

v.

COATES, Claimant.

If a British ship come from a foreign port (not British) to a port of the United States, the continuity of the voyage is not broken, and the vessel is not liable to forfeiture, under the act of April 18th, 1818, c. 65, by touching at an intermediate British closed port, from necessity, and in order to procure provisions without trading there.

APPEAL from the District Court of Louisiana.

This was an allegation of forfeiture, against the British ship Frances and Eliza, in the court below, for a breach of the act of Congress, of the 18th of April, 1818, c. 65, the first section of which is in these words: "That from and after the 30th day of September next, the ports of the United States shall be and remain closed against every vessel, owned wholly, or in part, by a subject or subjects of His Britannic Majesty, coming or arriving from any port or place in a colony or territory of His Britannic Majesty, that is or shall be, by the ordinary

miralty judge of South Carolina, to \*the High [\*397] Court of Admiralty, and thence to the delegates. The appellate jurisdiction was contested upon the ground that prosecutions for the breach of the navigation, and other revenue laws, were not, in their nature, causes civil and maritime, and under the ordinary jurisdiction of the court of admiralty, but that it was a jurisdiction specially given to the vice-admiralty courts by stat. 7 and 8, Wm. III., c. 22, s. 6, which did not take any notice of the appellate jurisdiction of the High Court of Admiralty in such cases. The objection, however, was overruled by the delegates, and the determination has since received the unanimous concurrence of all the common law judges, on a reference to them from the privy council. 2 Rob. 246. Whether this jurisdiction of the colonial courts of vice-admiralty over seizures for a breach of the revenue laws was a part of the original admiralty jurisdiction, inherent in those courts, or was derived from the statutes of Charles II. and William III., it is certain that it was uniformly exercised by those courts in this country before the revolution; and such seizures upon water were very early determined by this court to be "cases of admiralty and maritime jurisdiction," within the meaning of those terms, as used in the constitution. But revenue seizures made on land have been uniformly left to their natural forum, and to their appropriate proceeding, which is an exchequer information *in rem*. These informations are not to be confounded with criminal informations at common law, or with an information of debt, which is the king's action of debt. They are civil proceedings *in rem*, and may be amended in the district court where they are commenced, or in the circuit court upon appeal. Anonymous, 1 Gallis. Rep. 22. But if merits appear in this court, and an amendment is wanted to make the allegations correspond to the proof, the amendment will not be made by this court, but the cause will be remanded, with directions to permit an amendment, and for further proceedings. The Edward, *ante*, Vol. I., p. 261-264; The Caroline, 7 Cranch's Rep., 496, 500; The Anne, Id. 570.



laws of navigation and trade, closed against vessels owned by citizens of the United States: and such vessel that, in the course of the voyage, shall have touched at, or cleared out from any port or place in a colony or territory of Great Britain, which shall or may be, by the ordinary laws of navigation and trade aforesaid, open to vessels owned by citizens of the **399\*** United States, shall, nevertheless, be deemed to have come from the port or place in the colony or territory of Great Britain closed, as aforesaid, against vessels owned by citizens of the United States, from which such vessel cleared out and sailed, before touching at and clearing out from an intermediate and open port or place as aforesaid; and every such vessel so excluded from the ports of the United States, that shall enter, or attempt to enter the same, in violation of this act, shall, with her tackle, apparel and furniture, together with the cargo on board such vessel, be forfeited to the United States."

The libel set forth, in the words of the act, that the Frances and Eliza was owned, wholly or in part, by subjects of His Britannic Majesty, and had come from the port of Falmouth, in the Island of Jamaica, a colony of His Britannic Majesty, which port was closed against citizens of the United States, and that she attempted to enter the port of New Orleans, in the United States, contrary to the provisions of the act before recited. To this libel, William Coates, master of the vessel, put in an answer denying the allegations in the libel, and claiming her as the property of Messrs. Herring & Richardson, of London. The material facts appearing on record, are these:

The Frances and Eliza sailed from London, in the month of February, 1819, for South America, having on board about 170 men for the service of the patriots. They arrived at Margarita in April, where the troops were disembarked. The vessel remained on the coast **400\*** of Margarita until November, \*when Captain Coates, by order of Mr. Gold, agent of the owners, took command of her. Captain Storm, who originally was the master, died on the passage, and was succeeded by the first mate, who died at Margarita. Captain Coates was directed by the agent to proceed with the Frances and Eliza to New Orleans, and there to procure freight to England or the continent. The death of the agent in the month of October, obliged him to remain some time at Margarita, to arrange his affairs in the best manner he could. Having a scanty supply of salt provisions, and being without fresh provisions, which were not to be had at Margarita, he did not sail from that port until the 8th of November. Proceeding on the voyage, he met an American schooner off the west end of St. Domingo, the master of which supplied him with a cask of beef. He had at this time 29 souls on board; and in the prosecution of the voyage, being off the coast of Falmouth, in the Island of Jamaica, the Frances and Eliza hove to, within four or five miles of the shore, and the master went into Falmouth in his boat for provisions, of which they were much in want, having only three days' supply on board, and to get his name indorsed on the ship's register. On the day following, he returned with a small supply, which being insufficient, he went

again the next morning, to endeavor to increase his stock, and succeeded in getting enough to enable him to proceed to New Orleans. That he landed one passenger at Falmouth, and took two from thence to New Orleans. The passenger landed was a physician \*who had sailed from London with the [**\*401** troops, but left the service in distress, and took his passage in the Frances and Eliza to New Orleans. When at Falmouth, he found his professional prospects there favorable, and determined to remain; and George Glover, a mariner, had leave of the agent of the owners to work his passage from Margarita to New Orleans. Upon leaving Margarita the master took with him a letter of recommendation from the agent of the owners, to R. D. Shepherd & Co., of New Orleans, which letter he presented on his arrival. When he had proceeded about half way up the Mississippi, the Frances and Eliza was hailed by an officer on board the revenue cutter, the answer was that she was from Jamaica; the captain being asked "what he was doing off Jamaica," answered, that he "went in to get his name indorsed on the register, and to obtain a freight for England;" to which the officer replied that he was under the necessity of seizing his vessel for a breach of the navigation act. He then said he went in to get provisions.

Upon this testimony the District Court condemned the vessel as forfeited to the United States, and the claimant appealed to this court.

*Mr. D. B. Ogden*, for the appellant, argued that the vessel, on sailing from Margarita, was really bound to New Orleans, and not to Falmouth, in the Island of Jamaica; that even supposing she was bound to Falmouth, it was a mere alternative destination, depending on her being able to procure freight there; and that, as she in \*fact embraced the [**\*402** other branch of the alternative and went to New Orleans, this must be considered as her original destination. That the real object of touching at Falmouth was to obtain provisions, of which she was in want, and not to procure freight; and that even if touching there for the purpose of procuring freight could bring her within the operation of the act, it was impossible to attribute that effect to a mere touching to get necessary provisions. That the act, according both to its policy and its true legal constructions, makes the clearing out and sailing from a prohibited port the criterion of illegality, and not the mere touching at it for whatever purpose; and that the touching at Falmouth, be its purpose what it might, did not make it the *terminus a quo* of the supposed illegal voyage, and consequently did not bring the vessel within the purview of the act. He also insisted on the defectiveness of the libel, in alleging an attempt to enter a port of the United States, when, in fact, the vessel did actually enter.

The *Attorney-General*, contra, insisted that the allegation was sufficient to support the sentence, in stating that the vessel "attempted to enter the port of New Orleans, contrary to the provisions of the act." &c. She did actually enter the river, and was attempting to get up to New Orleans. But an attempt is included, necessarily, within the actual entry, and the

prohibition is in the alternative, "shall enter, or attempt to enter." As to the British port from which the vessel came or arrived, the statute **403\*** does not require that the vessel should actually enter *infra fauces portus*, or that she should take a cargo on board in the closed port. To insist upon an actual entry of the harbor, or an actual trading, would make the law wholly ineffectual. The first destination of the vessel was evidently to Falmouth, there to seek for a cargo. Failing in that, her destination was changed to the United States. Such a course of navigation is manifestly against the policy of the law, which was intended to cut off all trade or intercommunication with the closed ports. The legislative intention must be regarded in the construction of laws of trade and revenue, and it is the habit of all maritime courts to regard it.<sup>1</sup>

*Mr. Harper*, for the appellant, in reply, insisted that the object of the act being to counteract the exclusive system of Great Britain in favor of her colonial monopoly, and the carrying trade connected with it, the circumstance that a vessel, in the course of a voyage not prohibited, touched at a prohibited port, was not sufficient to bring it within the mischief intended to be avoided. The language of the act is, "coming or arriving from a port," &c. This cannot apply to a port where she never entered. She never came to anchor, but stood on and off. The port of Falmouth could not, therefore, be regarded as the *terminus a quo* of the voyage. The prohibitions of this statute are not like the belligerent prohibitions to enter a blockaded port, and the intention of the master has **404\*** nothing to do with it. Even supposing that he went to seek for a cargo, he would not have brought it to the United States, and consequently did not go for the purpose of violating the law. The criterion of a breach of the law is, the clearing out and sailing from a closed port. The touching at an intermediate open port will not, certainly, break the continuity of a voyage which has been commenced at an interdicted port. But then it must have been actually commenced there; and, in this case, the *terminus a quo* was an innocent port.

*Mr. Justice DUVALL* delivered the opinion of the court, and after stating the facts, proceeded as follows:

In the argument of this cause, it was contended by the Attorney-General, that touching at Falmouth, with the intention to get freight there, and coming from that port to a port in the United States, brought the *Frances* and *Eliza* within the operation of the navigation act; it being the policy of the law to prevent all communication between vessels of the United States and British ports, which were closed against them. On behalf of the owners, it was contended that if the *Frances* and *Eliza* was bound to Falmouth, it was a mere alternative destination, depending on her being able to get freight there; and that as she in fact embraced the other branch of the alternative, and went to New Orleans, this must be considered as her original destination.

If the destination of the *Frances* and *Eliza*,

\*from *Margarita* to New Orleans was **[405]** real, not colorable; and if the touching at Falmouth was for the purpose of procuring provisions, of which the ship's crew were really in want, there was not a violation of the navigation act. The evidence in the cause seems to justify the conclusion that her real destination was to New Orleans. The order of Mr. Gold, agent of the owners, to the master, to take command of the vessel and proceed to New Orleans, and there to endeavor to procure a freight to England or the continent; the letter of recommendation from John Guya, merchant, to Messrs. R. D. Shepherd & Co., requesting their aid to the captain to accomplish that purpose, taken in connection with the circumstance of Glover's taking his passage in the vessel, with the leave of the agent, from *Margarita* to New Orleans, establish the fact in a satisfactory manner. It appears to have been understood, by all who had any concern with the vessel, that her destination was to New Orleans.

The *Frances* and *Eliza* did not enter the port of Falmouth, but stood off and on, four or five miles from the harbor, for a few days, during which time the master went on shore to get provisions, of which he was in want. Whether he endeavored to procure freight there, is a fact not ascertained by the testimony. It is certain that he did not obtain it, because it is admitted that the vessel sailed in ballast to New Orleans. His real object in going on shore at Falmouth, appears to have been to procure provisions, of which the ship's crew were much in want. And there is no evidence \*of any act done by him, which can be **[406]** construed into a breach of the act concerning navigation. The policy of that act, without doubt, was to counteract the British colonial system of navigation; to prevent British vessels from bringing British goods from the islands, in exclusion of vessels of the United States, and to place the vessels of the United States on a footing of reciprocity with British vessels. The system of equality was what was aimed at. The landing a passenger there, who usually got employment, and for that reason chose to remain on the island; and the taking in two passengers there, one of which was a boy and a relative, and the other taken, passage free, to New Orleans, are not deemed to be acts in contravention of the true construction of the navigation act.

The log-book was supposed to furnish some suspicious appearances, but, on examination, was found to contain no material fact which could govern in the decision.

It is the unanimous opinion of the court that the sentence of the District Court ought to be reversed, and that the property be restored to the claimant.

*Decree reversed.*

[\*INSTANCE COURT. REGISTRY ACT.] **[407]**  
THE LUMINARY.

L'AMOUREAUX, Claimant.

A case of forfeiture, under the 27th section of the registry of vessels act, of December 31, 1792, c. 146, for the fraudulent use of a register, by a vessel not actually entitled to the benefit of it.



Where the *onus probandi* is thrown on the claimant, in an instance or revenue cause, by a *prima facie* case made out on the part of the prosecutor, and the claimant fails to explain the difficulties of the case by the production of papers and other evidence which must be in his possession, or under his control, condemnation follows from the defects of testimony on the part of the claimant.

THIS cause was argued by *Mr. D. B. Ogden* for the appellant, and by the *Attorney-General* for the respondents.

*Mr. Justice Story* delivered the opinion of the court:

This is a libel for an asserted forfeiture, founded on a violation of the 27th section of the act of 31st of December, 1792, c. 146, concerning the registering and recording of ships and vessels.<sup>1</sup> The libel charges that the certificate of registry or record of the schooner, made to one John C. King, as owner, was fraudulently or knowingly used for the said schooner, **408\*** on a \*voyage at and from Baltimore to Cayenne, and at and before her subsequent arrival at New Orleans, she not being entitled to the benefit thereof. The claim put in a denial to the allegation of forfeiture; and upon a hearing in the District Court of Louisiana, a decree of condemnation was pronounced, upon which an appeal has been taken to this court.

The facts of the case are these: The vessel sailed from Baltimore about the first of August, 1820, under the command of a Captain James Smith, having on board a Mr. Desmoland, who was owner of a part of the cargo, and being bound on a voyage to Cayenne. A letter of instructions was delivered to the master by the ostensible owner, John C. King, which, among other things, after stating the voyage and ordering a delivery of the cargo agreeably to the bill of lading, contained the following directions: "Mr. Joseph Desmoland, who goes out in the vessel, will provide you with everything necessary for that purpose. You will, as soon as you are required by this gentleman, deliver to him the schooner Luminary, with her boats, &c., having care to retain in your possession the register, and every other paper. Mr. Desmoland will discharge the crew agreeably to the laws of the United States; and this also you will be careful to see executed, and bring your proof thereof. As to yourself, Mr. Desmoland is to pay you according to agreement, that is to say, your wages due, and two months extra, sixty dollars per month. The remainder of the crew to receive the like pay, that is to say, two **409\*** months \*extra wages." "You will, also, during the whole voyage, abide by, and follow the instructions of Mr. J. Desmoland."

It is difficult to read this letter, and not at once perceive that the voyage of the vessel was to end at Cayenne, and that her master and crew were to be discharged, the register separated from the vessel, and all the usual proceedings had which are contemplated by our laws, where a vessel is transferred or sold in a foreign port.

1.—Which provides "that if any certificate of registry, or record, shall be fraudulently or knowingly used for any ship or vessel not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or vessel shall be forfeited to the United States, with her tackle, apparel and furniture.

The vessel was thenceforth to be under the sole government and direction of Mr. Desmoland, and all authority and control of the former owner was to cease. The question naturally arises, how this could happen. If the vessel was transferred to Mr. Desmoland at Baltimore, it admits of an easy explanation. If she was to be sold by him at Cayenne, for the account of the former owner, as his agent, it would seem more consonant to the ordinary course of business that the instructions should have been conditional, and should have stated the expectation of sale, and have provided for the event of an unsuccessful attempt of this nature. Mr. Desmoland would have been referred to as an agent, for there could be no reason to conceal that agency. At all events, the true nature of the case lies within the privity of King and Desmoland; and they have the full means to explain the transaction, if it be innocent. There must exist in the possession of Mr. Desmoland the documents under which he derived title from King, whatever that title may be; and his silence, after the most ample opportunity for explanation, and for the production \*of [**410** these papers, affords a strong presumption, that, if produced, they would not aid his cause or prove his innocence.

The schooner arrived at Cayenne, and from thence she was despatched to New Orleans by Mr. Desmoland, under the command of the same master, with the same register, and was entered at New Orleans as an American vessel. Mr. L'Amoureux came on board her at Cayenne, and the laconic instructions given by Mr. Desmoland to the master, for the voyage, were in these words: "I hereby desire Captain James Smith, on his arrival at New Orleans, to deliver the schooner Luminary, with all her tackle, &c., to Francois L'Amoureux, who goes in the said vessel. Cayenne, 1st of October, 1820." At New Orleans, Mr. L'Amoureux claimed the vessel as his own, and desiring to procure for her a new register as an American vessel, he induced the master to execute a bill of sale to him of the schooner, for the sum of \$1,000, as agent of King, the former owner. The master, whose testimony is marked by the most studied attempts at evasion, admits that he had no authority from King to execute this bill of sale, that he never received any consideration for it, and that he gave it simply because Mr. Desmoland had given him the instructions above stated. He concludes (and the conclusion seems irresistible, if Mr. L'Amoureux ever obtained title to the property, and she is not now the concealed property of Mr. Desmoland) that he purchased her at Cayenne. Mr. L'Amoureux now claims her from the court as his own property, and as no \*other origin is shown to his [**411** title, if he have any, it must be referred to a purchase while at that port. In what manner the purchase was made, and how the contract of sale was executed, are not disclosed. Yet the materiality of a full disclosure cannot be denied. If Mr. Desmoland sold in the name, and as agent of King, the bill of sale would show it, and Mr. L'Amoureux would possess it among his muniments of title. If he sold as owner, then he must have become so before the schooner departed from Baltimore, and, of course, the vessel was sailing, during the whole voyage, under a register which she was not entitled to



use, and under circumstances which the law prohibited. Why, then, has Mr. L'Amoureux kept from the eyes of the court his title deeds? If they would not prove the justice of the suspicions, which the uncommon circumstances of the case necessarily excite, it seems incredible that they should be suppressed. The suppression, therefore, justifies the court in saying, that the United States have made out a *prima facie* case, and that the burthen of proof to rebut it rests on the claimant.

But it has been asked, what motive could Mr. Desmoland, or Mr. L'Amoureux, have for this disguise? If no adequate motive could be assigned, it would make it more difficult to account for the extraordinary posture of the case. But as human motives are often inscrutable, the inadequacy of any apparent cause ought not to outweigh very strong circumstantial evidence of a transfer. For if the facts are such that they cannot be accounted for rationally, except **412\*** upon the supposition of a \*sale, there would be equal difficulties in rejecting the inference of that fact. But Mr. Desmoland may have had many motives to conceal the purchase. We do not know his national character, or his private situation. He might have been embarrassed. His national character might have exposed him to capture, or detention, by ships of war. He might have wished to reserve the benefit of selling higher by selling abroad to an American citizen, who could thus re-invest her with the American character. But if Mr. Desmoland were a Frenchman, and meant to carry on a trade with New Orleans, and to preserve the apparent American ownership through the instrumentality of Mr. L'Amoureux (and this is not an unnatural presumption), then he had an adequate motive for the disguise. The act of the 15th of May, 1820, ch. 126, had imposed a very high tonnage duty on French vessels entering the ports of the United States; and as this act was meant as a countervailing measure, to press heavily on French shipping, it was an important object to evade the payment of that duty by sailing under the American flag. Now, Mr. L'Amoureux has not shown any title from Mr. Desmoland, and if he be the confidential agent of the latter, the whole proceeding is just what we should expect with a view to this object. The apparent residence of Mr. Desmoland at Cayenne fortifies this presumption. There would be no absurdity, though there would be illegality, in such conduct. The parties cannot complain, that the court, in a case left so bare **413\*** of \*all reasonable explanation, construe their silence into presumptive guilt.

*Mr. Justice JOHNSON* dissented. It is not pretended that the evidence in this case makes out any specific offense against this vessel. A number of circumstances are collected into one view, which, as the court do not understand, they consider as sanctioning an inference of guilt, and making out a cause of forfeiture. After giving to these circumstances the utmost weight that can be required, they can be made to amount to no more than the groundwork of a conclusion that the vessel had been sold to Desmoland at Baltimore, or L'Amoureux at Cayenne, and had afterwards sailed under her original American register.

*Argumenti gratia*, I will concede either fact; Wheat. 8.

and yet I maintain that this vessel cannot be condemned, either under the libel in its present form, or under the facts thus assumed.

It will be observed that there is no evidence whatever in the record relative to the national character of these individuals; or, if any, it goes to show that L'Amoureux was an American citizen. Now, it is certain that they must come within the description of citizens or aliens. But if citizens, the offense of owning a vessel, and not changing her register, is no cause of forfeiture; the 14th section of this act expressly imposes a pecuniary penalty for this offense. In order, then, to maintain this forfeiture, it became indispensable that these individuals, or at least one of them, \*should have been **414** made out in evidence to be an alien. No such fact is proved; and this alone is fatal to the purposes of this libel. Both facts, that of being an alien, and that of using the American register, must concur, in order to make out the offense.

2. But had the fact been established in evidence that one of these individuals was an alien, or even both of them, still I maintain that this condemnation ought to be reversed.

This libel, it will be observed, is preferred expressly under the provisions of the twenty-seventh section of the registering act. By that section it is enacted that "if any certificate of registry or record shall be fraudulently and knowingly used for any ship or vessel not then actually entitled to the benefit thereof, according to the true intent and meaning of this act, such ship or vessel shall be forfeited to the United States, with her tackle, apparel and furniture." The offense, as laid in the libel, is "that at and after the departure of this vessel on a voyage, on which, on or before the 1st day of August last, she sailed from the port of Baltimore to Cayenne, and at and before her subsequent arrival at New Orleans, from Cayenne aforesaid, which was, &c., a certain certificate of registry or record thereof, made and delivered in pursuance of an act of Congress, entitled, an act, &c., to a certain John C. King, of the city of Baltimore aforesaid, mariner, as the owner thereof, was fraudulently or knowingly used for the said vessel, she not then being, to wit, &c., actually entitled \*to the benefit **415** thereof according to the true intent of the said act."

To the decree of forfeiture, founded upon this libel, I entertain two objections, either of which is fatal. In the first place, the forfeiture made out in evidence is not one comprised within this 27th section. If Desmoland and L'Amoureux were American citizens, it has already been shown that no forfeiture attaches; but whether they be citizens or aliens, there exist in this act express provisions, by distinct sections, that embrace their cases. The 14th section relates to the case of an American citizen, and the 16th section to that of an alien or foreigner who shall cover his interest by an existing register, after a transfer of property in the vessel.

I cannot imagine upon what principle this libel can be maintained under the provisions of the 27th section, when the evidence brings the vessel directly within the 14th or 16th section, if it brings her within the penalties of the law at all. If the answer be, that although the case of this vessel be specifically legislated upon



in distinct sections, yet the 27th will cover the same ground and she may be libeled under either, my answer is, that the conclusion of law is directly the reverse. I ask no other evidence to show that this case was not intended to be comprised within the 27th section, than the fact that in another section of the same act, the case is specifically provided for. And such is unquestionably the truth. The 27th section was not intended to embrace the two offenses specifically provided for in the 14th and 16th **416\*** sections. \*These two sections create two substantive offenses, one or the other, or both of which, has been committed in this case, or no offense has been committed. Those offenses can arise only upon the event of a sale by the owner of a ship; but the registers of vessels that have been condemned, or captured, or wrecked, or otherwise destroyed, may be fraudulently used to cover other vessels of corresponding built; and these, and various other unidentified offenses, are those against which the 27th section was intended to operate.

And this leads me to my second objection to sustaining the condemnation under the allegations in this libel.

The allegations are too vague and general, and I would as soon sustain an indictment for piracy or murder, without any specific allegations, as a libel in which the offense is not set forth with such convenient certainty as to put the claimant on his defense. It is true that the same technical niceties are not necessary in a libel, as the wary precision of the common law requires in indictments; and the rule, as usually laid down, is generally correct, viz., that the offense may be laid in the words of the act. But it is obvious that this rule can only apply to those laws which create a substantive offense, not those which generalize and create offenses by classes. In the case before us, the offense created by either the 14th or 16th section of this law, may well be laid in the words of the law; each describes but one offense, and that must invariably be the same. Not so with the 27th section; under it, especially after the **417\*** present \*decision, a variety of offenses may be comprised, distinguishable both into classes and individuals. There cannot be a more striking illustration of these remarks, than that which this case presents; had the libel counted upon the 14th or 16th section, instead of the 27th, the claimant might, perhaps, have been prepared to meet those specific charges in a manner which would have explained those supposed ambiguities which have now proved fatal to him.

These observations have been made under the admission that the evidence in the cause countenanced the conclusion that a sale of this vessel had taken place before she left Baltimore. If she was not sold until she reached Cayenne, and was then sold, deliverable in New Orleans, there has been no offense committed. And even if sold to L'Amoureux, an American citizen, it was no cause of forfeiture. And this, I think, the evidence fully establishes.

There is one fact in the cause which must put down the idea of her having been sold before she left Baltimore. She took in a cargo at that place, and Desmoland was one of the shippers. Smith, whose testimony I see no just ground for impeaching, expressly swears that

the freight of this outward voyage was paid at Baltimore, to King, the American owner. Why he should receive, and Desmoland pay, the freight of this voyage, after she became the property of the latter, it is difficult to discover. Nor is it less difficult to imagine what purpose it would have answered for her to retain her original character on a voyage to Cayenne, \*upon the supposition that she had be- **418** come the property of a Frenchman. Nothing but heavy duties and alien disabilities could have resulted from it. So far from having a motive to retain the original American character, his interests would have dictated exactly the reverse. If a contract of sale did take place in Baltimore, the vessel deliverable in Cayenne, this was no offense against the registering act; the American citizen was entitled to use the American character to facilitate the sale; or enhance the price of his vessel, by a contract to deliver her at a particular port.

But it has been argued that by assuming the fact of the sale to Desmoland at Baltimore, all the evidence in the cause may be explained with consistency.

I have already stated some facts, from which I infer directly the reverse; facts which appear to me altogether inconsistent with the idea of a sale at Baltimore. But let it be admitted that such a consequence would follow from this hypothesis, and it is still necessary to go farther. No innocent solution of these supposed difficulties ought to be practicable, before the inference of guilt can fasten upon this vessel. Yet the most rational and simple solution of every difficulty will be found in another hypothesis, altogether innocent and probable. Let it be supposed that Desmoland was the agent of King, for the sale of this vessel at Cayenne, and every fact in the case will be fully reconciled with the idea of King's interest having still remained in him. It was, of course, that on a sale taking place at Cayenne, the captain \*should deliver her up to Desmoland's **419** order. That she was then to put off her American character is proved by the instructions to Smith to bring back the register; and as the captain and his crew would then be left to find their way home from a distant country, they were to receive two months extra wages.

I see nothing in all this but consistency and fairness. Everything shows that she was not to continue trading under her American character; and yet the prosecution of such an intent, and of such an intent alone, would have comported with the fraud now imputed to her, to wit, that of evading the newly-imposed tonnage duty on French vessels.

With regard to the supposed transfer to L'Amoureux, at Cayenne, I consider him as acknowledged in the record to be an American citizen; and I have already shown that an actual sale to him at Cayenne would not subject the vessel to forfeiture for making the voyage to New Orleans under her original register. It was impossible that he could take out a new register at Cayenne; and the apprehension of incurring some penalty or forfeiture would naturally suggest the measure, which Smith supposes was adopted, of purchasing under a stipulation to deliver the vessel at New Orleans. In the choice between guilt and innocence, it is the construction which he has a right to ex-

pect a court of justice will give of his conduct.

Nor can I perceive how any unfavorable inference can be drawn from the circumstance of **420\*** \*Smith's signing the bill of sale at New Orleans. It is obvious that King expected to sell the vessel in Cayenne, and to separate her thus from the American marine. There was, therefore, no order taken for effecting that formal transfer which was necessary, under our laws, for the purpose of perpetuating her American character. I see no reason why we should not rather suppose these men ignorant than fraudulent. They were imposing upon no one; and if the collector could be induced to issue a new register, upon Smith's bill of sale, it was all that L'Amoureux stood in need of, since King's letter to Smith, and Desmoland's order to deliver the vessel, were sufficient muniments of title, against all the rights of King. I see nothing but fairness in the transaction; and the necessities of L'Amoureux's business may have well rendered it inconvenient to wait until King could transmit a regular power of attorney from Baltimore.

It is asked, why did not Desmoland and others come forward with evidence to explain all these transactions? I confess it appears to me that the record supplies the answer. They could not have had a serious apprehension of the fate they have met with. It is enough for them to prove themselves innocent, after evidence of fraud has been produced against them. Thinking, as I clearly do, that upon the evidence before the court they were entitled to a decree in their favor, I cannot perceive that any further explanation of their conduct ought to have been required.

There was no sufficient allegation in the libel; **421\*** \*no evidence of a sale to Desmoland; none of his alien character, if there had been a sale to him; the sale to L'Amoureux did not subject her to forfeiture; and not a fact had been made out in evidence which was not even more reconcilable with a state of innocence than a state of guilt.

I confess I think it a hard case.

*Decree affirmed with costs.*

Cited—Deady, 644; 1 Bliss 493; 2 Biss. 49; Crabbe, 336; 1 Abb. U. S. 18; 6 Ben. 89.

NOTE.—That a trustee cannot purchase the trust property, see note to *Massie v. Watts*, 6 Cranch, 148. As to marriage settlements, see note to *Sexton v. Wheaton*, *ante*, 29.

Where trustee buys, with trust money, lands, and takes deed to himself, he who is entitled to the money may follow the same and consider the purchase as made for his use, and the purchaser as his trustee. *Phillips v. Crammond*, 2 Wash. C. C. 441.

When the grantee of land had, in an account between him and the grantor, made out subsequent to the deed, given the grantor credit for the proceeds of part of the land conveyed by the deed, this amounts to a declaration of trust, and repels the idea that the conveyance was absolute. *Prevost v. Gratz*, 1 Pet. C. C. 364.

Whatever profit is gained by a trustee by the sale of property held by him in trust, belongs to the *cestui que trust*. A purchase made by a trustee is voidable by the election of the *cestui que trust* if he is dissatisfied with it, and a reasonable time afterwards impeaches its validity. *Prevost v. Gratz*, 1 Pet. C. C. 364; *Stephens v. Beall*, 22 Wall. 329.

One who acquires trust property from the trustee with notice of the trust, and that the transfer is in *Wheat*, 8.

[CHANCERY. TRUST. JURISDICTION.]

HUGH WALLACE WORMLEY, THOMAS STRODE, RICHARD VEITCH, DAVID CASTLEMAN, AND CHARLES M'CORMICK, *Appellants*,

v.

MARY WORMLEY, Wife of Hugh Wallace Wormley, by GEORGE F. STROTHER, her next friend, and JOHN S. WORMLEY, MARY W. WORMLEY, JANE B. WORMLEY, and ANNE B. WORMLEY, infant children of the said MARY and HUGH WALLACE, by the said STROTHER, their next friend, *Respondents*.

A trustee cannot purchase, or acquire by exchange, the trust property.

Where the trustee in a marriage settlement has a power to sell, and re-invest the trust property, whenever, in his opinion, the purchase money may be laid out advantageously for the *cestui que trusts*, that opinion must be fairly and honestly exercised, and the sale will be void where he appears to have been influenced by private and selfish interests, and the sale is for an inadequate price.

*Quære*, How far a *bonæ fidei* purchaser, without notice of the breach \*ot trust, in such a case, [\*422] is bound to see to the application of the purchase money.

Where the purchase money is to be re-invested upon trusts that require time and discretion, or the acts of sale and re-investment are contemplated to be at a distance from each other, the purchaser is not bound to look to the application of the purchase money.

But wherever the purchaser is affected with notice of the facts, which in law constitute the breach of trust, the sale is void as to him; and a mere general denial of all knowledge of fraud will not avail him if the transaction is such as a court of equity cannot sanction.

A *bonæ fidei* purchaser, without notice, to be entitled to protection, must be so, not only at the time of the contract or conveyance, but until the purchase money is actually paid.

This court will not suffer its jurisdiction, in an equity cause, to be ousted, by the circumstance of the joinder or non-joinder of merely formal parties, who are not entitled to sue, or liable to be sued, in the United States courts.

APPEAL from the Circuit Court of Virginia.

The original bill was filed by the respondents, Mary Wormley, and her infant children,

violation of it, is deemed, in equity, to take it as trustee, and will be held, as respects that property, to an execution of the trust. *Wilson v. Mason*, 1 Cranch. 45; *Mech. Bk. v. Seton*, 1 Pet. 229; *McCall v. Harrison*, 1 Brock. Marsh. 330.

Whenever the trustee has, in violation of his trust, transferred the trust subject, by sale or otherwise, to a third person, the *cestui que trust* may follow the property into the hands of such third person, unless he is a *bona fide* purchaser for a valuable consideration, without notice. 2 Sugd. on Vend. 148; 2 Story's Eq. s. 1258; 1 Atk. 59; *Ambler*, 409; 10 Ves. 511; 2 Mylne & K. 655; 3 Maule & S. 562; *Oliver v. Platt*, 3 How. 333, 401, affirming S. C. 3 McLean, 27; *Phillips v. Crammond*, 2 Wash. C. C. 441.

A sale of trust property under a judgment or decree of which the *cestui que trust* had no notice, and which was procured by fraudulent collusion with the trustee, does not conclude the *cestui que trust* from asserting his title to the property against the trustee or any purchaser with notice. *Oliver v. Platt*, 3 How. 333, 407; affirming S. C. 3 McLean, 27; *Baker v. Root*, 4 McLean, 572.

Wherever one party purchases property by direction of another, he is deemed to purchase as a



suing by their next friend, against the appellant, Hugh W. Wormley, her husband, Thomas Strode, as trustee, Richard Veitch, as original purchaser, and David Castleman and Charles McCormick, as mesne purchasers from Veitch of the trust property, for the purpose of enforcing the trusts of a marriage settlement, and obtaining an account, and other equitable relief. The bill charged the sale to have been a breach of the trusts, and that the purchasers had notice.

In contemplation of a marriage between Hugh W. Wormley and Mary Wormley (then Strode), an indenture of three parts was executed on the 5th of August, 1807, by way of marriage settlement, to which the husband and wife, and Thomas Strode, her brother, as trustee, were **423**\*] parties. \*The indenture, after reciting the intended marriage, in case it shall take effect, and in bar of dower and jointure, &c., &c., conveys all the real and personal estate held by Hugh W. Wormley, under a certain indenture specified in the deed, as his paternal inheritance, to Thomas Strode, in fee, upon the following trusts, viz., "for the use, benefit and emolument of the said Mary and her children, if any she have, until the decease of her intended husband, and then, if she should be the longest liver, until the children should respectively arrive at legal maturity, at which time each individual of them is to receive his equal dividend, &c., leaving at least one full third part of the estate, &c., in her possession, for and during her natural life; then, on her decease, the landed part of the said one-third to be divided among the children, &c., and the personal property, &c., according to the will, &c., of the said Mary, at her decease. But if the said Mary should depart this life before the decease of the said Hugh W. Wormley, then he is to enjoy the whole benefits, emoluments and profits, during his natural life, then to be divided amongst said W.'s children, as he by will shall see cause to direct, and then this trust, so far as relates to T. Strode, to end, &c.; and so, in like manner, should the said Mary depart this life without issue, then this trust to end, &c. But should Wormley depart this life before the said Mary, and leave no issue, then the said Mary to have and enjoy the whole of said estate for and during her natural \*life, and then to descend to the heirs of the said W., or as his will relative thereto may provide."

Then follows this clause: "And it is further covenanted, &c., that whenever, in the opinion of the said Thomas Strode, the said landed property can be sold and conveyed, and the money arising from the sale thereof be laid out

in the purchase of other lands, advantageously for those concerned and interested therein, that then, and in that case, the said Thomas Strode is hereby authorized, &c., to sell, and by proper deeds of writing to convey the same; and the lands so purchased shall be in every respect subject to all the provisions, uses, trusts and contingencies, as those were by him sold and conveyed. And it is further understood by the parties, that the said H. W. W., under leave of the said Thomas Strode, his heirs and assigns, shall occupy and enjoy the hereby conveyed estate, real and personal, and the issues and profits thereof, for and during the term of his natural life, and after that, the said estate to be divided agreeably to the foregoing contingencies."

The property conveyed by the indenture consisted of about 350 acres of land, situate in Frederick county, in Virginia. The marriage took effect, and there are now four children by the marriage. For a short time after the marriage, Wormley and his wife resided on the Frederick lands; and a negotiation was then entered into by Wormley and the trustee, for the exchange of the Frederick lands for lands of the trustee, in the county of Fauquier. Various reasons were suggested \*for this [**425** exchange, the wishes of friends, the proximity to the trustee and the other relations for the wife and the superior accommodations of the family of Wormley. The negotiation took effect; but no deed of conveyance or covenant of agreement, recognizing the exchange, was ever made by Wormley; and no conveyance of any sort, or declaration of trust, substituting the Fauquier lands for those in the marriage settlement, was ever executed by the trustee. Wormley and his family, however, removed to the Fauquier lands, and resided on them for some time. During this residence, viz., on the 16th of September, 1810, the trustee sold the Frederick lands by an indenture, to the defendant, Veitch, for the sum of five thousand five hundred dollars; and to this conveyance Wormley, for the purpose of signifying his approbation of the sale, became a party. The circumstances of this transaction were as follows: The trustee had become the owner of a tract of land in Culpeper county, in Virginia, subject to a mortgage to Veitch and one Thompson, upon which more than \$3,000 were then due, and a foreclosure had taken place. To discharge this debt, and relieve the Culpeper estate, was a leading object of the sale, and so much of the trust money as was necessary for the extinguishment of this debt, was applied for this purpose. At the same time, Strode, as collateral security to Veitch for the performance of the covenant of

trustee for the other, upon the payment of any money advanced in making the purchase. *Rothwell v. Dewees*, 2 Black. 613; *Baker v. Whiting*, 3 Sumn. 475; *Phillips v. Crammond*, 2 Wash. C. C. 441.

Where an attorney purchased property, on an execution issued by him, on a judgment in which he was the attorney for the party recovering; held, that a trust was thereby created for the benefit of his client, the judgment creditor. *Stockton v. Ford*, 11 How. 232.

A trustee is disqualified from purchasing or acquiring an interest adverse to that of his *cestui que trust* in the trust property. *Walden v. Bodley*, 14 Pet. 156; *Prevost v. Gratz*, Pet. C. C. 364; *Lenox v. Notrebe*, Hempst. 251; *Miehoud v. Girod*, 4 How. 503; *Sloo v. Law*, 3 Blatchf. 459; *Matter of Thorp. Davies*, 290.

Where a person acquires the legal estate in real property as the agent of another, or upon a trust and confidence that he will acquire it for the benefit of such other, equity will imply a trust in favor of the latter, and compel the purchaser to account to him accordingly. Such a transaction is not within the statute of frauds, and therefore the trust need not be in writing. *Manning v. Hayden*, 5 Sawyer, 360; *Church v. Kidd*, 3 Hun. N. Y. 254; *Ryan v. Dox*, 34 N. Y. 307; *Moyer v. Moyer*, 21 Hun. N. Y. 67.

A purchaser of trust estate, with knowledge of the trust, is subject to all the duties in respect to the same which rested upon the trustee from whom he purchased. *Gautier v. Doug. Man. Co.*, 13 Hun. N. Y. 514; *Williams v. Thorn*, 11 Paige, 459; *Amory v. Lawrence*, 3 Cliff. 323.

general warranty contained in the indenture, executed a mortgage upon the Fauquier lands, then in the possession of Wormley. In **426\*** 1811, Veitch conveyed the Frederick lands to the defendants, Castleman and M'Cormick, for a large pecuniary consideration, in pursuance of a previous agreement, and by the same deed made an equitable assignment of the mortgage on the Fauquier lands. About this time, Wormley having become dissatisfied with the Fauquier lands, a negotiation took place for his removal to some lands of the trustee in Kentucky; and upon that occasion a conditional agreement was entered into between the trustee and Wormley, for the purchase of a part of the Kentucky lands, in lieu of the Fauquier lands, at a stipulated price, if Wormley should, after his removal there, be satisfied with them. Wormley accordingly removed to Kentucky with his family; but becoming dissatisfied with the Kentucky lands, the agreement was never carried into effect. Afterwards, in April, 1813, Castleman and M'Cormick, by deed, released the mortgage on the Fauquier lands, in consideration that Veitch would enter into a general covenant of warranty to them of the Frederick lands; and on the same day the trustee executed a deed of trust to one Daniel Lee, subjecting the Kentucky lands to a lien as security for the warranty in the conveyance of the Frederick lands, and subject to that lien, to the trusts of the marriage settlement, if Wormley should accept these lands, reserving, however, to himself, a right to substitute any other lands upon which to charge the trusts of the marriage settlement. At this period the dissatisfaction of Wormley was known to all the parties, and Wormley was neither a party, nor assented to **427\*** the deed, and Castleman and M'Cormick had not paid the purchase money. In August, 1813, the trustee sold the Fauquier lands to certain persons by the name of Grimmer and Mundell, without making any other provision for the trusts of the marriage settlement.

At the hearing, the court below pronounced a decree declaring "that the exchange of land made between the defendants, Hugh W. Wormley and Thomas Strode, is not valid in equity, and that the defendant, Thomas Strode, has committed a breach of trust in selling the land conveyed to him by the deed of the 5th of August, 1807, for purposes not warranted by that deed, in misapplying the money produced by the said sale, and in failing to settle other lands to the same trusts as were created by the said deed; and that the defendants, Richard Veitch, David Castleman, and Charles M'Cormick, are purchasers with notice of the facts which constitute the breach of trust committed by the said Thomas Strode, and are, therefore, in equity, considered as trustees; and that the defendants, David Castleman and Charles M'Cormick, do hold the land conveyed, &c., charged with the trusts in the said deed mentioned, until a court of equity shall decree a conveyance thereof. The court is further of opinion that the said defendants are severally accountable for the rents and profits arising out of the said trust property while in possession thereof, and that the said defendants, Castleman and M'Cormick, are entitled to the amount of the incumbrances from which the land has been relieved by any of

\*the defendants, and of the value of the **428** permanent improvements made thereon, and of the advances which have been made to the said Hugh Wallace Wormley by any of the defendants, for the support of his family; the said advances to be credited against the rents and profits, and the value of the said permanent improvements, and of the incumbrances which have been discharged, and which may not be abated by the rents and profits, to be charged on the land itself; and it is referred to one of the commissioners of the court to take accounts according to their directions, and report," &c.

The court, afterwards, partially confirmed the report which had been made, reserving some questions for its future decision: "And it being represented on the part of the plaintiffs that they have removed to the state of Kentucky, and are about removing to the state of Mississippi, and that it will be highly advantageous to them to sell the trust estate, and to invest the proceeds of sale in other lands in the state of Mississippi to the uses and trusts expressed in the deed of August 5th, 1807; and it appearing, also, that there is no fund other than the trust estate from which the sum due to the defendants, Castleman and M'Cormick, can be drawn, this court is further of opinion that the said trust estate ought to be sold, and the proceeds of sale, after paying the sum due to the defendants, Castleman and M'Cormick, invested in other lands in the state of Mississippi, to the same uses and trusts," &c. The sale, therefore, was decreed; commissioners were appointed to make it; the **429** proceeds to be first applied in satisfaction of the sums found due by the commissioner's report, and the balance to be paid to the trustee, to be invested by him in lands lying in Mississippi, "for which he shall take a conveyance to himself in trust, for the uses and trusts expressed in the deed of 5th of August, 1807, &c., and the court being of opinion that Thomas Strode is an unfit person to remain the trustee of the plaintiff, doth further order, that he shall no longer act in that character," &c., and proceed to appoint another in his stead, of whom bond and surety was required.

So much of this last decretal order as directs a sale of the property therein mentioned, was suspended until the further order of the court, "unless the said David Castleman and Charles M'Cormick shall sign and deliver to the marshal, or his deputy, who is directed to make the said sale, an instrument of writing, declaring that should the decree rendered in this cause be reversed in whole or in part, they will not claim restitution of the lands sold, but will consent to receive in lieu thereof the money for which the same may be sold; which instrument of writing the marshal is directed to receive, and to file among the papers in the cause in this court."

So much of the decretal order as directs the land to be sold to the highest bidder, was subsequently set aside, and until the appointment of a trustee, the marshal directed to receive propositions for the land, and to report the same to the court, which would give such further directions respecting the sale of the said land as shall then appear **430** proper. Whereupon, the defendants appealed from all the decrees pronounced in the cause.



*Mr. Jones*, for the appellants, argued, 1. That in point of fact, all the arrangements of the trustee for exchanging and disposing of the trust estate, were not only fair and honest, but a discreet exercise of his authority; highly beneficial to the *cestui que trusts*, and entirely to their advantage.

2. That whether they were so or not was no concern of the purchasers under the trustee; he being invested, by the terms of the trust, with a clear discretion, which invited all the world to treat with him, as with one having a complete authority to act upon his own opinion of what was discreet and expedient in the administration of the trust, and not as with one executing a defined duty or authority, either purely ministerial, or mixed with a limited discretion over the subordinate details.

3. That the selling of the trust estate, and the investing of the proceeds, were, in their nature, and by the terms of the deed, to be two distinct substantive acts in the exercise of the discretionary authority vested in the trustee; and were not to be done *uno flatu*; therefore, the purchaser claiming a title under one consummate act in the exercise of that discretion, was not responsible for any subsequent indiscretion or fraud of the trustee, in the progressive execution of the trust. Wherever the deed confers an immediate power of sale, for a purpose which cannot be immediately defined and ascertained, but must be postponed for any **431**\*] \*period of time, however short, the purchaser is not bound to see to the application of the purchase money.<sup>1</sup> It is observed by Sir W. Grant, master of the rolls, that the doctrine, binding the purchaser to see to the application of the money, has been carried farther than any sound equitable principle will warrant.<sup>2</sup> But it has never been extended to a case like the present, where the mode in which the money is to be invested depends upon a variety of contingent and complicated circumstances, which are submitted to the judgment and discretion of the trustee. Where the trust is to pay debts and legacies, the purchaser is discharged by payment to a trustee.<sup>3</sup>

But it might, perhaps, be said that the authority to sell is combined with that to apply the proceeds. But he contended that they were entirely independent and unconnected. They might indeed be associated in the mind of the trustee, but that remaining a secret in his breast could not affect an innocent purchaser with the consequences of any subsequent error or fraud of the trustee. Where, indeed, the *cestui que trust* is no party to the sale, nor to the original deed creating the trust, there may be more room for the application of the doctrine, as to the purchaser seeing to the application of the money. Such are deeds of assignment for the payment of debts, in which the creditors are frequently not, originally, parties. \*And in the case cited, the master of the rolls says that the circumstance of the creditors coming in and

executing the deed, consummates the authority of the trustee, to give a valid discharge for the purchase money of an estate sold by him.<sup>4</sup> But here the *cestui que trusts* are not only parties to the deed creating the trust, but assenting to the very transaction now complained of.

4. So that if the mere discretion of the trustee be not competent, *per se*, strictly to justify the purchasers under him, and to protect their title, still the peculiar circumstances of this case give them a superinduced equity against the claims of the *cestui que trusts*. 1st. The previous consultation and deliberate approbation of the respective parents, and other disinterested friends of such of the *cestui que trusts* as were *sui juris*. 2d. The agency of those who were *sui juris*, in soliciting and recommending the measure in question, their active co-operation in it, and their subsequent acquiescence. 3d. The approbation of the parents of such of the *cestui que trusts* as were not *sui juris*. These circumstances would have afforded sufficient evidence of the expediency of the measure, to have induced a court of chancery, upon the application of the parties, to have sanctioned and directed it. Consequently, all the present plaintiffs are divested of every pretension to equitable relief; and so far as the claim is urged for the advantage of those who were *sui juris*, and who, by their active co-operation and implicit acquiescence encouraged \*and promoted the sale, it [**433** must be repudiated by the court as inequitable and unconscientious. Wormley and wife were the efficient *cestui que trusts*. The equitable proprietary interest was in them. They were both *sui juris*. A married woman is considered as a *feme sole* as to property settled to her use, whether in possession or reversion, and she may dispose of it, unless particularly restrained by the terms of the settlement.<sup>5</sup>

There is no such universal, inflexible rule, as that the trustee cannot change the trust estate.<sup>6</sup>

If he had a discretionary power, it signifies not how the payment was made, and whether a credit was given or not. Nor is this such a purchase, by the trustee himself, as will invalidate the sale in respect to *bonæ fidei* purchasers.<sup>7</sup> It is not a sale by himself to himself. He does not unite both the characters of vendor and vendee, and, therefore, it does not involve the mischiefs meant to be corrected by the rule. The consent of the *cestui que trusts* who are *sui juris*, confirms the sale, at least as to these innocent purchasers.

5. But if all these positions should be overruled, \*he insisted that the decree of [**434** the court below was erroneous in its details; because it should, in the first instance, have decreed, as against the trustee himself, an execution of the trust; and in the alternative of his failure and inability, the repayment of the purchase money by Veitch, the original purchaser from the trustee; and the land in the hands of the appellants, Castleman and M'Cormick, who were purchasers with a general warranty from

1.—Balfour v. Welland, 16 Ves. 150.

2.—Id. 156.

3.—Co. Litt. 290, b; Butl., note 1, s. 12.

4.—Balfour v. Welland, 16 Ves. 157.

5.—Sturges v. Corp, 13 Ves. 190. [See on the subject of the power of a *feme covert* over her separate estate, the Methodist Episcopal Church v. Jacques,

3 Johns. Ch. Rep. 77, and Ewing v. Smith, 3 Des-sausure's Rep. 417.]

6.—2 Fonbl. Eq. 88, note f; 1 Fonbl. Eq. 191, 196; Fraser v. Bailey, 1 Bro. Ch. Rep. 517.

7.—Whiteeote v. Lawrence, 3 Ves. Jun., 740; Lister v. Lister, 6 Ves. 631; Exparte James, 8 Ves. 348; Coles v. Trecothick, 9 Ves. 246; Randall v. Errington, 10 Ves. 423.

Veitch, as he was from the trustee, should have been the last resource, after the others had been exhausted; and then only to raise the money due, giving Castleman and McCormick an option to retain the land by paying the money, instead of decreeing the land to be sold at all events for the benefit of the *cestui que trusts*. The appellants ought not to have been held to account for the mesne profits, because Wormley, the only person yet entitled to receive them, was a party to the sale, and was clearly competent to alien the estate, and the rents and profits, during his life, he being sole *cestui que trust* for life; and thus, if the sale is to be set aside at all for the benefit of his wife and children, it can only be to the extent of protecting and securing their future and contingent interests.

6. He also contended that the bill must be dismissed for want of jurisdiction. Wormley, the husband, is made a party defendant, though he is a citizen of the same state with his wife and infant children, who are plaintiffs.<sup>1</sup>

**435\***] \*The Attorney-General, contra, argued, 1. That the trustee had broken every one of the trusts he had undertaken to perform, on assuming the fiduciary character. If he, therefore, were now in the actual possession of the Frederick lands, if he had conveyed them, and taken back a reconveyance to his own use, there could be no question that a court of equity would hold these lands in his possession subject to the original trusts. But if the appellants purchased with knowledge of the trusts, and of the breach of trusts, equity converts them into trustees, with all the liabilities of the original trustee.<sup>2</sup> He argued upon the facts to show that they were chargeable with this knowledge. Although they had denied, in the answer, all fraud on their own part, and all knowledge of fraud in others, yet they do not deny a knowledge of such facts as affects them with the consequences of the trustee's misconduct.

2. It may be laid down as a general proposition, that trustees are incapable of becoming the purchasers of the trust subject. The two characters of buyer and seller are inconsistent. *Emptor emit quam minimo potest, venditor vendit quam maximo potest.*<sup>3</sup> Where the trust is for persons not *sui juris*, as *femes covert*, infants, and the like, the court will, under no circumstances whatever, be they ever so fair between the parties (as consulting friends, &c.), confirm **436\***] a purchase of the \*trust property by the trustee, unless it be done under the immediate authority and sanction of the court.<sup>4</sup> It cannot be established even by a sale at public auction, or before a master.<sup>5</sup> The only mode in which it can be done, is by a previous decree of permission, which the court will not

grant, unless where it is clearly for the benefit of the *cestui que trust*.<sup>6</sup> A sale made without such permission, may, or may not, be confirmed, at the option of the *cestui que trust*.<sup>7</sup> And in order to set aside a purchase by a trustee, it is not necessary to show that he has made any advantage by his purchase.<sup>8</sup> But the whole of this subject has been so thoroughly examined by Mr. Chancellor Kent, in several cases determined by him, that it is unnecessary to do more than to give the court a general reference to the authorities cited by him.<sup>9</sup> The rule is applicable with peculiar force to the present case, because here the purchase was not under the sanction of the Court, nor at a master's sale, nor at auction, where the trustee resists a fair competition; there was no payment of the purchase money to the use of any of the *cestuis que trust*; and (if we were bound to show that the trustee has made an advantage) he has made all \*the advant- [**437** age. If Strode had been a trustee merely for the purpose of sale, he could not have acquired the trust fund by purchase. But his was not a mere power to sell; it was a power to sell, whenever he could, in his honest opinion, invest the proceeds of the sale advantageously in other lands, to be settled to the same uses. The sale, without a re-investment, was a breach of trust. Those who purchased under him had notice of the breach of trust.

3. The general principle is that a purchaser from a trustee is bound to see to the application of the purchase money. But that principle is stated with this limitation, that he is only thus bound where the trust is of a defined and limited nature, and not where it is general and unlimited, as a trust for the payment of debts generally.<sup>10</sup> That is, if the trust be of such a nature that the purchaser may reasonably be expected to see to the application of the purchase money, as if it be for the payment of legacies, or of debts which are scheduled or specified, the purchaser is bound to see that the money is applied accordingly; and that, although the estate be sold under a decree of a court of equity, or by virtue of an act of Parliament.<sup>11</sup> And Mr. Sugden says that those most strongly disposed to narrow this rule, do still hold that where the act is a breach of duty in the trustee, it is very fit that those who deal with him should be affected by an act tending to defeat the \*trust of which they have [**438** notice.<sup>12</sup> This is what Sir W. Grant says, in the case cited on the other side, with this addition, that "where the sale is made by the trustee, in performance of his duty, it seems extraordinary that he should not be able to do what one should think incidental to the right exercise of his power; that is, to give a valid discharge for the purchase money."<sup>13</sup> But here

1.—*Strawbridge v. Curtis*, 3 Cranch's Rep. 267; *Corporation of New Orleans v. Winter*, 1 Wheat. Rep. 94.

2.—*Adair v. Shaw*, 1 Scho. & Lefr. 862; *Sanders v. Dehew*, 2 Vern. 271; 2 Foulb. Eq. 152; 15 Ves. 350; *Bovey v. Smith*, 1 Vern. 149; S. C. 2 Cas. in Ch. 124.

3.—*Sugd. Vend.* 422, 423, and cases there cited.

4.—*Davidson v. Gardner*.

5.—*Sugd. Vend.* 427.

6.—*Id.* 432.

Wheat. 8.

7.—5 Ves. 678; 6 Ves. 631.

8.—*Ex-parte James*, 8 Ves. 348; *Ex-parte Bennett*, 10 Ves. 393.

9.—*Green v. Winter*, 1 Johns. Ch. Rep. 27; *Schiefelin v. Stewart*, *Id.* 620; *Davoue v. Fanning*, 2 Johns. Ch. Rep. 252.

10.—*Sugd. Vend.* 367.

11.—*Id.* 368.

12.—*Sugd. Vend.* 373.

13.—*Balfour v. Willard*, 16 Ves. 151.



the sale was made, not in performance of the trustee's duty, but in violation of it; and the supposed assent of the husband and wife, to the breach of trust, will not cure it.<sup>1</sup>

Mr. Justice STORY delivered the opinion of the court, and after stating the case, proceeded as follows:

Such is the general outline of the case; and in the progress of the investigation, it may become necessary to advert to some other facts with more particularity.

And the first question arising upon this posture of the case is, whether Strode, the trustee, by the sale to Veitch, has been guilty of any breach of trust. And this seems to the court to be scarcely capable of controversy. That there are circumstances in the case which raise a presumption of bad faith on the part of the trustee, and expose him to some suspicion, cannot escape observation. But assuming him to **439\*** have acted with \*entire good faith, his proceedings were a plain departure from his duty. In respect to the supposed exchange of the Fauquier for the Frederick lands, it is impossible for a moment to admit its validity. In the first place, it was not made between parties competent to make it. Wormley had no authority over the estate, after the marriage settlement. The chief object of that settlement was to secure the property to the use of the wife and children, during the joint lives of the husband and wife. And though it is said, in another part of the deed, that Wormley shall occupy and enjoy the estate, and the issues and profits thereof, during his life, yet this was to be under leave of the trustee; and to suppose that he thus acquired an equitable interest for life, is to defeat the manifest and direct intention of the other clauses in the deed, which avow the whole object to be the security of the estate, during the same period, for the use of the wife and children. The true and natural construction of this clause is, that it points to the discretion which the trustee may exercise, as to allowing the husband to occupy the estate, and take the profits for the maintenance of the family, whenever the trustee perceives it may be safely done, without involving the trustee in any responsibility, to which he might be exposed, by such a permission, without such an authority. But, at all events, the right to dispose of the equitable fee to any one, much less to the trustee himself, did not exist in Wormley; and any exchange attempted to be made by him, however beneficial, would have been utterly void. But no **440\*** \*exchange was in fact consummated. It is true, that the removal of the Fauquier lands took place upon an agreement to this effect; but no definitive conveyance was ever made; and the trustee himself never settled, and never took a step towards settling, the Fauquier estate upon the trusts of the marriage settlement, as it was his indispensable duty to do if he meant to conduct himself correctly. As to the substituted Kentucky lands, the transaction was still more delusive. The agreement for the substitution was merely conditional, depending upon the subsequent election of Wormley, and his dissent put an end to it.

As to the conveyance to Lee, ostensibly for the trusts of the settlement, it can be viewed in no other light than an attempt to cover up the most unjustifiable proceedings. That conveyance was not executed until after the dissent and dissatisfaction of Wormley were well known; and so far from its containing any valid performance of the trusts, it expressly gives a prior lien to the purchasers of the Frederick lands as security for their covenant of warranty; and to complete the delusion, the trustee reserved to himself the authority to substitute any other lands, leaving the trusts to float along, without fixing them definitively upon any solid foundation. If we add that the Fauquier lands were mortgaged to the purchasers for the same covenant, and that this mortgage was discharged only for the purpose of selling the property to Grimmer and Mundell, we shall come irresistibly to the conclusion that the trustee never was in a situation **\*to give an unencumbered title on either** [**\*441** the Fauquier or Kentucky lands, to secure the trusts; and that if he was, he never in fact executed any conveyance for this purpose. In every view, therefore, of this part of the case, it is clear that no valid exchange did, or could take place; and that as there was no equitable or legal transmutation of the property from the *cestuis que trust*, it remained in the trustee, clothed with all the original fiduciary interests.

But, independent of these considerations, there is a stubborn rule of equity, founded upon the most solid reasoning, and supported by public policy, which forbade any such exchange. No rule is better settled than that a trustee cannot become a purchaser of the trust estate. He cannot be at once vendor and vendee. He cannot represent in himself two opposite and conflicting interests. As vendor he must always desire to sell as high, and as purchaser to buy as low, as possible; and the law has wisely prohibited any person from assuming such dangerous and incompatible characters. If there be any exceptions to the generality of the rule, they are not such as can affect the present case. On the contrary, if there be any cogency in the rule itself, this is a strong case for its application; for, by the very terms of the settlement, the trustee was invested with a large discretion, and a peculiar and exclusive confidence was placed in his judgment. Of necessity, therefore, it was contemplated that his judgment should be free and impartial, and unbiassed by personal interests. The asserted exchange, **\*so far at least as it** [**\*442** affects to justify or confirm the proceedings of the trustee, may, therefore, be at once laid out of the question.

Then, was the sale to Veitch a breach of trust? The power given to the trustee by the settlement is certainly very broad and unusual in its terms; but it is not unlimited. The trustee had not an unrestricted authority to sell, but only when, in his opinion, the purchase money might be laid out advantageously for the *cestuis que trust*. It is true, the sale and re-investment are to be decided by his opinion, which is an invisible operation of the mind. But his acts, nevertheless, are subject to the scrutiny of the law; and if that opinion has not been fairly and honestly exercised, if it has been swayed by private interests and selfish

1.—Thayer v. Gold, 1 Atk. 615.

objects; if the sale has been at a price utterly disproportionate to the real value of the property, and the evidence demonstrate such facts, a court of equity will not sanction an act which thus becomes a fraud upon innocent parties.

Much ingenuity has been exercised in a critical examination of the nature of the power itself, as it stands in the text of the settlement. It is contended that the acts of sale, and of re-investment, are separate and distinct acts, and the power to sell is, therefore, to be disjoined from that of repurchase, so that the sale may be good, though the purchase money should be misapplied. How far a *bonæ fidei* purchaser is bound, in a case like the present, to look to the application of the purchase money, need not be decided in this case. There is much reason **443\*** in the doctrine that where the \*trust is defined in its object, and the purchase money is to be re-invested upon trusts which require time and discretion, or the acts of sale and re-investment are manifestly contemplated to be at a distance from each other, the purchaser shall not be bound to look to the application of the purchase money; for the trustee is clothed with a discretion in the management of the trust fund, and if any persons are to suffer by his misconduct, it should be rather those who have reposed confidence, than those who have bought under an apparently authorized act. But, in the present case, it seems difficult to separate the acts from each other. The sale is not to be made unless a re-investment can, in the opinion of the trustee, be advantageously made. He is not to sell upon mere general speculation, but for the purpose of direct re-investment. And it is very difficult to perceive how the trustee could arrive at the conclusion that it was proper to sell, unless he had, at the same time, fixed on some definite re-investment, which, compared with the former estate, would be advantageous to the parties. Although, therefore, the acts of sale, and purchase, are to be distinct, they are connected with each other; and, at least as to the trustee, there cannot be an exercise of opinion, such as the trust contemplated, unless he had viewed them in connection. If he should sell without having any settled intention to buy, leaving that to be governed by future events, he would certainly violate the confidence reposed in him. *A fortiori*, if he should sell with an intention not to re-invest, but to speculate **444\*** late, for the \*purpose of relieving his own necessities, or of appropriating the trust fund indefinitely to his own uses.

Now, in point of fact, what has the trustee done in this case? He has sold the trust property to pay his own debts. He has never applied the proceeds to any re-investment. To this very hour there has been no just and fair application of the purchase money. The Fauquier lands are gone; the Kentucky lands have been rejected and are loaded with liens; and there is nothing left but the personal responsibility of the trustee, embarrassed and distressed as he must be taken to be, unless the trusts are still fastened to the Frederick lands. Can it, then, be contended for a moment that there is no breach of trust, when the sale was not for the purposes of re-investment? When the party puts his right to sell, not upon an honest ex-

ercise of opinion at the time of sale, but upon a distinct anterior transaction, invalid and incomplete, by which he became clothed with the beneficial interests of the estate? When he claims to be, not the disinterested trustee, selling the estate, but the trustee purchasing by exchange the trust fund, and thus entitled to deal with it according to his own discretion, and for his own private accommodation, as absolute owner? Where the purchase money is to be applied to extinguish his own debts; and there is no proof of his means to replenish, or acquire an equal sum from other sources? In the judgment of the court, the sale was a manifest breach of trust. It was in no proper sense an execution of the power. The power, in the \*contemplation of the trustee, was **[\*445]** virtually extinguished. He sold, not because he intended an advantageous re-investment, but because he considered himself the real owner of the estate. The very letter, as well as the spirit of the power, was therefore violated, for the trustee never exercised an opinion upon that which was the sole object of the power to sell—an advantageous re-investment.

The next point for consideration is, whether the defendants, Veitch, and Castleman and M'Cormick, were *bonæ fidei* purchasers of the Frederick lands, without notice of the breach of trust. If they had notice of the facts, they are necessarily affected with notice of the law operating upon those facts; and their general denial of all knowledge of fraud will not help them, if, in point of law, the transaction is repudiated by a court of equity. If they were *bonæ fidei* purchasers, without notice, their title might have required a very different consideration.

And first, as to Veitch. The deed to him contained a recital of the marriage settlement, and the power authorizing the sale. He, therefore, had direct and positive notice of the title of the trustee to the property. There is the strongest reason to believe that he was fully cognizant of the exchange of the Frederick and Fauquier lands, negotiated between Wormley and the trustee. The certificate from Wormley, respecting the exchange, and expressing satisfaction with it, which was procured a few days before the sale, and which Veitch now produces, shows that he \*must have **[\*446]** had a knowledge of the exchange. Its apparent object was to ascertain the state of the title. The removal of the Wormley family, and their known residence, at this time, on the Fauquier lands, strengthen this presumption. If he knew of the exchange, he could not but know that he purchased of the trustee an estate, which he claimed as his own, in a bargain with an unauthorized person, and that the trustee was, at the same time, the vendor and purchaser. He also knew that the sale to himself was not in execution of the power, or for the purpose of re-investment; for, according to the other facts, the exchange had already effected that, and no further re-investment was contemplated. He took a mortgage, as additional security for the warranty, on the sale of the Fauquier lands, not even now alleging that he did not know their identity. And under these circumstances, he could not but know that there had been no actual conveyance or declaration of trust of the Fauquier lands, in execu-



tion of the trust, for otherwise the trustee could not have mortgaged them to him. He therefore stood by, taking a conveyance from the trustee of the trust estate, knowing at the same time that no re-investment had been made which could be effectual, and that no re-investment was contemplated as the object of the sale; and, as far as his mortgage could go, he meant to obtain a priority of security that should ride over any future declaration of trust.

This is not all. The very sale of the trust fund was to be, not for re-investment, but to **447\*** pay a large \*debt due to himself, upon which a decree of foreclosure of a mortgaged estate had been obtained; and he could not be ignorant that the application of the trust fund to such a purpose was a violation of the settlement, and afforded a strong presumption that the trustee had no other adequate means of discharging the debt, or buying other lands advantageously in the market. And yet, with notice of all these facts, the deed itself, from the trustee to Veitch, contains a recital that the sale was made "with the intention of investing the proceeds of such sale in other lands of equal or greater value." This was utterly untrue, and could not escape the attention of the parties. Veitch then had full knowledge of all the material facts, and he does not even deny it in his answer, for that only denies the inference of fraud, which is a mere conclusion of law from the facts, as they are established. Purchasing, then, with a full knowledge of the rights of Mrs. Wormley and her children, and of the breach of trust, Veitch cannot now claim shelter in a court of equity, as a *bonæ fidei* purchaser for a valuable consideration.

The next question is, whether Castleman and M'Cormick are not in the same predicament. In the judgment of the court, they clearly are. They purchased from Veitch, whose deed gave them full notice of the trust, and they could not be ignorant of the recital in it, since their title referred them to it. They must have perceived that the sale to Veitch, in order to be valid, must have been with a view **448\*** to re-investment of the \*purchase money in other real estate. It was natural for them to inquire whether the sale had been made under justifiable circumstances, and whether there had been any such re-investment. Previous to the sale to Veitch, they had entered into a negotiation with the trustee himself, for a direct purchase of the Frederick lands; and on that occasion became acquainted with the fact that the trustee was largely indebted to Veitch, and that one object of the sale was to apply the proceeds to the payment of that debt. How, then, could they be ignorant that the proceeds of the sale, which was very soon afterwards made to Veitch, were to be applied to extinguish the same debt, and that the transfer was not in execution of the trust, but to administer to the trustee's own necessities? This is not all. Before the execution of the deed to them they knew of the arrangement respecting the Fauquier lands, and that Wormley had become dissatisfied with the bargain. They knew that these lands had not been settled by the trustee upon the trusts of the settlement, and they took an equitable assignment of the mortgage from Veitch of the same lands. It may be said that the evidence of these facts is not

positively made out in the record; but if it be not, the circumstantial evidence fully supports the conclusion. The answer itself of Castleman and M'Cormick does not deny notice of these facts. It states, indeed, that they supposed the transaction with Veitch fair, because they were satisfied that the trustee never received more from Veitch than what he has given the *cestuis que trust* credit for. \*Was it a fair [**449** execution of the trust, so to sell the estate, and to give credit for the proceeds? To apply them to pay the trustee's debts, and relieve his necessities? To sell without any definite intention as to a re-investment? They also deny all knowledge of fraud. But this is a mere general denial, and does not negative the knowledge of the facts, from which the law may infer fraud.

The subsequent conduct of Castleman and M'Cormick shows that they were not indifferent to the execution of the trust; but that they felt no interest to secure the rights of the *cestuis que trust*. They were privy to the removal to Kentucky, and exhibited much anxiety to have it accomplished. They knew subsequently the dissatisfaction of Wormley with that removal, and with the Kentucky lands. Yet they, in the year 1813, relieved the Fauquier lands from their own encumbrance, and enabled the trustee to dispose of it for other purposes than the fulfillment of the trusts for which it had been originally destined. And throughout the whole, their conduct exhibits an intimate acquaintance with the nature of their own title, and the manner and circumstances under which it had been acquired by Veitch, and the objections to which it might be liable. And they ultimately took the general warranty of Veitch, upon releasing their claim on the Fauquier lands, as a security for its validity.

There is a still stronger view which may be taken of this subject. It is a settled rule in equity, that a purchaser without notice, to be entitled to protection, must not only be so at the time of the \*contract or conveyance, [**450** but at the time of the payment of the purchase money. The answer of Castleman and M'Cormick does not even allege any such want of notice. On the contrary, it is in proof that upwards of \$3,000 of the purchase money was paid in the autumn of 1813 and the spring of 1814. And this was not only after full notice of the anterior transactions, but after the commencement of the present suit.

It appears to us, therefore, that the circumstances of the case can lead to no other result than that Castleman and M'Cormick were not purchasers without notice of the material facts constituting the breach of trust; and that, therefore, the Frederick lands ought in their hands to stand charged with the trusts in the marriage settlement. The leading principle of the decree in the Circuit Court was therefore right.

Some objections have been taken to the subordinate details of that decree; but it appears to us that the objections cannot be sustained. The decree directs an account of the rents and profits of the Frederick lands while in possession of the defendants: It further directs an allowance of the amount of all encumbrances which have been discharged by the defendants, and of the value of any permanent improvements made thereon, and also of any advances made for the support of Wormley's family.

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These advances are to be credited against the rents and profits; and the value of the improvements, and of the discharged encumbrances, not recouped by the rents and profits, are to be a charge on the land itself. A more liberal [451] \*decree could not, in our opinion, be required by any reasonable view of the case.

An objection has been taken to the jurisdiction of the court, upon the ground that Wormley, the husband, is made a defendant, and so all the parties on each side of the cause are not citizens of different states, since he has the same citizenship as his wife and minor children. But Wormley is but a nominal defendant, joined for the sake of conformity in the bill, against whom no decree is sought. He voluntarily appeared, though perhaps he could not have been compelled so to do. Under these circumstances, the objection has no good foundation. This court will not suffer its jurisdiction to

be ousted by the mere joinder or non-joinder of formal parties; but will rather proceed without them, and decide upon the merits of the case between the parties who have the real interests before it, whenever it can be done without prejudice to the rights of others.<sup>1</sup>

\*Mr. Justice JOHNSON. After the [452] most careful examination of this voluminous record, I think it \*due to the parties de- [453] fendant, to express the opinion that I cannot discover any evidence of fraud in any part of their transactions.

\*The proposed exchange between the [454] Frederick and Fauquier lands was made openly and deliberately, \*upon consultation [455] with friends of the *cestuis que trust*, and obviously had many prudential \*considera- [456] tions to recommend it. That Wormley and his family must have starved had they remained

1.—The general rule and its exceptions, as to who are necessary parties to a bill in equity, are so fully and clearly laid down by Mr. Justice Story, in the case of *West v. Randall* (2 Mason's Rep., 181-190), and the principles of practice asserted in the judgment, are so closely connected with the above position in the principle case in the text, that the editor has thought fit to subjoin the following extract. It is only necessary to state that the case was of a bill filed by an heir or next of kin for a distributive share of an estate:

"It is a general rule in equity, that all persons materially interested, either as plaintiffs or defendants, in the subject-matter of the bill, ought to be made parties to the suit, however numerous they may be. The reason is, that the court may be enabled to make a complete decree between the parties, may prevent future litigation, by taking away the necessity of a multiplicity of suits, and may make it perfectly certain that no injustice shall be done, either to the parties before the court, or to others who are interested by a decree, that may be grounded upon a partial view only of the real merits. Mitf. Pl. 29, 144, 220; Coop. Eq. Pl. 33, &c., 185; 2 Madd. 142; Gilb. For. Rom. 157, 158; 1 Harris. Ch. Pr., ch. 3, p. 25; Newl. Edit; Leigh v. Thomas, 2 Ves. 312; Cockburn v. Thompson, 16 Ves. 321; Beaumont v. Meredith, 3 Ves. and Beames, 180; Hamm v. Stevens, 1 Vern. 110. When all the parties are before the court, it can see the whole case; but it may not where all the conflicting interests are not brought out upon the bill. Gilbert, in his *Forum Romanum*, p. 157, states the rule, and illustrates it with great precision. 'If,' says he, 'it appears to the court that a very necessary party is wanting; that without him no regular decree can be made; as where a man seeks for an account of the profits or sale of a real estate, and it appears upon the pleadings that the defendant is only tenant for life, and consequently the tenant in tail cannot be bound by the decree; and where one legatee brings a bill against an executor, and there are many other legatees, none of which will be bound either by the decree or by the account to be taken of the testator's effects, and each of these legatees may draw the account in question over again at their leisure; or where several persons are entitled, as next of kin, under the statute of distributions, and only one of them is brought on to a hearing; or where a man is entitled to the surplus of an estate, under a will, after payment of debts, and is not brought on; or where the real estate is to be sold under a will, and the heir at law is not brought on. In these, and all other cases, where the decree cannot be made uniform, for as, on the one hand the court will do the plaintiff right, so, on the other hand they will take care that the defendant is not doubly vexed, he shall not be left under precarious circumstances because of the plaintiff, who might have made all proper parties, and whose fault it was that it was not done. The cases here put are very appropriate to the case at bar. That in respect to legatees, probably refers to the case of a suit by one residuary legatee, where there are other residuary legatees; in which case it has often been held, that all must be joined in the suit. Parsons v. Neville, 3 Bro. Ch. Cas. 365; Cockburn v. Thompson, 16 Ves. 321; Sherritt v. Birch, 3 Bro. Ch. 229; Alward v. Wheat, 8.

Hawkins, Rep. T. Finch, 113; Brown v. Rickets, 3 Johns. Ch. Rep. 553. But where a legatee sues for a specific legacy, or for a sum certain on the face of the will, it is not in general necessary that other legatees should be made parties, for no decree could be had against them, if brought to a hearing (*Haycock v. Haycock*, 2 Ch. Cas. 124; *Dunstall v. Rabbett*, Finch, 243; *Attorney-General v. Ryder*, 2 Ch. Cas. 178; *Atwood v. Hawkins*, Rep. F. Finch, 118; *Wainwright v. Waterman*, 1 Ves., Jun., 311); and in general, no person against whom, if brought to a hearing, no decree could be had, ought to be made a party. *De Golls v. Ward*, 3 P. Wms. 310. Note. And when a party is entitled to an aliquot proportion only of a certain sum in the hands of trustees, if the proportion and the sum be clearly ascertained and fixed upon the face of the trust, it has been held that he may file a bill to have it transferred to him, without making the persons entitled to the other aliquot shares of the fund, parties. *Smith v. Snow*, 3 Madd. Rep. 10. The reason is the same as above stated, for there is nothing to controvert with the other *cestuis que trust*. I am aware that it had been stated by an elementary writer of considerable character, that one of the next of kin of an intestate may sue for his distributive share, and the master will be directed by the decree, to inquire and state to the court, who are all the next of kin, and they may come in under the decree. *Coop. Eq. Pl. 33, 40*. This proposition may be true, *sub modo*; but that it is not universally true is apparent from the authority already stated. See *Bradburn v. Harper*, Amb. Rep. 374; 2 Madd. 146; *Gilb. For. Rom.* 157.

"The rule, however, that all persons materially interested in the subject of the suit, however numerous, ought to be parties, is not without exceptions. As Lord Eldon has observed, it being a general rule, established for the convenient administration of justice, it must not be adhered to in cases to which, consistently with practical convenience, it is incapable of application. *Cockburn v. Thompson*, 16 Ves. 321; and see *S. P. Wendell v. Van Rensselaer*, 1 Johns. Ch. Rep. 349. Whenever, therefore, the party supposed to be materially interested is without the jurisdiction of the court; or if a personal representative be a necessary party, and the right of representation is in litigation in the proper ecclesiastical court; or the bill itself seeks a discovery of the necessary parties; and, in either case, the facts are charged in the bill, the court will not insist upon the objection; but if it can, will proceed to make a decree between the parties before the court, since it is obvious that the case cannot be made better. Mitf. 145, 146; *Coop. Eq. Pl. 39, 40*; 2 Madd. Ch. Pr. 149; 1 Harris, Ch. 3. Nor are these the only cases; for where the parties are very numerous, and the court perceives that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole; in these and analogous cases, if the bill purports to be not merely in behalf of the plaintiffs, but of all others interested, the plea of the want of the parties will be repelled, and



**457**\*] upon the lands in Frederiek, is abundantly proved; and no worse consequences could **458**\*] have \*happened to them from either of these exchanges. It is satisfactorily shown, **459**\*] also, that the exchange \*for the Fauquier land was highly advantageous. Taking money, as the most correct comparison of value, it **460**\*] \*appears that the Frederiek land, after being long hawked about for sale, and having \$1,000 added to its value by Strode, in the extinction of the mother's life estate, sold for no more than \$5,500, a sum satisfactorily proved to be its full value at the time; whereas, the Fauquier land, after Wormley's refusal to take it, was sold for \$8,000. So that the two tracts then stood in comparison of value, as \$4,500 to \$8,000. And that Strode was fully sensible of

the great difference in value, and satisfied to bear the loss, is positively proved by the fact that when Wormley resolved to move to Kentucky, \*they established the value of the [\***461** Fauquier lands between themselves at \$7,000; and Strode actually gave an acknowledgement to Wormley for \$6,500, the balance of the \$7,000, after dividing with him the sum paid for his mother's life estate.

The case is one in which, it is true, the conduct of the defendants is greatly exposed to misrepresentation and misconstruction; but when reduced to order, and examined, the circumstances admit of the most perfect reconciliation with the purest intentions. It is true that Strode was in debt; that it was necessary to sell the Fauquier lands to satisfy his credit-

the court will proceed to a decree. Yet, in these cases, so solicitous is the court to attain substantial justice, that it will permit the other parties to come in under the decree, and take the benefit of it, or to show it to be erroneous, and award a rehearing; or will entertain a bill or petition which shall bring the rights of such parties more distinctly before the court, if there be certainty or danger of injury or injustice. *Coop. Eq. Pl. 39; 2 Madd. 144, 145; Cockburn v. Thompson, 16 Ves. 321.* Among this class of cases are suits brought by a part of a crew of a privateer against prize agents, for an account, and their proportion of prize-money. There, if the bill be in behalf of themselves only, it will not be sustained; but if it be in behalf of themselves and all the rest of the crew, it will be sustained upon the manifest inconvenience of any other course; for it has been truly said, that no case can call more strongly for indulgence than where a number of seamen have interests; for their situation at any period, how many were living at any given time, how many are dead, and who are entitled to representation, cannot be ascertained (*Good v. Blewitt, 13 Ves. 397; Leigh v. Thomas, 2 Ves. 312; Contra, Moffa v. Farquherson, 2 Bro. Ch. Cas. 338; Acc. Brown v. Harris, 13 Ves. 552; Cockburn v. Thompson, 16 Ves. 321*); and it is not a case, where a great number of persons, who ought to be defendants, are not brought before the court, but are to be bound by a decree against a few. So, also, is the common case of creditors suing on behalf of the rest, and seeking an account of the estate of their deceased debtor, to obtain payment of their demands; and there the other creditors may come in and take the benefit of the decree. *Leigh v. Thomas, 2 Ves. 312; Cockburn v. Thompson, 16 Ves. 321; Hendricks v. Franklin, 2 Johns. Ch. Rep. 283; Brown v. Ricketts, 3 Johns. Ch. Rep. 553; Coop. Eq. Pl. 39 136.* But Sir John Strange said, there was no instance of a bill by three or four, to have an account of the estate, without saying they bring it in behalf of themselves and the rest of the creditors. *Leigh v. Thomas, 2 Ves. 312; Coop. Eq. Pl. 39.* And legatees seeking relief, and an account against executors, may sue in behalf of themselves and all other interested persons, when placed in the same predicament as creditors. *Brown v. Ricketts, 3 Johns. Ch. Rep. 553.* Another class of cases is, where a few members of a voluntary society, or an unincorporated body of proprietors, have been permitted to sue in behalf of the whole, seeking relief, and an account against their own agents and committees. Such was the ancient case of the proprietors of the Temple Mills Brass Works (*Chancery v. May, Prec. Ch. 592*), and such were the modern cases of the Opera House, the Royal Circus, Drury Lane Theatre, and the New River Company. *Lloyd v. Loaring, 9 Ves., Jr., 773; Adair v. New River Company, 11 Ves. 429; Cousins v. Smith, 13 Ves. 542; Coop. Eq. Pl. 40; Cockburn v. Thompson, 16 Ves. 32.* There is one other class of cases, which I will just mention, where a lord of a manor has been permitted to sue a few of his tenants, or a few of the tenants have been permitted to sue the lord, upon the question of a right of common; or a parson has sued, or been sued by some of his parishioners, in respect to the right of tithes. In these and analogous cases of general right, the court dispense with having all the parties, who claim the same right, before it, from the manifest inconvenience,

if not impossibility of doing it, and is satisfied with bringing so many before it, as may be considered as fairly representing that right, and honestly contesting in behalf of the whole, and therefore binding, in a sense, that right. *2 Madd. 145; Coop. Eq. Pl. 41; Mitf. Pl. 145; Adair v. New River Company, 11 Ves. 429.* But even in the case of a voluntary society, where the question was, whether a dissolution and division of the funds, voted by the members, was consistent with their articles, the court refused to decree until all the members were made parties. *Beaumont v. Meredith, 3 Ves. and Beames, 180.* The principle upon which all these classes of cases stand, is that the court must either wholly deny the plaintiffs an equitable relief, to which they are entitled, or grant it without making other persons parties; and the latter it deems the least evil, as it can consider other persons as *quasi* parties to the record, at least for the purpose of taking the benefit of the decree, and of entitling themselves to other equitable relief, if their rights are jeopardized. Of course, the principle always supposes that the decree can, as between the parties before the court, be fitly made, without substantial injury to third persons. If it be otherwise, the court will withhold its interposition.

"The same doctrine is applied, and with the same qualification, to cases where a material party is beyond the jurisdiction of the court, as if the party be a partner with the defendant, and resident in a foreign country, so that he cannot be reached by the process of the court. There, if the court sees that, without manifest injustice to the parties before it, or to others, it can proceed to a decree, it acts upon its own notion of equity, without adhering to the objection. *Coop. Eq. Pl. 35; Mitf. Pl. 146; Cowslad v. Cely, Prec. Ch. 83; Darwent v. Walton, 2 Atk. 510; Whalley v. Whalley, 1 Ves. 484, 487; Milligan v. Milledge, 3 Cranch's Rep. 220.* The ground of this rule is peculiarly applicable to the courts of the United States; and, therefore, if a party who might otherwise be considered as material, by being a made party to the bill, would, from the limited nature of its authority, oust the court of its jurisdiction, I should strain hard to give relief as between the parties before the court; as, for instance, where a partner, or a joint trustee, or a residuary legatee, or one of the next of kin, from not being a citizen of the state where the suit was brought, or from being a citizen of the state, if made a plaintiff would defeat the jurisdiction, and thus destroy the suit, I should struggle to administer equity between the parties properly before us, and not suffer a rule, founded on mere convenience and general fitness, to defeat the purposes of justice. *Russell v. Clark, 7 Cranch's Rep. 69, 98.*

"I have taken up more time in considering the doctrine as to making parties, than this cause seemed to require, with a view to relieve us from some of the difficulties pressed at the argument, and to show the distinctions (not always very well defined) upon which the authorities seem to rest. Apply them to the present case. The plaintiff claims, as heir, an undivided portion of the surplus, charged to be in the defendants' hands and possession. No reason is shown on the face of the bill why the other heirs, having the same common interest, are not parties to it. The answer gives their names, and shows them within the jurisdiction of the court, and as defendants, they might have been

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ors; that the money arising from the Frederick land was applied to the payment of Strode's debts. But there was nothing iniquitous in all this. It is perfectly explained thus: The Fauquier land must be sold to pay Strode's debts; the situation of the Wormleys on the trust estate was so bad that no change could make it worse; the removal to the Fauquier lands was thought advisable by all their friends; where, then, was the fraud in letting them have the Fauquier lands at an under price, and paying his debts out of the actual proceeds of the trust estate? The money arising from the latter was, under this arrangement, the price of the former. It was, in fact, paying his debts with the price of his own property, not that of the trust estate.

joined in this suit without touching the jurisdiction of the court, for they are all resident in this state. As plaintiffs they could not be joined without ousting our jurisdiction, for then some of the plaintiffs would have been citizens of the same state as the defendants. *Strawbridge v. Curtiss*, 3 Cranch's Rep. 267. Now, in the first place, the other heirs might, if parties, controvert the very fact of heirship in the plaintiff, and that would touch the very marrow of his right to the demand now in question.

The fact, however, is not denied or put in issue by the answer, and, therefore, as to the present defendants, it forms no ground of controversy. But they insist that the presentsuit will not close their accounts; and that the other heirs may sue them again, and controvert the whole matter now in litigation, and thus vex them with double inconveniences and perils. This is certainly true; and it is as certain that they could not be made plaintiffs without ousting the present plaintiff of his remedy here. They might have been made defendants; but the question is, whether the plaintiff is compellable so to make them, unless they deny his heirship, or they collude with the defendants. If there be no controversy between him and them, he could have no decree against them at the hearing; and it would be strange if, when he has nothing to allege against them, he must still name them as defendants in his bill. I agree to the general doctrine that where a residuary legatee sues, he must make the other residuary legatees parties; and I think it analogous to the present case. But there the rule would not apply if the other residuary legatees were in a foreign country, or without the reach of the jurisdiction of the court. The case of the next of kin, put by Gilbert in the passage before cited, is identical with the present. *Gilb. For. Rom.* 157, 158. But there the same exception must be implied. And even in a case where a mistake in a legacy, of an aliquot part of the personal estate, was sought to be rectified, and the next of kin were admitted to be necessary parties (as to which, however, as the executor represents all parties in interest as to the personal estate, a doubt might be entertained, whether, under the peculiar circumstances of this case, they were necessary defendants) (*Peacock v. Monk*, 1 Ves. 127; *Lawson v. Barker*, 1 Bro. Ch. Cas. 303; 1 Eq. Abrid. 73; p. 13; *Anon.* 1 Ves. 261; *Wainwright v. Waterman*, 1 Ves., Jr., 311), the court dispensed with their being made parties, it appearing that they were numerous and living in distant places, and the matter in dispute being small and the plaintiff a pauper. *Bradwin v. Harpur*, Ambler, 374. The rule is not, then, so inflexible that it may not fairly leave much to the discretion of the court; and upon the facts of the present case, it being impossible to make the other heirs plaintiffs, consistently with the preservation of the jurisdiction of the court, or to make them defendants, from any facts which can be truly charged against them, I should hesitate a good while before I should enforce the rule; and if the cause turned solely upon this objection, I should not be prepared to sustain it. *Clarke v. Russell*, 7 Cranch, 69, 98. There is, indeed, a difficulty upon the face of the bill, that it shows no reason why the other heirs were not made parties, as plaintiffs; and if there had been a demurrer, it might have been fatal. But the answer seems to set that right, by disclosing the

It has been argued that the sale of the trust estate was not made with a view to re-investment; but the evidence positively proves the contrary. It goes to show that the re-investment was the leading object, and actually took place previous to the sale of the trust [\*462] estate. And even if that construction of the power be conceded, which would require the sale and re-investment to be simultaneous acts, or that which would render the purchaser liable for the application of the purchase money, the facts of the case would satisfy either exigency. For the re-investment was actually made simultaneously with the sale; or, if it was not finally consummated, the cause is to be found altogether in the anxiety of the defendants to satisfy a capricious man, and the ignor-

citizenship and residence of the other heirs; and in this respect, relying on the facts as a defense, it may well aid the defects of the bill.

"There is, however, a more serious objection to this bill for the want of parties, and that is, that the personal representative of William West is not brought before the court, and for this no reason is assigned in the bill. Now, it is to be considered that the bill charges the defendants with trust property, personal as well as real, and prays an account and payment of the plaintiff's distributive share of each. I do not say that the heir, or next of kin, cannot, in any case, proceed for a distributive share against a third person, having in his possession the personal assets of the ancestor, without making the personal representative a party; but such a case, if at all, must stand upon very special circumstances, which must be charged in the bill. The administrator of the deceased is, in the first place, entitled to his whole personal estate, in trust for the payment of debts and charges, and as to the residue, in trust for the next of kin. The latter are entitled to nothing until the debts are paid; and they cannot proceed against the immediate debtor of the deceased, in any case, any more than legatees or creditors, unless they suggest fraud and collusion with the personal representative, and then he must be made a party, or some other special reason be shown for the omission. *Newland v. Champion*, 1 Ves. 105; *Utterson v. Mair*, 4 Bro. Ch. Cas. 270; *S. C.* 2 Ves., Jr., 95; *Alsagar v. Rowley*, 6 Ves. 751; *Bickley v. Dodington*, 2 Eq. Abrid., 78, 253. It is, therefore, in general, a fatal objection in a bill for an account of personal assets, that the administrator is not a party; nor is this objection repelled if there be none at the time, unless there be some legal impediment to a grant of administration. *Humphreys v. Humphreys*, 3 P. Wms. 348; *Griffith v. Bateman*, Rep. T. Finch, 334. Now, upon the facts of this case, it is apparent that William West died insolvent; and if so, it would be decisive against the plaintiff's title to any portion of the personalty. And as to the real estate, as that is also liable, in this state, to the debts of the intestate, this fact would be equally decisive of his title to any share in the real trust property. This shows how material to the cause the personal representative of the intestate is, since he is, *ex officio*, the representative, in cases of this sort, of the creditors. But upon the general ground, without reference to these special facts, I think that the personal representative of William West, not being a party, is a well-founded objection to proceeding to a decree. I am aware that a want of parties is not necessarily fatal, even at the hearing, because the cause may be ordered to stand over to make further parties (*Anon.* 2 Atk. 14; *Coop. Eq. Pl.* 289; *Jones v. Jones*, 3 Atk. 111); but this is not done of course, and rarely, unless where the cause, as to the new parties, may stand upon the bill and the answer of such parties. For if the new parties may controvert the plaintiff's very right to the demand in question, and the whole cause must be gone over again upon a just examination of witnesses, it seems at least doubtful whether it may not be quite as equitable to dismiss the cause without prejudice, so that the plaintiff may begin *de novo*. *Gilb. For. Rom.* 159. If this cause necessarily turned upon this point alone, I should incline to adopt this course."



ance of Strode in supposing himself justified in yielding to Wormley's judgment or will.

Had Strode actually sold the Fauquier lands; paid off his encumbrances from the purchase money; then sold the Frederick land; and re-invested the fund in a repurchase of the Fauquier lands, there could not have been an exception taken to the sufficiency of the re-investment. And then the transaction would, in a moral point of view, have been necessarily regarded as favorably as I am disposed to regard it. Yet it is unquestionable, that thus stated, it presents a correct summary of the whole transaction, as made out in the evidence. It has, however, been put together so as to admit of distorted views; and such will ever be the case where men expose themselves to suspicion by mixing up their own interests with the interests of others placed under their protection. I can see nothing but liberality in the conduct of Strode towards Wormley, and little else than improvidence, caprice, and ingratitude in the conduct of the latter.

**463\*]** \*Nevertheless, there are canons of the court of equity which have their foundation, not in the actual commission of fraud, but in that hallowed orison, "lead us not into temptation."

One of these is, that a trustee shall not be permitted to mix up his own affairs with those of the *cestui que trust*. Those who have examined the workings of the human heart, well know that in such cases the party most likely to be imposed upon is the actor himself, if honest; and if otherwise, that the scope for imposition given to human ingenuity, will enable it generally to baffle the utmost subtlety of legal investigation. Hence the fairness or unfairness of the transaction, or the comparison of price and value, is not suffered to enter into the consideration of the court, on these occurrences; but the rule is positive and general, that the *cestui que trust* may be restored to his original rights against the trustee, at his option. And where infants, &c., are interested, they will be restored or not, with a view solely to the benefit of the *cestuis que trust*. It is unquestionable, from the evidence, that both Veitch, and Castleman and M'Cormick, must be affected by both legal and actual notice of the transactions of Strode. They are, therefore, liable to the same decree which ought to be made against the latter.

It is, however, some satisfaction to me to be able to vindicate their innocence, while I feel myself compelled to subject them to a serious loss. The rule which requires this adjudication, may, in many cases, be a hard one, but it is a fixed rule, and has the sanction of public policy.

*Decree affirmed with costs.*

Aff'g—1 Brock. 330.

Cited—10 Wheat. 188 (n); 10 Pet. 212; 4 How. 555; 11 How. 395; 17 How. 140, 508; 18 How. 469; 18 Wall. 586; Deady, 291, 431; 1 Sumn. 511, 583, 584; 2 Sumn. 350; Hemp. 545, 599, 618; Bald. 217; 1 Wood. & M. 361; 2 Wood. & M. 232; 3 Wood. & M. 489, 491; 1 Paine, 412, 413; 2 Paine, 543; 1 Dill. 294; 1 Story, 66; 1 Abb. U. S. 372; 2 McLean, 314, 317; 4 Wash. 599; 6 Blatchf. 116.

[\*CONSTITUTIONAL LAW. CHARITABLE USE.]

[\*464

# THE SOCIETY FOR THE PROPAGATION OF THE GOSPEL IN FOREIGN PARTS

v.

## THE TOWN OF NEW HAVEN, AND WILLIAM WHEELER.

A corporation for religious and charitable purposes, which is endowed solely by private benefactions, is a private eleemosynary corporation; although it is created by a charter from the government.

The capacity of private individuals (British subjects), or of corporations, created by the crown, in this country, or in Great Britain, to hold lands or other property in this country, was not affected by the revolution.

The proper courts in this country will interfere to prevent an abuse of the trusts confided to British corporations holding lands here to charitable uses, and will aid in enforcing the due execution of the trusts; but neither those courts, nor the local legislature where the lands lie, can adjudge a forfeiture of the franchises of the foreign corporation, or of its property.

The property of British corporations, in this country, is protected by the 6th article of the treaty of peace of 1783 in the same manner as those of natural persons; and their title, thus protected, is confirmed by the 9th article of the treaty of 1794, so that it could not be forfeited by any intermediate legislative act, or other proceeding, for the defect of alienage.

The termination of a treaty, by war, does not divest rights of property already vested under it.

Nor do treaties, in general, become extinguished, *ipso facto*, by war between the two governments. Those stipulating for a permanent arrangement of territorial, and other national rights, are, at most, suspended during the war, and revive at the peace, unless they are waived by the parties, or new and repugnant stipulations are made.

The act of the legislature of Vermont, of the 30th of October, 1794, granting the lands in that state, belonging to "The Society for Propagating the Gospel in Foreign Parts," to the respective towns in which the lands lie, is void, and conveys no title under it.

**\*THIS** case came before the court [\*465] upon a certificate of a division in opinion of the judges of the Circuit Court for the District of Vermont. It was an action of ejectment, brought by the plaintiffs against the defendants, in that court. The material facts, upon which the question of law arose, were stated in a special verdict, and are as follows:

By a charter granted by William III., in the thirteenth year of his reign, a number of persons, subjects of England, and there residing, were incorporated by the name of "The Society for the Propagation of the Gospel in Foreign Parts," in order that a better provision might be made for the preaching of the gospel, and the maintenance of an orthodox clergy in the colonies of Great Britain. The usual corporate powers were bestowed upon this society, and, amongst others, it was authorized to purchase estates of inheritance to the value of £2,000 per annum, and estates for lives or years, and goods and chattels, of any value. This charter of incorporation was duly accepted by the persons therein named; and the corporation has ever since existed, and now exists, as an organized body politic and corporate, in England, all the members thereof being subjects of the King of Great Britain.

NOTE.—See note to Trustees v. Hart, 4 Wheat. 1. Wheat. 8.

On the 2d of November, 1761, a grant was made by the Governor of the province of New Hampshire, in the name of the King, by which a certain tract of land, in that province, was granted to the inhabitants of the said province, and of the King's other governments, and to **466**\*] their heirs and \*assigns, whose names were entered on the grant. The tract so granted was to be incorporated into a town, by the name of New Haven, and to be divided into sixty-eight shares, one of which was granted to "The Society for the Propagation of the Gospel in Foreign Parts." The tract of land thus granted was divided among the grantees by sundry votes and proceedings of a majority of them, which, by the law and usage of Vermont, render such partition legal. The premises demanded by the plaintiffs, in this ejectment, were set-off to them in the above partition, but they had no agency in the division, nor was it necessary, by the law and usage of Vermont, in order to render the same valid.

On the 30th of October, 1794, the legislature of Vermont passed an act, declaring that the rights to land in that state, granted under the authority of the British government, previous to the revolution, to "The Society for the Propagation of the Gospel in Foreign Parts," were thereby granted severally to the respective towns in which such lands lay, and to their use forever. The act then proceeds to authorize the selectmen of each town to sue for and recover such lands, if necessary, and to lease them out, reserving an annual rent, to be appropriated to the support of schools. Under this law, the selectmen of the town of New Haven executed a perpetual lease of a part of the demanded premises to the defendant, William Wheeler, on the 10th of February, 1800, reserving an annual rent of \$5.50; immediately after which, the said Wheeler entered **467**\*] upon the land so leased, and has ever since held the possession thereof. Similar donations were made, about the same time with the above grant, to the plaintiffs, of lands lying within the limits of Vermont, by the Governor of New Hampshire, in the name of the King; but the plaintiffs never entered upon such lands, nor upon the demanded premises, nor in any manner asserted a claim or title thereto, until the commencement of this suit.

The verdict found a number of acts of the state of Vermont respecting improvements or settlements, and also the limitation of actions; but as the discussions at the bar did not involve any questions connected with those acts, those parts of the special verdict need not be more particularly noticed.

Upon this special verdict, the judges of the court below were divided in opinion upon the question, whether judgment should be rendered for the plaintiffs or defendants, and the question was thereupon certified to this court.

The cause was argued at the last term by *Mr. Hopkinson* for the plaintiffs, and by *Mr. Webster* for the defendants, and continued to the present term for advisement.

*Mr. Hopkinson*, for the plaintiffs, stated that the act of the legislature of Vermont, of the 30th of October, 1794, could have no effect upon the title of the corporation, unless the principle upon which it purports to have been

enacted is sound and legal. Two reasons are assigned in the preamble \*to the act: [**468** (1) That, by the custom and usages of nations, no aliens can, or of right ought to hold real estate in a country to whose jurisdiction they cannot be made amenable. (2) That the plaintiffs being a corporation erected by, and existing within a foreign jurisdiction, to which they alone are amenable, by reason whereof, at the time of the late revolution of this state, and of the United States, from the jurisdiction of Great Britain, all lands in the state, granted to the plaintiffs, became vested in the state, and have since that time remained unappropriated, &c. If these positions were true, then the plaintiffs cannot recover, independently of this act, which has no other effect than to vest the land, or the title thus accrued, in the state, or their grantees, the town schools. If, on the other hand, the position was untrue, the right of the plaintiffs remains unimpaired, and they are entitled to recover possession of the lands in the present action.

Against these positions, he would contend, (1) That the general position that no alien can hold real property in this country, is contradicted, at least as to all titles vested in British subjects, prior to the 4th of July, 1776, by the uniform and settled decision of this and other courts; both upon the general principle that the division of an empire makes no change in private rights of property, and under the operation of the treaties between the United States and Great Britain. (2) That independently of these treaty provisions, the title of an alien is not divested from him, nor vested in the state, until office found.

\*1. There is no general law or custom [**469** of nations, preventing aliens from holding lands in the different states of the world. It depends upon the municipal law of each particular nation, and, in this country, upon that of the several states of the Union. There are various regulations on the subject, in the different states; and *non constat*, by the special verdict, but what aliens, in general, may hold lands in Vermont. Be this as it may, the treaties of 1783 and 1794 form a paramount law in that state, and in all the states. In the case of *The Society, &c., v. Wheeler*,<sup>1</sup> this same corporation was sought to be defeated in its right to recover its lands in New Hampshire, not merely as aliens, but as alien enemies. But the court held that a license from the government to sue might be presumed, there being no evidence to the contrary; and as to the general principle of the right of an alien to bring an action for real property, Mr. Justice Story said that there was "no pretense for holding that the mere alienage of the demandants would form a valid bar to the recovery in this case, supposing the two countries were at peace; for, however, it might be true, in general, that an alien cannot maintain a real action, it is very clear that either upon the ground of the ninth article of the treaty of 1794, or upon the more general ground that the division of an empire works no forfeiture of rights previously acquired, for anything that appears on the present record, \*the present action might well be main- [**470** tained."



The treaty of 1783 forbids all forfeitures on either side. That of 1794 provides that the citizens and subjects of both nations, holding lands (thereby strongly implying that there were no forfeitures by the revolution), shall continue to hold, according to the tenure of their estates; that they may sell and devise them; and shall not, so far as respects these lands and the legal remedies to obtain them, be considered as aliens. In the case of *Kelly v. Harrison*,<sup>1</sup> which was that of an alien widow of a citizen of the United States, the Supreme Court of New York held that the plaintiff was entitled to recover dower of lands of which her husband was seized, prior to the 4th of July, 1776, but not of lands subsequently acquired. The British treaties were not considered by the court as bearing on the case. It was, therefore, the naked question, of the effect of the revolution, even upon a contingent right to real property, acquired antecedent to the revolution. In the same case, Mr. Chief Justice Kent says: "I admit the doctrine to be sound (*Calvin's* case, 7 Co. 27 b.; Kirby's Rep., 413), that the division of an empire works no forfeiture of a right previously acquired. The revolution left the demandant where she was before."<sup>2</sup> The case of *Jackson v. Lunn*<sup>3</sup> gives the same principle, and \*also recognizes the treaty of 1794, as confirming the title of persons holding lands.

In *Harden v. Fisher*,<sup>4</sup> which was also under the treaty of 1794, this court held that it was not necessary for the party to show a seisin in fact, or actual possession of the land, but only that the title was in him, or his ancestors, at the time the treaty was made. The treaty applies to his title, as existing at that epoch, and gives it the same legal validity as if he were a citizen. In a subsequent case, *Jackson v. Clark*,<sup>5</sup> where the point was whether an alien enemy could make a will of lands in New York, or convey his estate in any manner, the court would not hear an argument, it being settled by former decisions.<sup>6</sup> In *Orr v. Hodgson*,<sup>7</sup> the court confirmed the same doctrine, and also determined that the 6th article of the treaty of 1783 was not meant to be confined to confiscations *jure belli*; but completely protected the titles of British subjects from forfeiture by escheat for the defect of alienage. But the great leading case on this subject, is that of *Fairfax v. Hunter*,<sup>8</sup> where the operation of the treaty of 1794 was determined as confirming the titles of British subjects, even where there had been a previous cause of forfeiture, but no office found, or other proceeding to assert the right of the state. And in *Terrett v. Taylor*,<sup>9</sup> which was \*472\* the case of an ecclesiastical corporation, it was held that the dissolution of the regal government no more destroyed the right to possess and enjoy the property than it did of any other corporation or individual, the division of an empire creating no forfeiture of vested rights of property.

2. At all events, the alien lost no right, and the state acquired none, until office found.

It is firmly settled by the uniform decisions of this court, and of the most respectable state courts, that an alien may take an interest in lands, and hold the same against all the world, except the government, and even against it, until office found.<sup>10</sup>

If, then, the plaintiffs are to be considered as aliens, and labor under no other disability, it is clear that their title to the lands in question remains unimpaired, and as it existed previous to the 4th of July, 1776; and this upon three grounds: (1) Of the general law on the division of an empire. (2) Of the operation of the treaties of 1783 and 1794. (3) On the ground that the title of the state acquired by forfeiture, if any, had not been asserted by, nor that of the plaintiffs divested by, an inquest of office. And consequently, that the first position assumed by the legislature of Vermont to justify its act, is unfounded in law.

The second ground taken by the legislature is, \*that the plaintiffs having become a [\*473 foreign corporation by the revolution, could not continue to hold lands in this country after that event.

This presents the single question whether an alien corporation is in a different situation, in this respect, from an alien individual. On the part of the plaintiffs we contend that all the legal principles and rules which go to protect the title of an individual, will equally avail to protect that of a corporation; and that whether the security of the former is founded upon the general law as to the division of an empire, or upon the peculiar stipulations of the treaties of 1783 and 1794, or the defect of an inquest of office.

In this case, although the trust is in aliens, the use is to citizens of our own country; and the forfeiture would, therefore, only affect those in whom the beneficial interest is vested. On what ground can it be insisted, that a British corporation, holding lands in this country, in trust for British subjects prior to the declaration of independence, forfeited the lands at that epoch, and that they became *ipso facto* vested in the state where they lie, without office found, or other equivalent legal ceremony? If there be no such principle of law, and if, where the whole interest is British, it is protected, why should it not be equally protected where the real beneficial interest is American, and the trusteeship only is British? It is obvious that the revolution has nothing to do with the question. The position assumed by the legislature of Vermont must stand or fall, independent of that circumstance, and its introduction only \*tends to confuse the inquiry. The [\*474 broad position is, that at no time, nor under any circumstances, can a foreign corporation, or trustee, hold lands in this country for any use whatever. And why is it thought indispensably necessary, that the corporation, which in this case is the trustee, should be locally

1.—2 Johns. Cas. 29.

2.—Id. 32.

3.—3 Johns. Cas. 109.

4.—1 Wheat. Rep. 300.

5.—3 Wheat. Rep. 1.

6.—Id. 12, note 3, and the authorities there collected.

7.—4 Wheat. Rep. 453.

8.—7 Cranch's Rep. 603; S. C. 1 Wheat. Rep. 304.

9.—9 Cranch's Rep. 43.

10.—Fairfax v. Hunter, 7 Cranch's Rep. 603; 1 Wheat. Rep. 304; Craig v. Leslie, 3 Wheat. Rep. 563; Jackson v. Beach, 1 Johns. Cas. 399; Jackson v. Lunn, 3 Johns. Cas. 109.

within our jurisdiction? The answer will be, undoubtedly, in order to prevent neglect, or abuse of the trust. But that is properly a matter between the trustee and the *cestuis que trust*; and it is a strange remedy to take the property from both, least the former should impose upon the latter. If abuses should be found to exist, an appropriate legal remedy may easily be found. In England, alienage is no plea in abatement in the case of a corporation. By the old law, an abbot or prior alien could have an action real, personal or mixed, for any thing concerning the possessions or goods of the monastery, because they sue in their corporate capacity, and not in their own right to carry the effects out of the kingdom.<sup>1</sup> The circumstance, that the execution of the trust is in England, is here regarded. A corporation can have no local habitation. The disability must result from the character of the individual members. Thus, it is held, that a body corporate, as such, cannot be a citizen of any particular state of the Union; and its right to sue, or not to sue, in the federal courts, depends solely upon the character of the individual members.<sup>2</sup>

**475\*]** \*Whatever danger there may be from a foreign corporation holding lands in this country, it can only be a reason for restraint and regulation, but not for confiscation and forfeiture. If the execution of the trust can be regulated otherwise than according to the charter, it must be from the necessity of the case only; and the legislative interference must not go beyond providing an adequate remedy by some appropriate judicial proceeding. To say that the corporation, so far as respects these lands, is dissolved by the revolution, is to say that the lands are forfeited by the revolution. The trust remains, the corporate body remains, the land remains; but all connection between them (that is, the right of the corporation to hold in trust for the same purposes) is dissolved by the separation of the empire. It is only necessary to state this proposition to show its inconsistency with the well-established principles of law.

*Mr. Webster*, contra, contended, 1. That the capacity of the plaintiffs, as a corporation, to hold lands in Vermont, ceased by, and as a consequence of, the revolution.

2. That the Society for Propagating the Gospel, being in its politic capacity a foreign corporation, is incapable of holding lands in Vermont, on the ground of alienage; and that its rights are not protected by the treaties of 1783 and 1794.

3. That if those rights were so protected, the effect of the late war between the United States and Great Britain, was such as to put an end

to those treaties, and, consequently, to rights derived \*under them, unless they had [\***476** been revived by the treaty of peace at Ghent, which was not done.

He argued on the first and second points, that the dismemberment of the British empire dissolved this corporation, so far as respects its capacity to hold lands in this country, not merely because they are aliens, but from the peculiar circumstances of the case. The society is such a corporation as cannot hold lands in England, under the statutes of mortmain, without a license from the crown, which they have in their charter. But this license does not extend to authorize them to hold lands in the colonies. The statutes of mortmain do not extend to the colonies.<sup>3</sup> In the interpretation of treaties, the probable intention of the framers is to be taken as the guide, and the sense of the terms they use is to be limited and restrained by the circumstances of the case.<sup>4</sup> The British treaties are to be construed, not only as \*the [\***477** sort of title meant to be protected, but also the sort of persons and property meant to be protected. The mere personal disability of British subjects to hold lands, is taken away. They are protected against escheat. But corporations, such as this, ought to be considered as impliedly excepted from this provision. This might well be contended, even as to those who have a beneficial proprietary interest, and *a fortiori*, as to such as are mere trustees. In the present case, the revolution has violently separated the trustees from the property, and from the *cestuis que trust*. The former are in a foreign country, the latter are here. Can it be imagined that the treaties meant to take from the courts of equity of this country the ordinary power of enforcing the trust, or of changing the trustee in case of abuse or inability to perform his trust, independent of the statute of Elizabeth? But if the legislature cannot change the trustee, neither can the courts. Reciprocity lies at the foundation of all treaties between nations. But the English Court of Chancery has determined that it cannot enforce a trust connected with a charity in this country. Thus, Lord Thurlow took the administration of a charity, under an appointment by the trustees, and a plan confirmed by a decree of the court, out of the hands of William and Mary College, in Virginia, because the trustees had become foreign subjects by the separation of the two countries; and even denied costs to the college, because its existence as a corporation had not been, and could not be \*proved since [\***478** the revolution.<sup>5</sup> So, also, where the state of Maryland claimed certain bank stock which had been vested in the hands of trustees in England, by the colony of Maryland, before the

1.—Co. Litt. 129 a.

2.—Hope Ins. Co. v. Boardman, 5 Cranch's Rep. 57; Bank of the U. S. v. Deveaux, 5 Cranch's Rep. 61.

3.—Attorney-General v. Stewart, 2 Moriv. Rep. 143.

4.—Vattel, Droit des Gens, l. 2, c. 17, s. 270. "Entrons maintenant dans le détail des règles sur lesquelles l'interprétation doit se diriger, pour être juste et droite. 1. Puisque l'interprétation légitime d'un acte ne doit tendre qu'à découvrir la pensée de l'auteur; ou des auteurs de cet acte, dès qu'on y rencontre quelque obscurité, il faut chercher quel-

le a été vraisemblablement la pensée de ceux qui l'ont dressé, et l'interpréter en conséquence. C'est la règle générale de toute interprétation. Elle sert particulièrement à fixer le sens de certaines expressions, dont la signification n'est pas suffisamment déterminée. En vertu de cette règle, il faut prendre ces expressions dans le sens le plus étendu, quand il est vraisemblable que celui qui parle a eu en vue tout ce qu'elles désignent dans ce sens étendu: et au contraire, on doit en resserrer la signification, s'il paraît que l'auteur a borné sa pensée à ce qui est compris dans le sens le plus resserré."

5.—The Attorney-General v. City of London, 1 Vesey, Jr., 243; 3 Bro. Ch. Cas. 171.



revolution, the claim was rejected by Lord Rosslyn, upon the ground that the colonial government, which existed under the King's charter, was dissolved by the revolution, and though Great Britain had acknowledged the state of Maryland, yet the property which belonged to a corporation, which had thus become a foreign corporation, or been dissolved, could not be transferred to a body which did not exist under the authority of the British government. The new state could take only such rights of the old as were within their jurisdiction, and the fund, no object of the trust existing, must be considered as *bona vacantia* at the disposal of the crown.<sup>1</sup>

In the case now before this court, either the corporation is dissolved, or it has become a foreign corporation. If it still exists, for any purpose, it may forfeit its franchises for non-user or misuser. If its franchises are forfeited, a forfeiture of its property follows as a matter of course. But how is a *quo warranto*, or any other process, to go against it from our courts? And if the proceeding is in the English courts, to whom is the property to revert? It is plain that **479\*** it can revert to \*no other than the grantor, *i. e.*, the state of Vermont representing the crown

Here, the state, instead of proceeding in a court of equity to enforce a trust, or to present a new scheme for the administration of the charity, has proceeded to escheat the property for defect of alienage in those who claim the legal title. This it has done directly by a legislative act, and not through an inquest of office, or any analogous ceremony, which was unnecessary.<sup>2</sup>

Upon the third point, he argued, that even supposing the treaties of 1783 and 1794 protected the rights of property of the plaintiffs, whether beneficial or fiduciary, yet the late war abrogated such provisions of those treaties as were not revived by the peace of Ghent. The general rule certainly is, that whatever subsists by treaty, is lost by war.<sup>3</sup> Peace merely restores the two nations to their natural state.<sup>4</sup>

**480\*** \*Foreigners cannot, independent of conventional stipulations, by the general usage of nations, or by the common law, hold lands in this country. This pre-existing law, therefore, revives, there being no recognition in the treaty of Ghent of the articles of the former treaties, excepting British subjects from the operation of the rule.

Mr. Justice WASHINGTON delivered the opinion of the court, and after stating the case, proceeded as follows:

It has been contended by the counsel for the defendants,

1st. That the capacity of the plaintiffs, as a

corporation, to hold lands in Vermont, ceased by, and as a consequence of, the revolution.

2d. That the society being, in its politic capacity, a foreign corporation, it is incapable of holding land in Vermont, on the ground of alienage; and that its rights are not protected by the treaty of peace.

3d. That if they were so protected, still the effect of the last war between the United States and Great Britain was to put an end to that treaty, and consequently, to rights derived under it, unless they had been revived by the treaty of peace, which was not done.

1. Before entering upon an examination of the first objection, it may be proper to premise that this society is to be considered as a private eleemosynary \*corporation, although it [**481** was created by a charter from the crown, for the administration of a public charity. The endowment of the corporation was to be derived solely from the benefactions of those who might think proper to bestow them, and to this end the society was made capable to purchase and receive real estates, in fee, to a certain annual value, and also estates for life, and for years, and all manner of goods and chattels to any amount.

When the defendants' counsel contends that the incapacity of this corporation to hold lands in Vermont is a consequence of the revolution, he is not understood to mean that the destruction of civil rights, existing at the close of the revolution, was, generally speaking, a consequence of the dismemberment of the empire. If that could ever have been made a serious question, it has long since been settled in this and other courts of the United States. In the case of *Dawson's lessee v. Godfrey* (4 Cranch, 323), it was laid down by the judge who delivered the opinion of the court, that the effect of the revolution was not to deprive an individual of his civil rights; and in the case of *Terrett v. Taylor* (9 Cranch, 43), and of *Dartmouth College v. Woodward* (4 Wheat. Rep., 518), the court applied the same principle to private corporations existing within the United States at the period of the revolution. It is very obvious, from the course of reasoning adopted in the two last cases, that the court was not impressed by any circumstance peculiar to such corporations, which distinguished them, in \*this re- [**482** spect, from natural persons; on the contrary, they were placed upon precisely the same ground. In *Terrett v. Taylor*, it was stated that the dissolution of the regal government, no more destroyed the rights of the church to possess and enjoy the property which belonged to it, than it did the right of any other corporation or individual to his or its own property. In the latter case, the Chief Justice, in reference to the corporation of the college, observes that

en cas de rupture; par exemple le temps qui sera donné aux sujets, de part et d'autres, pour se retirer; la neutralité assurée d'un commun consentement à une ville, à une province, &c. Puisque, par des traités de cette nature, on veut pourvoir à ce qui devra s'observer en cas de rupture, on renonce au droit de les annuler par la déclaration de guerre."

4.—Vattel, l. 4, c. 1, s. 8. "Les effets généraux et nécessaires de la paix sont de réconcilier les ennemis et de faire cesser de part et d'autre toute hostilité. Elle remet les deux nations dans leur état naturel."

1.—Barclay v. Russell, 3 Ves., Jr., 424; Dolder v. The Bank of England, 10 Ves. 354.

2.—Smith v. Maryland, 6 Cranch's Rep. 286; Fairfax v. Hunter, 7 Cranch's Rep. 622.

3.—Marten's Law of Nations, l. 2, c. 1, s. 8; Vattel, l. 3, c. 10, s. 175. "Les conventions, les traités faits avec une nation, sont rompus ou annulés par la guerre qui s'élève entre les contractants; soit parcequ'ils supposent tacitement l'état de paix, soit parceque chacun pouvant dépouiller son ennemi de ce qu'il lui appartient, lui ôte les droits qu'il lui avait donnés par des traités. Cependant il faut excepter les traités où on stipule certaines choses



it is too clear to require the support of argument, that all contracts and rights respecting property remained unchanged by the revolution; and the same sentiment was enforced, more at length, by the other judge who noticed this point in the cause.

The counsel, then intended, no doubt, to confine this objection to a corporation consisting of British subjects, and existing in its corporate capacity in England, which is the very case under consideration. But if it be true that there is no difference between a corporation and a natural person, in respect to their capacity to hold real property; if the civil rights of both are the same, and are equally unaffected by the dismemberment of the empire, it is difficult to perceive upon what ground the civil rights of a British corporation should be lost, as a consequence of the revolution, when it is admitted that those of an individual would remain unaffected by the same circumstance.

But it is contended by the counsel, that the principle so firmly established, in relation to **483\*** corporations \*existing in the United States at the period of the revolution, is inapplicable to this corporation, inasmuch as the courts of Vermont can exercise no jurisdiction over it, to take away its franchise, in case of a forfeiture of them, by misuser or non-user, or in any manner to change the trustees, however necessary such interference might be, for the due administration and management of the charity. If this be a sound reason for the alleged distinction, it would equally apply to other trusts, where the trustees happened to be British subjects, residing in England, and entitled to lands in Vermont, not as a corporate body, but as natural persons claiming under a common grant. The question of amenability to the tribunals of Vermont would be the same in both cases, as would be the consequent incapacity of both to hold the property to which they had an unquestionable legal title at the period of the revolution.

It is very true, as the counsel has insisted, that the courts of Vermont might not have jurisdiction in the specified cases; and it is quite clear that were they to exercise it, and decree a forfeiture of the franchises of the corporation or the removal of the trustees, the plaintiffs would not be less a corporation, clothed with all its corporate rights and franchises.

But it is not perceived by the court how this exemption of the corporation from the jurisdiction of a foreign court to forfeit its franchises, or to interfere in its management of the charity, can destroy, or in any manner affect its civil rights, or its capacity to hold and enjoy the **484\*** property legally \*vested in it. It would surely be an extraordinary principle of law, which should visit such a corporation with the same consequences, on account of a want of jurisdiction in the courts of the country where the property lies to inquire into its conduct, as would happen if, after such an inquiry, judicially made, the corporation should be found to have forfeited its franchises; in other words, that the possibility that the corporation might commit a forfeiture, which the law will not presume, or might require the interference of a court of chancery to enforce the due administration of the charter, which might never happen, should produce a forfeiture, or something Wheat. 8.

equivalent to it, of the very funds which were, in whole, or in part, to feed and sustain the charity. This, nevertheless, seems to be the amount of the argument, and it is deemed by the court too unreasonable to be maintained, unless it appeared to be warranted by judicial decisions. It would seem that the state in which the property lies ought to be satisfied that the courts of the country in which the corporation exists, will not permit it to abuse the trusts confided to it, or to want their assistance, when it may be required to enable it to perform them in a proper way.

Were it even to be admitted that the legislature of Vermont was competent to pronounce a sentence of forfeiture of the property belonging to this corporation, upon the ground of its having abused, or not used its franchises, still the act of 1794 does not profess to have proceeded upon that ground. The only reasons assigned in the \*preamble of the act, [**\*485** for depriving the plaintiffs of this property, are, 1. That, by the custom and usages of nations, aliens cannot, and ought not to hold real estate in a country to whose jurisdiction they cannot be made amenable; and, 2. That this corporation, being created by, and existing within a foreign jurisdiction, all lands in the state, granted to the said society, became vested, by the revolution, in that state. For aught that appears to the contrary, the society was, at the moment when the act passed, fulfilling the trusts confided to it in the best manner for promoting the benevolent and laudable objects of its incorporation. It may further be remarked that the effect of this act is not merely to deprive the corporation of its legal control over the charity, so far as respects the property in question, but to destroy the trusts altogether, by transferring the property to other persons, and for other uses, than those to which they were originally destined by the grant made to the society.

The case chiefly relied upon by the defendants' counsel, in support of his first point, was that of the *Attorney-General v. The City of London* (1 Ves., Jr., 247, and 3 Bro. Ch. Cas., 171), under the will of Mr. Boyle, which directed the residue of his estate to be laid out by his executors for charitable, and other pious uses, at their discretion. They purchased, under a decree of the Court of Chancery, the manor of Brafferton, which they conveyed to the city of London, upon trust to lay out the rents and profits in the advancement of the Christian religion among infidels, as the Bishop \*of [**\*486** London, and one of the executors, should appoint, such appointment to be confirmed by a decree of the Court of Chancery. The trustees appointed a certain part of the rents and profits to be paid to an agent in London, for the college of William and Mary in Virginia, for the purpose of maintaining and educating in the Christian religion, as many Indian children as the fund would support; the president, &c., of the college to transmit accounts of their receipts and expenditures yearly to the Court of Chancery, and to be subject to certain rules then prescribed, and to such others as should thereafter be adopted with the approbation of the court. This appointment was ratified by a decree of the Court of Chancery. The object of the information was to have the dispo-



sition of this charity taken from the college, and that the master should lay before the court a new scheme for the future disposition of the charity. The new scheme was ordered by the chancellor, upon the ground that the college, belonging to an independent government, was no longer under the control of the court.

The difference between that case and the present is, that in that, the president, &c., of the college, were not the trustees appointed by the will of Mr. Boyle, or by his executors, to manage the charity, but were the mere agents of the trustees for that purpose, or rather the servants of the Court of Chancery, as they are styled by the counsel for the college, in the administration of the charity, subject to such orders and rules as might be prescribed by the **487\*** trustees, and sanctioned by the \*chancellor. The college had a mere authority to dispose of the charity, but without any interest whatever in the fund. The trustees resided in England, and there, too, was the fund. The president, &c., of the college derived all their authority from the trustees, and from the Court of Chancery. To that court they were accountable, and were necessarily removable by the court, whenever it should appear to the chancellor to be necessary for the due administration of the charity.

In the present case, the plaintiffs were, at the period of the revolution, entitled to the legal estate in the land in question, under a valid and subsisting grant; and the only question is, whether the estate so vested in them, was divested by the revolution, and became the property of the state. We have endeavored to show that it was not.

The case of *Barclay v. Russel* (3 Ves., 424) was also mentioned by the defendants' counsel, and ought, therefore, to be noticed by the court. That was a claim on the part of the state of Maryland, of certain funds which had been vested in trustees in London, before the American revolution, by the old government of Maryland, in trust for certain specific purposes. The case is long, and rather obscurely reported; but in the case of *Dolben v. The Bank of England* (10 Ves., 352), the lord chancellor states the ground upon which the claim was rejected. His lordship observes that "that was a case in which the old government existed under the King's charter, and a revolution took **488\*** place, though the new government \*was acknowledged by this country. Yet it was held, that the property, which belonged to a corporation existing under the King's charter, was not transferred to a body which did not exist under his authority, and, therefore, the fund in this country was considered to be *bona vacantia* belonging to the crown.

Another, and perhaps a more intelligible reason, is assigned in the case itself, namely, that the funds were vested by the old government in the hands of the trustees, by the act of 1733, for certain specific trusts, the execution of which was then rendered impossible. "There is no specific purpose," says the chancellor, "that the will of the present government can point out, for which purpose, according to the original creation of the trust, I can direct the trustee to transfer. It is, therefore, the common case of a trust, without any specific purpose to which it can be applied; the consequence of

which is that the right to dispose of this money is vested in the crown."

Now, it is quite clear, that if the premises upon which this case was decided were correct, the conclusion is so. The old government was treated as a corporation, which ceased to exist as such by the new form of government, deriving its name, its existence and its constitution, from a totally different source from that under which the old corporation existed. The old corporation no longer existed, the consequence of which was precisely that which would take place in case of the dissolution of any private corporation; their \*legal rights would [**\*489** cease, and would not descend or pass to the new corporation. So, too, if the specific purpose for which the trust was created had ceased, the disposition of the fund clearly devolved upon the crown.

But, in this case, the plaintiffs exist, at this day, as a corporation, precisely as it did before the revolution; and the specific purposes to which the trust was to be applied, by the terms of the charter, still remain the same. The cases, therefore, are totally unlike each other.

2. The next question is, was this property protected against forfeiture, for the cause of alienage, or otherwise, by the treaty of peace? This question, as to real estates belonging to British subjects, was finally settled in this court, in the case of *Orr v. Hodgson* (4 Wheat. Rep., 453), in which it was decided that the 6th article of the treaty protected the titles of such persons, to lands in the United States, which would have been liable to forfeiture, by escheat, for the cause of alienage, or to confiscation, *jure belli*.

The counsel for the defendants did not controvert this doctrine, so far as it applies to natural persons; but he contends that the treaty does not, in its terms, embrace corporations existing in England, and that it ought not to be so construed. The words of the 6th article are, "there shall be no future confiscations made, nor any prosecutions commenced, against any person or persons, for or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future \*loss or damage, either [**\*490** in his person, liberty, or property," &c.

The terms in which this article is expressed are general and unqualified, and we are aware of no rule of interpretation applicable to treaties, or to private contracts, which would authorize the court to make exceptions by construction, where the parties to the contract have not thought proper to make them. Where the language of the parties is clear of all ambiguity, there is no room for construction. Now, the parties to this treaty have agreed that there shall be no future confiscations in any case, for the cause stated. How can this court say that this is a case where, for the cause stated, or for some other, confiscation may lawfully be decreed? We can discover no sound reason why a corporation existing in England may not as well hold real property in the United States, as ordinary trustees for charitable, or other purposes, or as natural persons for their own use. We have seen, that the exemption of either, or all of those persons, from the jurisdiction of the courts of the state where the property lies, affords no such reason.



It is said that a corporation cannot hold lands, except by permission of the sovereign authority. But this corporation did hold the land in question, by permission of the sovereign authority, before, during and subsequent to the revolution, up to the year 1794, when the legislature of Vermont granted it to the town of New Haven; and the only question is, whether **491\*** [this grant was not void \*by force of the 6th article of the above treaty. We think it was.

Was it meant to be contended that the plaintiffs are not within the protection of this article, because they are not persons who could take part in the war, or who can be considered by the court as British subjects? If this were to be admitted, it would seem to follow that a corporation cannot lose its title to real estate, upon the ground of alienage, since, in its civil capacity, it cannot be said to be born under the allegiance of any sovereign. But this would be to take a very incorrect view of the subject. In the case of *The Bank of The United States v. Deveaux* (5 Cranch's Rep., 86), it was stated by the court that a corporation, considered as a mere legal entity, is not a citizen, and therefore could not, as such, sue in the courts of the United States, unless the rights of the members of it, in this respect, could be exercised in their corporate name. It was added that the name of the corporation could not be an alien or a citizen; but the corporation may be the one or the other, and the controversy is, in fact, between those persons and the opposing party.

But even if it were admitted that the plaintiffs are not within the protection of the treaty, it would not follow that their right to hold the land in question was divested by the act of 1794, and became vested in the town of New Haven. At the time when this law was enacted, the plaintiffs, though aliens, had a complete, though defeasible, title to the land, of **492\*** [which they could not be deprived \*for the cause of alienage, but by an inquest of office; and no grant of the state could, upon the principles of the common law, be valid, until the title of the state was so established. (*Fairfax's devisee v. Hunter's lessee*, 7 Cranch's Rep., 503). Nor is it pretended by the counsel for the defendants that this doctrine of the common law was changed by any statute law of the state of Vermont, at the time when this land was granted to the town of New Haven. This case is altogether unlike that of *Smith v. The State of Maryland* (6 Cranch's Rep., 286), which turned upon an act of that state, passed in the year 1780, during the revolutionary war, which declared that all property within the state, belonging to British subjects, should be seized, and was thereby confiscated to the use of the state; and that the commissioners of confiscated estates should be taken as being in the actual seisin and possession of the estates so confiscated, without any office found, entry, or other act to be done. The law in question passed long after the treaty of 1783, and without confiscating or forfeiting this land (even if that could be legally done), grants the same to the town of New Haven.

3. The last question respects the effect of the late war between Great Britain and the United States, upon rights existing under the treaty of peace. Under this head, it is contended by the

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defendants' counsel, that although the plaintiffs were protected by the treaty of peace, still the effect of the last war was to put an end to that treaty, and, consequently, to civil rights derived \*under it, unless they had been revived [**493** and preserved by the treaty of Ghent.

If this argument were to be admitted in all its parts, it nevertheless would not follow that the plaintiffs are not entitled to a judgment on this special verdict. The defendants claim title to the land in controversy solely under the act of 1794, stated in the verdict, and contend that by force of that law, the title of the plaintiffs was divested. But if the court has been correct in its opinion upon the two first points, it will follow that the above act was utterly void, being passed in contravention of the treaty of peace, which, in this respect, is to be considered as the supreme law. Remove that law, then, out of the case, and the title of the plaintiffs, confirmed by the treaty of 1794, remains unaffected by the last war, it not appearing from the verdict that the land was confiscated, or the plaintiffs' title in any way divested, during the war, or since, by office found, or even by any legislative act.

But there is a still more decisive answer to this objection, which is, that the termination of a treaty cannot divest rights of property already vested under it.

If real estate be purchased or secured under a treaty, it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights than the repeal of a municipal law affects rights acquired under it. If, for example, a statute of descents, be repealed, it has never been supposed that rights of property \*already vested during its [**494** existence, were gone by such repeal. Such a construction would overturn the best established doctrines of law, and sap the very foundation on which property rests.

But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to this subject, we are satisfied that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning.

We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do no.



ease on the occurrence of war, but are, at most, **495\*** only suspended \*while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.

A majority of the court is of opinion that judgment upon this special verdict ought to be given for the plaintiffs, which opinion is to be certified to the Circuit Court.

*Certificate for the plaintiffs.*

Cited—4 Pet. 502; 12 Pct. 722, 749; 14 Pet. 413; 1 How. 206; 6 How. 542; 1 Paine, 656.

[DEVISE.]

DALY'S LESSEE *v.* JAMES.

J. B. devises all his real estate to the testator's son, J. B., Jun., and his heirs lawfully begotten; and, in case of his death without such issue, he orders A. Y., his executors and administrators, to sell the real estate within two years after the son's death; and he bequeaths the proceeds thereof to his brothers and sisters, by name, and their heirs forever, or such of them as shall be living at the death of the son, to be divided between them in equal proportions, share and share alike. All the brothers and sisters die, leaving issue. Then A. Y. dies, and afterwards J. B., Jun., the son, dies without issue. *Heirs* is a word of limitation; and none of the testator's brothers and sisters being alive at the death of J. B., Jun., the devise to them failed to take effect.

*Quære*, Whether a sale by the executors, &c., under such circumstances, is to be considered as valid in a court of law.

However this may be, a sale, thus made, after the lapse of two years from the death of J. B., Jun., is without authority, and conveys no title.

*Quære*, Under what circumstances a court of equity might relieve, \*in case the trustee should refuse to exercise the power within the prescribed period, or should exercise the same after that period.

A power to A. Y., and his executors or administrators, to sell, may be executed by the executors of the executors of A. Y.

**E**RROR to the Circuit Court of Pennsylvania.

This was an action of ejectment, brought in the court below, by the plaintiffs in error, to recover the possession of a messuage and lot in the city of Philadelphia. The special verdict in the case stated that on the 8th of August, 1768, John Bleakley, of Philadelphia, being then in London, made and duly executed his last will, as follows: "In the name of God, Amen. I, John Bleakley, of Philadelphia, Esquire, now in London, and shortly bound to Philadelphia, being in perfect health, and of sound and disposing mind, memory, and understanding, and considering the certainty of death, and the uncertainty of the time thereof, do therefore make and declare this my last will and testament, in manner following, that is to say: First, and principally, I commend my soul to God, and my body to the earth or sea, as he shall please to order; and as for and concerning my worldly estate, I give, devise and bequeath the same in manner following, that is to say: First, I will and desire that all my just debts and funeral expenses (if any) be fully paid and satisfied, as soon as conveniently may be after my decease. Also, I give and bequeath to my brother, David Bleakley, living in the north of Ire-

land, the sum of ten pounds sterling. Also, I give and bequeath to my brother, William Bleakley, living near Dungannon, the sum of ten pounds sterling. Also, I \*give and **\*497** bequeath to my sister, Margaret Harkness, of Dungannon, the sum of one hundred pounds sterling. Also, I give and bequeath to my sister, Sarah Boyle, wife of the Rev. Mr. Boyle, the sum of ten pounds sterling. Also, I give and bequeath to my cousin, Archibald Young, of Philadelphia, an annuity of thirty pounds, Pennsylvania money, to be paid to him out of the rents and profits of my real estate, on the 25th day of March, in every year, during the joint lives of him, the said Archibald Young, and my son, John Bleakley, or his heirs lawfully begotten. But, in case of the decease of my said son, without issue lawfully begotten as aforesaid, in the life-time of the said Archibald Young, then the said annuity is to cease; and in lieu thereof, I give and bequeath unto the said Archibald Young, and his assigns, the sum of four hundred pounds sterling, payable out of the proceeds of my real estate, when the same is sold and disposed of, according to the intention of this my will, hereinafter mentioned, and before any dividend is made of the proceeds of my said estate. And this legacy or bequest is made to my said cousin, Archibald Young, not only for the natural affection I have and bear to him as a relation, but also as a full compensation for the services he has already rendered me, and in lieu of his commissions for the trouble he may hereafter have in the execution of this my will. All the rest and residue of my estate, real and personal, of what nature, kind or quality the same may be or consist, and hereinbefore not particularly disposed of, I give, \*devise, and bequeath to my son, John **\*498** Bleakley, and his heirs lawfully begotten; and in case of the decease of my said son, without such issue, then I do direct and order my said cousin, Archibald Young, his executors or administrators, to sell and dispose of my real estate, within two years after the decease of my said son, John Bleakley, to the best advantage. And I do hereby give and bequeath the proceeds thereof to my said brothers, David Bleakley and William Bleakley, and my said sisters, Margaret Harkness and Sarah Boyle, and their heirs forever, or such of them as shall be living at the decease of my said son, to be divided between them in equal proportions, share and share alike, after deducting out of such proceeds the sum of 400 pounds sterling, hereinbefore given and bequeathed to the said Archibald Young, immediately on the decease of my said son without issue in lieu of the annuity above mentioned. And in case my said son should die before he attains the age of twenty-one years, without issue lawfully begotten, as aforesaid, then my will and mind is, that the remainder of my personal estate, hereby intended for my said son at his own disposal, if he should live to attain the age of twenty-one years, shall go to, and be divided amongst my said brothers and sisters, with the proceeds of my real estate, as is hereinbefore directed to be divided. And I do hereby nominate and appoint the said Archibald Young, and my said son, John Bleakley, executors of this my will, hereby revoking, and making void, all former wills, codicils, and bequests, by me, at any time or times \*here- **\*499**



tofore made, and do ordain this will to be as and for my last will and testament. In witness whereof," &c.

The testator died in the month of January, 1769. His brothers and sisters all died, leaving children (who are still alive), at or about the following periods, viz.: Sarah Boyle between the years 1760 and 1770; William in the year 1775; David in the year 1790, and Margaret Harkness in the year 1794. The children were of full age, or nearly so, when the above will was made, and were personally known to the testator. Archibald Young died in May, 1782, having duly made and executed his last will and testament, whereby he appointed Robert Correy his executor, who, on the 24th of April, 1797, made his last will and testament, and thereof appointed Eleanor Curry and James Boyd the executors, and died in June, 1802.

John Bleakley, the son, died on the 3d of September, 1802, without issue, and of full age, having previously executed his last will and testament, whereof he appointed J. P. Norris his executor, and thereby directed his real and personal estate to be sold, and the proceeds, after paying certain legacies, to be divided among certain of his relations. On the 25th of May, 1803, the said Norris, for a valuable consideration, sold and conveyed the premises in dispute to W. Folwell, who, on the 21st of April, 1810, conveyed the same for a valuable consideration to the defendant. On the 1st of February, 1805, Eleanor Curry and James Boyd, the executors **500\*** of R. Correy (who was the \*executor of A. Young), by deed, bargained and sold the premises in question to James Smith, which deed was afterwards canceled; and subsequently, on the 27th of March, 1820, they sold and conveyed the said premises to the lessor of the plaintiff, who, at the time of his purchase, had notice of the death of the brothers and sisters of John Bleakley, in the life-time of his son.

Upon this special verdict, judgment having been rendered, *pro forma*, for the defendant, in the court below, the cause was brought by writ of error to this court.

*Mr. Wheaton*, for the plaintiff, stated that the will of J. Bleakley, Senior, was, in effect, a devise of an estate tail to the testator's son, with a remainder over to his executor, A. Young, &c., in trust to sell, in case of the son's dying without issue, and the proceeds to be distributed equally among his brothers and sisters, and their heirs (as a *designatio personarum*), or such of them as should be living at the son's death. But the first difficulty in the cause was a determination of the Supreme Court of Pennsylvania, upon an ejectment brought in that court, under the same will. The State Court there held that the words "heirs" was a word of limitation; and none of the brothers and sisters being alive at the death of the son, J. Bleakley, Junior, the object of the power to sell had failed; their issue were not entitled, and a sale by the executors of Young conveyed no title; although it was admitted that the power might **501\*** be \*executed by Young's executors, if the object of sale had continued.<sup>1</sup>

This decision was that of two judges only,<sup>2</sup> and could hardly be considered as a binding authority even in the state courts, whatever respect might be felt for the great abilities of the learned judges by whom it was pronounced. This is not one of those cases where the decisions of the state courts, on questions of local law, establish rules of property, which this court will not disturb; but it is a mere question of the interpretation of a will, depending entirely on the rules of the common law.

There are two questions for consideration: (1) Whether the power or trust, to sell, now exists; and (2) How the distribution of the proceeds of the sale is to be made.

The second question is certainly subordinate to the first. For if there be an absolute power to sell (as will be contended), then the disposition of the fund is a matter to be determined between the trustees and those who may claim it in a court of equity; but it cannot interfere with the paramount authority to sell. But it has been supposed that if the object for creating the fund no longer exists, the power is gone with it. The second question, therefore, will be considered first; not meaning, however, to admit that the one is a corollary from the other. Reasons may have existed <sup>\*to</sup> **[\*502]** induce the testator to desire a sale at all events; and the fact of its not being in express terms restricted to any particular event, goes to prove that it was to be made under all circumstances, except only the son's having issue.

Such is the necessary ambiguity of all human language, that particular words used in a will, or any other writing, must be taken in their most usual technical sense or not, according to other considerations. One of the most important of these considerations is the design of the writer, as manifested by the general scope of the writing itself. What, then, was the intention of the testator, and who were the objects of his bounty, as manifested by the will itself? We contend that he intended to devise all his property, and to retain it in his own family. The first and great rule in the exposition of wills, is the intention of the testator expressed, which, if consistent with the rules of law, shall prevail.<sup>3</sup> To this, all other rules are but subsidiary or suppletory.<sup>4</sup> Supposing this to be the design of the testator, the means are appropriate to the end. He gives to his cousin, A. Young, a small pecuniary annuity, burthened with onerous duties; and to his son, the mere usufruct of the residue, unless he should have children; in which event only the restraint on alienation is removed.

The first great object of the testator's bounty, <sup>\*then</sup>, was his son. The second class **[\*503]** of objects was his brothers and sisters; and the third class was the children of his brothers and sisters.

Had the brothers and sisters survived the son, they would unquestionably have succeeded, by the executory devise, on the occurrence of the sole contingency, viz., the death of the son, without issue lawfully begotten. Did the devise extend beyond the brothers and

1.—Smith's Lessee v. Folwell, 1 Binney's Rep. 546.

2.—Tilghman, Ch. J., and Yeates, J.; Smith, J., died after the argument, and before judgment, and Breckenridge, J., dissented.

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3.—Sir W. Jones., Isæus. Com. 308.

4.—Cas. Temp. Talbot, 43; 2 Burr. 770; 1 Fonbl. Eq. 413; Ambrose v. Hodgson, Dougl. 323.



sisters? It is clear that it was not, it terms, restricted to the brothers and sisters personally; the terms of it contemplate something more. The words are, "to my said brothers, &c., and my said sisters, &c., and their heirs forever, or such of them as shall be living at the decease of my said son, to be divided between them in equal proportions, share and share alike." Whatever may be the technical meaning of the word *heirs*, &c., the use of them certainly shows that the testator looked beyond the brothers and sisters. The opposite construction rejects words which the testator has thought fit to use; and it is a well-established principle, that no words in a will shall be rejected that can bear any construction.<sup>1</sup> The opposite argument must also take for granted that the words, "such of them as shall be living," &c., refer to brothers and sisters merely. But this supposition is contradicted, both by fair grammatical construction, and the general scope of the will. *Fiat relatio proximis antecedenti*: the word "them" is in immediate juxtaposition 504\*] with the word "heirs." The whole scope and object of the will is to provide for the family; and to restrict this devise to the brothers and sisters, is to defeat this object. The intention of the testator was evidently to dispose of his property, not to leave it floating and precarious. The death of his brothers and sisters was naturally to have been expected; but of their children, some of them would probably be alive, should the son die without issue. It was not for the purpose of giving a fee-simple that the word "heirs" was introduced; for it was personal property which was devised, and which would pass absolutely without words of inheritance. The children of his brothers and sisters were personally well known and dear to him. They were, therefore, the natural objects of his bounty; and this extrinsic circumstance may aid in the construction.

But what is the meaning of the word "heirs" as coupled with the words "brothers and sisters?" It may mean, (1) *Heirs at law*; in which case, whilst it bears the most technical meaning, it will consist with a liberal and rational interpretation. The proceeds go to the brothers, &c. If any of them are dead, to the heir at law of the deceased, standing in *loco parentis*, and the surviving brothers, &c. If all are dead, leaving children, to the heirs at law of all. If all are dead, and some have left no children, and therefore, no heirs at law, except the children of the others, then to the surviving heirs at law. (2) Or it may mean *children*. It is thus used in popular discourse, and writings 505\*] not technical: If children, then "heirs," says St. Paul.<sup>2</sup> The testator himself uses it in this sense, in at least one other part of his will. He says: "I give and bequeath to my son, John Bleakley, and his heirs lawfully begotten;

and in case of his decease without such issue," &c. And this use of the word is perfectly legal. Thus, in *Jones v. Morgan*: "It is first necessary to determine upon the whole of the will, whether, by the word *heirs*, the testator meant that succession of persons so denominated by the law. If that appears to be the intention, the rule in *Shelly's* case must, in all events, take place. But when the word is used in any other sense, the rule is not applicable, and the limitation must have its effect, as if proper words had been made use of."<sup>3</sup> So, in *Bamfield v. Popham*, "It was agreed that the word *heirs* was not always, and of necessity, to be intended as a word of limitation. Thus, in 2 Ventr., 311, a devise to A for life, remainder to the heirs male of the body of A, now living; these were words of purchase. So, in Raym., 279, *Lisle v. Gray* (1 Jones, 114), lands were limited to A for life, &c., the words *heirs male*, were understood to signify sons."<sup>4</sup> And in *Darbison v. Beaumont*: "Devise to the heirs male of J. S. begotten. J. S. having a son, and the testator taking notice that J. S. was then living, a sufficient description of [\*506 testator's meaning, and such son shall take, though (strictly speaking) he is not heir." "As to the objection, that Mr. Long being living, there could not, in a legal sense, be any heir male, &c., it was answered that the intent of the testator, by the devise (which was the only matter in question), did plainly appear, &c. That the word *heir* had, in law, several significations; in the strictest, it signified one who had succeeded to a dead ancestor; but in a more general sense, it signified an heir apparent, which supposes the ancestor to be living; and in this latter sense, the word *heir* is frequently used in statutes, law books, and records."<sup>5</sup> By way of analogy, it may also be mentioned that the word "issue" is frequently taken as a *descriptio personarum*.<sup>6</sup>

The rule in *Shelly's* case has been frequently broken in upon in favor of last wills. Once fix the intention, and the word *heirs* may as well be a word of purchase, as a word of limitation. And it may even be taken as a word of purchase in a deed, if such be the intention of the grantor.<sup>7</sup> So, also, in marriage articles.<sup>8</sup> This is not upon the principle that the rules of property are different \*in [\*507 chancery from what they are at law; that notion was long since completely exploded.<sup>9</sup> But the rule has been still more frequently relaxed in the case of devises, for very obvious reasons.<sup>10</sup> Several attempts have been made, both by judges and elementary writers, to classify the cases in which, by an exception to the rule, the word *heirs* is construed as a word of purchase; but all the exceptions will be found to turn upon the intention of the testator. And when it is said that this intention must not be

1.—Barry v. Edgeworth, 2 P. Wms. 575.

2.—Rom. viii, 17.

3.—Bro. Ch. Rep. 206.

4.—1 P. Wms. 59; S. P. 1 P. Wms. 87, 142, 754; 2 P. Wms. 471; 1 Eq. Cas. Abr. 194; 3 Bro. Parl. Cas. 467; 2 Ves. 646; 1 Ventr. 225; 2 Lord Raym. 873, 1407; 2 Salk. 679; Dougl. 323.

5.—1 P. Wms. 232; S. P. 1 Ventr. 344; 2 Lev. 232; Raym. 330; 2 Sir W. Jones, 99; Pollexf. 457.

6.—Cruise's Dig., tit. 38; Devise, c. 10, s. 33-35.

7.—Lisle v. Gray, Th. Raym. 315; S. P. Walker v. Snow, Palmer's Rep. 349.

8.—Honor v. Honor, 1 P. Wms. 123; Bale v. Coleman, Id. 142; Trevor v. Trevor, Id. 612; West v. Errisey, 2 P. Wms. 349.

9.—Watts v. Ball, 1 P. Wms. 108; Phillips v. Phillips, Id. 35.

10.—Archer's case, 1 Co. Rep. 66; Luddington v. Kime, Lord Raym. 203; Backhouse v. Wells, 1 Eq. Cas. Abr. 184; 1 Ventr. 184; Lord Raym. 1561; Bagshaw v. Spencer, 1 Ves. 142.

contrary to the rules of law, this *dictum* does not apply to the technical sense of the terms used by the testator. It merely applies to the legality of the object which he wishes to effect. *e. g.* The testator wishes to create a perpetuity; any words, however untechnical, which import the idea, are sufficient; but the law will not permit a perpetuity to be created at all. This distinction is clearly stated by Lord Keeper Henley. "It was argued that if the intent was plain, yet, if the testator had used words which, by the rules of law, imported a different signification, the rule of law, and not the intent, would prevail; but there was no such rule applicable to this case. In case of a will, the intent shall prevail, if not contrary to law; the meaning of which is, if the limitations are such as the law allows; but it does not mean that the words must be taken in such signification as the law imposed on them. If **508\***] words, which, in \*consideration of law, were generally taken as words of limitation, appear in a will to be very plainly intended as words of purchase, they must be considered as such both in courts of law and equity."<sup>1</sup>

But admitting, *argumenti gratia*, that if the children of the testator's brothers and sisters take in character of heirs, they must take in quality of heirs, *i. e.*, by descent; they may take in this manner consistently with the rules of law. Either it is a contingent executory devise to their parents, or, as it is commonly called, an executory interest; or it is a contingency or possibility coupled with an interest. In the first case, although the devisees die before the contingency happens, their children will take by descent.<sup>2</sup> If it be a contingency or possibility coupled with an interest, they may take in the same manner.<sup>3</sup> It is now the settled text law, that these contingent estates are transmissible to the heirs of the devisee, where such devisee dies before the contingency happens, and if not disposed of before, will vest in such heirs when the contingency happens; **509\***] though formerly \*an opinion prevailed that they could not pass by a will made previous to their vesting.<sup>4</sup>

If it should be objected that this is a double contingency, which is bad, the answer is, that there is no rule of law which prohibits a limitation on a double contingency, or a contingency on another contingency. A limitation may be good, though made to depend on any number of contingencies, if they be collateral to, or independent of, each other, and may all happen within the legal time of limitation. In *Routledge v. Dorrit*,<sup>5</sup> a grandchild took on a limitation dependent on no less than four contingencies.

It is a well-established doctrine that where a class or denomination of heirs, indefinitely, are intended to be embraced, the word *heirs* is a

word of limitation; but where particular or special persons are constituted the stock of a new descent, it operates as a word of purchase.<sup>6</sup> Here the devise is to the brothers and sisters, and such of their heirs as may be living at a particular time. Heirs general, therefore, could not have been meant; but only the heirs of each brother, and of each sister, *i. e.*, the children of each brother and sister. The term is restricted (supposing it to be a devise of the realty) to such as should be heir \*of [**510** such of the brothers and sisters as were dead when J. Bleakley, Jun., died without leaving issue. The heirship must be established by the known canons of descent; but when ascertained, the objects defined would still take by purchase. The word *heirs* is, indeed, a word of limitation, for the purpose of ascertaining who are to take; but after it has performed that office, the objects who are to take are in by purchase, and not by descent. And herein, it is humbly apprehended, consists the radical defect in the argument of the learned judges of the State Court. If the word *heirs* necessarily compelled all who take under it, to take in quality of heirs, then the argument that they must take *per stirpes*, and not *per capita*, might have its difficulties. But this word does not operate, exclusively, either as a word of purchase, or of limitation. That it is often a word of purchase has been before shown; and in the common case of a devise "to A for life, remainder to the heirs of B, who leaves a daughter, and his wife *enfeinte* with a son. On the death of B, the daughter takes, under the description of heir, by purchase, and she shall not be divested by the subsequent birth of the son."<sup>7</sup> So, also, in the case of an estate to A for life, remainder to the right heirs of B, or of an executory devise to the right heirs of A. The canons of descent are referred to for the purpose of ascertaining who are the right heirs; and after this is ascertained, such persons \*take by purchase. It does not follow, [**511** that because the word *heirs* is a word of limitation, that the heirs, when ascertained, must take as heirs; for there are many cases where terms of limitation operate only *sub modo* as such, viz., for the purpose of defining the objects who are to take in quality of purchasers. Thus, if a remainder be limited in gavelkind, or borough English lands, to the right heirs of A, the common law points out the eldest son as the heir, contrary to the custom, which gives the land in the one case to all the sons, and in the other to the youngest son. "For," says Mr. Watkins, "notwithstanding we may thus have recourse to the law of descents to ascertain the persons who are to take, yet, when they are once ascertained, they take as purchasers."<sup>8</sup> So, if lands be devised to the right heirs of A, who leaves two daughters, they are

1.—Austen v. Taylor, Ambl. 376; S. P. Sir W. Jones, Iseus. 308.

2.—Gurnell v. Wood, 8 Vin. Abr. 112; Willes' Rep. 211; S. P. Goodright v. Searle, 2 Wills. 29; Porter v. Bradley, 3 Term Rep. 143; Weale v. Lower, Pollexf. 54; Viek v. Edwards, 3 P. Wms. 372; 1 H. Bl. 30, 33; 3 Term Rep. 88.

3.—King v. Withers, 3 P. Wms. 414; Perry v. Phillips, 1 Ves., Jr., 254; Selwyn v. Selwyn, 2 Burr. 1131; Roe v. Jones, 2 H. Bl. 30.

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4.—Fearne's Cont. Rem. 534, 537; Cas. Temp. Talb. 123; 2 Ves. 119; 1 Str. 131; 2 Atk. 618; Watk. Desc. 14; Cruise's Dig. tit. 38; Devise, e. 3, s. 18-21, c. 20, s. 43-53; 2 Bl. Comm. 290.

5.—2 Ves., Jr., 358.

6.—Hargr. Law Tracts, 561; Jones v. Morgan, 1 Bro. Ch. Cas. 206.

7.—Goodwright v. Wright, 1 Str. 30; Dougl. 499 note; Watk. Desc. 208.

8.—Watk. Desc. 226; Co. Litt. 220 a; Brown v. Barkman, 1 Str. 42.



both his heirs; but they take not as parceners (for to do this they must take by descent), but as joint-tenants, or in common, *i. e.*, as purchasers.<sup>1</sup> In general, purchasers take *per capita*, and those who claim by descent, take *per stirpes*; but if the intention of the grantor or deviser can be better promoted by purchasers taking *per stirpes* than *per capita*, there is no inflexible rule of law to prevent it. In the present case, we hold that the intention is plain, and that all claiming as heirs of those brothers and sisters **512\*** would take *per stirpes*, even \*though they take by purchase; but whether they take in one way or the other is quite immaterial, provided it be shown that the brothers and sisters personally were not the sole objects of the testator's bounty, and consequently need not survive J. Bleakley, Jun.

The same construction has been adopted, respecting personal property, under the statute of distributions, 29 Charles II., c. 3. Where there is a bequest of personalty to the relations or next of kin of A, the statute furnishes the rule; *i. e.*, ascertains who are the persons comprehended within these words; and these persons may take *per capita*, though if distributed, in such case, under the statute, they would take *per stirpes*.<sup>2</sup>

That these children are entitled to take, as purchasers, under the word *heirs*, is manifest, as none can claim by descent, unless the subject of the limitation vests, or might have vested, in the ancestor, *qua* ancestor. But here no estate, in land, was ever contemplated to vest in the brothers or sisters named, or in either of them. The entire estate, in the land vested either in Bleakley, Jun., or in Young, the executor, &c., and the proceeds of a sale, *i. e.*, personalty only, was to be paid over to such persons as satisfied the description entitled at the time of Bleakley, Jun., his death without issue. Under no possible circumstances or view of the case could these children take in quality of heirs; because nothing ever did or could vest in their parents as ancestors; and **513\*** the \*subject itself of the devise was not real property, but money, of which heirship cannot with legal accuracy be predicated. It is, therefore, manifest, that if they take at all, it must be as purchasers, and that the word *heirs* may be used for the purpose of ascertaining who are embraced within the scope of the testator's bounty; and having performed that duty, it is *functus officio*, and ceases to operate as a word of limitation.<sup>3</sup>

The next question in the cause is, whether the power to sell exists in those who have exercised it, and under a sale from whom the plaintiff claims title.

And this divides itself into two inquiries: (1) Whether there is in any person, now existing, an authority to sell. (2) Whether the event has taken place, which, in the contemplation of the testator, was to occasion its exercise.

1. It is a familiar principle, that no execution of a trust shall fail for want of a trustee. On a total failure, chancery will appoint one; but if the individual named by the testator is

wanting, it devolves on the person who succeeds to the general rights and duties with which it is coupled. Here the direction of the testator himself extends it beyond the first individual named. The trust, as it is created, extends not only to the executors, but to the administrators of A. Young, who may be total strangers. But even if it were not so, the power given to one will extend by operation \*and construction of law to his execu- **\*514** tors, and so on from executor to executor.<sup>4</sup> And, by the local law of Pennsylvania, the distinction between a power to sell, and a devise of the land to be sold, is taken away, and the executors have the same interest in the one case as in the other.<sup>5</sup> The remainder in fee, then, on the death of Bleakley, Jun., vested in the executors, &c., for the purpose of sale. The will of the testator was that it should be sold on the occurrence of that event. It is immaterial for what reason. It is sufficient that it was his will. The direction to sell is mandatory, and not a mere discretionary authority. The time within which it was to be performed is immaterial. Its performance might have been retarded by many accidents.

2. The event has occurred, which, in the contemplation of the testator, was to occasion the exercise of the power to sell. The language of the will on this point is unambiguous and clear. "In case of the decease of my said son without issue, then I do direct and order," &c. It is made to depend on the single event of his decease without issue. How the proceeds are to be distributed is another and a distinct question. They are not made dependent upon each other. If the brothers and sisters had all lived, they could not have entered into possession of the real property; they could \*only have compelled an execution of **\*515** the trust, by the preliminary measure of a sale.

*Mr. Sergeant*, contra, stated that this case had been submitted to the highest court of Pennsylvania, where it was decided against the title, now in question, so long since as 1809. He admitted that a verdict and judgment in ejectment were not conclusive, and that a second ejectment might be brought on the same title. But the decision of a competent court of the highest resort, solemnly rendered on a question of law, submitted to them by the parties, ought to be decisive of what the law is on that question, as between the parties, and all claiming under them with notice. It would be conclusive on that court, and on all inferior jurisdictions; and where there is concurrent jurisdiction, the rule is that the tribunal which first gets possession has exclusive possession of the cause and of its incidents. Here the question was upon the law of Pennsylvania, as it regarded land in that state; not the statute law, which is written, but the common law, as shown by the decisions of her courts, and modified by usage and custom, or the peculiar adoption and application of its principles. Had this case been first submitted to the Circuit Court, and brought here by appeal, a

1.—*Coxden v. Clark*, Hob. 33; 3 Leon. 14, 24.

2.—*Prec. in Ch.* 401; 1 Atk. 470; 2 P. Wms. 385.

3.—*Co. Litt.* 13 a., 298 a.; *Watk. Desc.* 233; *Swain v. Burton*, 15 Ves., Jr., 365.

4.—8 Vin. Abr. 465; P. c. cites 2 Bulst. 291; 19 Hen. VI., fol. 9; 8 Vin. 467, pl. 16; 2 Brownl. 194; *Bulstr.* 219; 1 Ch. Cas. 180; 2 Bl. Comm. 506.

5.—3 Laws of Pennsylv. 200.

decision of the Supreme Court of the state, in another case, in all respects similar, would be of the highest authority. And it is fit that it should be so for the sake of uniformity in the settlement of the law; or else, the peculiar judicial constitution of this country might be **516\***] productive \*of the greatest confusion. Suppose the decision of this court should be different from that of the State Court; it is not a case in which, by the constitution and laws of the Union, this court has any superiority that would give its decision a binding effect. There would, consequently, be an irreconcilable conflict of decisions. The decision of the Supreme Court of Pennsylvania must therefore be regarded as of the highest authority, and ought to be followed, unless flatly absurd and unjust.

But, considering the will, independent of the authority of the decision in the State Court, it is obvious that the testator did not mean to provide for the disposition of his estate, in every event that might happen, except by the residuary clause in favor of his son. If he had said, or had clearly intimated, that he meant in no case to die intestate, so as to let in the heir, this might have been considered as a pervading intention that would influence the interpretation of the will. But this was not necessary, for the law had provided an heir, in whose favor the affections of the testator would coincide with the provisions of the law. The heir is a favorite of the common law, and is not to be disinherited but by express words, or by necessary implication. That implication can only exist where there is a plain intention not to die intestate. But here the intention was merely to provide for certain persons, whom the testator, for reasons known only to himself, chose to consider as objects of his bounty, in certain events. So far he meant to **517\***] restrain \*his son, and no further. From his having done so, it is impossible to infer an intention to provide for other persons, or for other events, as there might be, in a case where there was a manifest design not to die intestate.

The will must be interpreted by itself, and then it will appear that the testator had in view: (1) His son, to whom he gives a clear estate tail in the realty, and an absolute estate in the personalty, on certain terms. (2) A. Young, to whom he gives an annuity of £30 a year, during the joint lives of himself and the son, or the son's issue; and to whom, in the event of his surviving the son, and the son dying without issue, or the issue failing in his life-time, he gives £400 in lieu of the annuity, to be paid out of the proceeds of the sale of his estate. A. Young could then, certainly, take nothing but in the case specified of the son dying without issue, or the issue failing in the life-time of Young. It is put in place of the annuity, and, in case of issue, the annuity is to be continued. (3) The brothers and sisters of the testator. If the son die, leaving A. Young, the right of A. Young is vested; and then (*i.e.*, A. Young surviving the son, and the son dying without issue) the testator's will is that the property shall be sold by A. Young, his executor, &c., and the proceeds, after paying his £400 to the four brothers and sisters, by name, and their heirs, or such of them as shall be living at the son's decease. And that this was

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meant only of his brothers and sisters, is evident \*from the subsequent bequest to [**518** them of his personal estate.

We say, then, that the power to sell was limited to arise upon the contingency: (1) Of John, the son, dying without issue in the life-time of A. Young, or of the issue failing in the life-time of A. Young; or (2) Of his dying without issue, living one or more of the brothers or sisters of the testator. And that neither of these contingencies having happened, the fee, which was in the son by descent, was discharged from the power, and was devised by his will.

But it may be asked, why should the disposition in favor of the brothers and sisters be made dependent upon the life of A. Young? The answer is, because it was first and chiefly for the sake of A. Young that the sale was to be made; and there is no more reason, as regards the intention of the testator, for limiting the disposition in case of issue failing, than in case of the son's dying leaving no issue. And yet the former is clearly done, and was indispensable. Suppose J. Bleakley, Jun., had left a child who survived A. Young one day and then died. The reversion in fee would then go to the heir of John, the son, so as to merge and destroy the estate tail, and all intermediate contingent estates.<sup>1</sup> The contingent limitation is only good by way of executory devise. J. Bleakley, Jun., took a vested estate tail by the will, and the reversion in fee by descent. The descent was immediate, liable to open and let in the power, \*upon the happening of [**519** the contingency upon which the power was to arise. After the failure of the estate tail, the fee would be in the son and his heirs, until the power was exercised, no estate being given to A. Young. This could only be done by executory devise.<sup>2</sup> There is no preceding particular estate to support the remainder. The fee by descent is no particular estate. It must therefore be considered a contingent limitation, good only by way of executory devise. As a contingent remainder, it might be barred by common recovery, but not as an executory devise.<sup>3</sup> It is, besides, the creation of an estate of freehold, to commence *in futuro*, by the exercise of a power collateral to the estate, and therefore also must be an executory devise. As an executory devise cannot be destroyed by an alteration of the preceding limitation, nor barred by a recovery, to avoid perpetuity, the contingency must be one to happen within a reasonable time, *i. e.*, a life or lives in being, and twenty-one years and a few months thereafter.

Now, let us consider whether it is so limited, and what the limitation is. Dying without issue, or failure of issue, legally imports an indefinite failure of issue, as it respects both personal and real estate, but especially the latter, "for there the interest of the heir is concerned, which is always much favored at law."<sup>4</sup> In the case of personal \*estate, it has in- [**520** deed been often construed to mean a dying without issue living at the time of the death. And in the case of real estate, it has been

1.—Ferne's Cont. Rem. 343, 353, 7th ed.

2.—2 Ves., Jr., 269.

3.—Ferne's, 419, 423, 424, 429.

4.—Id. 476.



sometimes so construed. But this has been only from necessity, to support the limitations over, and effectuate the legal intention of the testator.<sup>1</sup> And it has therefore never been so construed where there was an express limitation in the will to the contrary, or of equivalent legal effect. Where, then, there is a limitation sufficient to maintain and preserve the subsequent dispositions, such implication is unnecessary. And where there is a limitation expressed, inconsistent with such implied limitation, the implication is impossible. Such inconsistency is equally great, whether the actual limitation is shorter or longer than the implied limitation. The limitation in this will is the dying of J. Bleakley, Jun., without issue, in the life-time of A. Young; which includes his so dying, leaving no issue, or leaving issue which failed in the life-time of A. Young. It is not a double contingency, but a single contingency embracing both events. The limitation, too, is sufficient to support the ultimate disposition. If so, there can be no limitation to dying without issue, &c. The words are: "I give to my cousin, A. Young, &c., an annuity, &c., during the joint lives of him, the said A. Young, and my son, J. Bleakley, or his heirs lawfully begotten; but in case of the decease of my said son without issue lawfully begotten, as aforesaid," &c.

If it be said that the subsequent words, which contain the disposition in favor of the brothers and sisters, are different, "and in case of the decease of my said son without such issue," and ought to be construed a dying without issue living at the time of his death, I answer that they cannot be so interpreted here; because, (1) They are connected with the antecedent words in the prior part of the will, "hereinafter mentioned, and before any dividend is made of the proceeds of my said estate;" and with the words in the subsequent part, "after deducting out of the proceeds," &c. (2) It would make the bequest to A. Young depend upon one contingency, and that to the brothers and sisters upon another; whereas, they are plainly connected together, and made to depend upon one contingency. (3) These same identical words are before used as equivalent to a failure of issue; "during the joint lives of him, the said A. Young, and my son, J. B., or his heirs lawfully begotten; but in case of the decease of my said son without issue," &c.

As a limitation, the life of his brothers and sisters, who were *in esse*, would answer equally well as the life of A. Young. But it must be admitted that there is no express limitation of that kind in the will. And it would follow that if there be not a limitation to the life of A. Young, there is none at all.

Under this head, however, I shall contend, (1) That the distribution was to be made [\*522] among such of the brothers and sisters as should be living at the time when the contingency happened. (2) As none were then living, and A. Young was dead, there was no object for the exercise of the power, and therefore the power was never brought into existence.

Such was the opinion of a majority of the

judges of the State Court; and it is the natural and obvious reading of the will. The proceeds are given to the brothers and sisters by name, to be divided between them in equal proportions, share and share alike; which imports that he had some definite idea whom it was to be divided amongst. But, if there were any doubt, the bequest of the personal estate, which refers to the former, makes it quite plain. The legal construction is the same; for it cannot be denied that *heirs* is, generally, a word of limitation, and only descriptive of the quantity of estate meant to be given. Strike out the words "and their heirs forever," and all doubt is dissipated. Strike out the words of contingency, "or such of them as shall be living at the decease of my said son," and would not the whole vest in the ancestor, and the heir take by descent? In either case, suppose one to die in the life-time of the testator, would not the legacy lapse? But the words "for ever," unequivocally stamps the character of limitation. The supposition that *heirs* is to be a word of purchase, in one event only, goes on the ground that the same word is to be construed, according to circumstances, in senses entirely different. That is to say, that in the mind of the testator, and at the time of making the [\*523] will, it was understood to be a word both of limitation and of purchase. It would follow, then, that if one of the brothers and sisters died in the life-time of the testator, the heir would take by purchase. There could therefore be no such thing as a lapsed legacy or devise, if the word *heirs* be used; and some new mode must be invented of describing the quantity of the estate.

This construction is liable to another objection, that it strikes out an entire clause. It is manifest enough that the testator thought it was real estate, and therefore used the word *heirs*. He might well think so, as it was to be real estate up to a certain point. How this estate was to be regarded, might not have been generally understood at the time when this will was made. It was probably Lord Hardwicke who first decided that land to be converted into money, or money to be laid out in land, were to be considered "by the transmutation of a court of equity."<sup>2</sup> Besides, the legatee might, in such case, perhaps, have an election.<sup>3</sup> At law, it is still real estate; that is, supposing A. Young to be either dead, or his legacy paid. And it deserves to be remarked, that the testator drops these words, when he speaks of what he himself deems personal estate.

Our construction is the only reasonable and practicable one. *Heirs*, standing alone, is never a word of purchase; and when it is a word of purchase, it always means [\*524] that the heir is to take in exclusion of the ancestor.<sup>4</sup> Thus, where an estate is given to the ancestor for life, the heir may take by purchase, so that the estates will not unite. Where the ancestor takes no estate at all, an heir may take by purchase, as the first taker; the word *heir* being then a *descriptio personæ*, or individual designation.

But supposing it to be otherwise, we must

2.—3 Atk. 256.

3.—1 Madd. 395; 1 P. Wms. 130, 389.

4.—Powell. Dev. 236, 237, 239, 241.

1.—Dansey v. Griffiths, 4 Maul. & Selw. 61; and see 5 Mass. Rep. 500.

take one of two alternatives: (1) That if some of the brothers and sisters were living, and some dead, those who were living, and the heirs of those who were dead, should take. In that case, the heirs must take *per capita* as purchasers. (2) That if the brothers and sisters were all dead, the heirs of all would take. In this case, also, they must take *per capita*. That could not be the intention. But even as words of purchase, *heirs*, standing alone, and without qualification, is a designation only of the person or persons who, by law, are heirs. It can never mean children or issue.<sup>1</sup> Then what heir is it to be? The heir by the law of Ireland, of England, or of Pennsylvania? If restricted to the issue of the brothers and sisters (which is a still further construction), and all are to take equally, then there might be every possible variety in the circumstances and character of these children, which must have been unknown to the testator, and are unknown to the court. But there is a flat legal **525\*** bar to such a construction; \*and that is, that the limitation to the children would be upon a double contingency, which is bad.

But it is said that the contingent interest is descendible, and would go to the children. Doubtless it might; but that must depend upon the nature of the contingency.

If, then, A. Young being dead, and all the brothers and sisters being dead, there was no object remaining for the power, did the power itself ever come into existence? It never existed in A. Young, because he died before the contingency happened; and it could not be derived from him to his executors or administrators. But supposing it might; then, at law, it expired at the end of two years from the death of J. Bleakley, Jun., and before the deed to Smith.<sup>2</sup> To be sure, equity would not suffer it to perish, if there were objects for its exercise. But, even in equity, it expired with the expiration of its object.<sup>3</sup> Here all the objects were completely at an end.

It is, however, contended, that the use is subordinate to the power, and the sale is to be made at all events. But that makes the end subservient to the means. The purpose was contingent, and therefore the power was made contingent. No good purpose is to be answered by prolonging the \*existence of the power. It may, perhaps, only be meant that the whole is to be considered as the personal estate of the testator, and go according to the statute of distributions. The consequence would then be that he would die intestate. But there is no case which goes so far, and no reason for it. If it were personal estate at the death of Bleakley, Jun., then it all goes to him by will; and he surviving A. Young, and the brothers and sisters of the testator, took the whole absolutely in possession. He would have the right of election, and he makes his election by his will.

*Mr. D. B. Ogden*, for the plaintiff, in reply, argued that the adjudication in the state court had no other authority here than the opinion of

the same learned men would have upon any other question of general law. It was not conclusive, as a *resjudicata*, even in the state court; and by what magic could the doctrines on which it was founded be considered as conclusive in another forum? A judgment in ejectment is never conclusive at law; and how can a decision in another suit, on the same devise, or another devise, be considered as conclusive on a tribunal having concurrent jurisdiction? The question was not upon the local law, of which the state courts are the exclusive expounders; it arose not upon the statute, or the common law of Pennsylvania (if any such there be), but upon that law which is expounded at Westminster and at Washington.

The intention of the testator is the great polar star in the interpretation of wills. If **\*527** there be ambiguity in the particular words used by the testator, you may not only look at the general scope and design of the will, as manifested on its face, but you may go out of the will, and inquire into the state of the testator's family, in order to ascertain whether particular persons might probably be the object of his bounty.<sup>4</sup> It would be strange, indeed, if wills were the only writings in which the necessary imperfection of human language might not be supplied by a view of all those extrinsic considerations which may be supposed to have influenced the writer's mind, and caused him to use words in one sense or another. It appears in the case, that the testator had just left his relations in Ireland, his native country, where his brothers and sisters and their children, then were, the latter being of age, or nearly so, and that his will was made in London, on his way to this, his adopted country. Next to his son, his brothers and sisters and nephews and nieces, were probably nearest his heart.

It is admitted that the son took an estate tail. The question has been supposed to be, what became of the reversion on the failure of issue? But whether it descended on the son, or was devised to the testator's brothers and sisters is immaterial; because, the question is, whether the fee, in whomsoever it may now be, is still subject to the power of sale created by the will. He might charge the reversion after the estate tail **\*had expired**. And he has not only **\*528** empowered, but ordered and directed A. Young, his executors, &c., to sell. His object, doubtless, was to convert the real property into money, in order that it might go to his relations in Ireland, who would probably never come to this country. If a testator says, "I will my heir shall sell the land, and does not mention for what purpose, it is in the breast of the heir at law whether he will sell it or no, &c. But when a testator appoints an executor to sell, his office shows that it is intended to be turned into personal assets, without leaving any resulting trust in the heir."<sup>5</sup>

It is apparent that the testator considered himself as disposing of personal property. The subsequent legacy of his personal estate shows that he considered it as one common fund. It

1.—Powell, 242, 243.

2.—15 Hen. VII., fol. 12.

3.—Sugd. Powers, 459, 460, 258, 470; Bradley v. Powell, Cas. Temp. Talb. 193; Yates v. Phetipplace, 2 Vern. 416; Tournay v. Tournay, Prec. Ch. 290; Wheat. 8.

Roper v. Radcliffe, 9 Mod. 171; Croft v. Lee, 4 Ves., Sr., 60.

4.—1 Ball & Beatty, 431.

5.—2 Atk. 568.



is a mistake to suppose that Lord Hardwicke established for the first time, in 1746, the rule of equity, that land devised to be sold and converted into money, shall be considered as personal property. Such had always been the doctrine of the Court of Chancery. The order to sell is absolute, not coupled with any condition whatsoever, nor depending on the lives of his brothers and sisters. If nothing had been said about the distribution of the proceeds, they would go of course to the personal representatives. The subsequent clause is merely intended to describe how the proceeds were to be divided, and not to indicate the quantity of interest in what had thus become \*personal property by its very destination before it had been actually sold. As to the word *heirs*, it must surrender its ordinary technical meaning in order to subserve the intention. And it is clear that it may be a word of purchase wherever it is necessary for that purpose. Thus, it sometimes means *children*, and sometimes *issue* indefinitely.<sup>1</sup> If the words "their heirs" were stricken out of this clause, the property being personal, would be vested absolutely in the brothers and sisters. The words, therefore, must have been added for some other purpose than to create a limitation. All the legatees, except one, and probably that one, were alive at the death of the testator. There was, then, no lapsed legacy. There was a clear contingent remainder to the brothers and sisters, which was transmissible to their representatives. The words "their heirs forever" were intended as words of purchase, and to substitute the children or grandchildren for the original parents, in order to effect the great intention of the testator, which was, to keep the estate in his own family. He supposed he had prevented his son from aliening it by the entail, and that he had provided for the case of his son's dying without issue, by the direction to sell, and the disposition of the proceeds. All his intentions are to be frustrated by the construction contended for on the other side.

As to the supposed difficulties about the distribution of the proceeds among those who are entitled, that question is not now before the court. [\*530] \*It is sufficient that there is an object for the present exercise of the power. It is immaterial in what proportions those who are entitled are to take. When they shall file their bill on the equity side of the court, it will be time enough to consider that question.

The case cited from the year book, 15 Hen. VII., has nothing to do with the present question. That was a feoffment, on condition that the feoffee, who was the party in interest, should aliene; and not the case of a trust. The time within which the power was to be executed is immaterial, it being merely incidental to the general object of the testator. Suppose the executor of A. Young, and all the others by whom the power was to have been executed, had neglected or refused; are the *cestuis que trust* to be disappointed? Would not a court of equity compel the execution, or supply the defective execution? And if so, will it not confirm what has been already done? It may indeed be admitted that the trust will not be enforced, or the execution of it confirmed, if the object for

which it was created no longer exists. But here the first object was to convert the real property into money, and then to distribute it. But if the property is to be considered as real estate, it would vest in him who was heir at law of the original donor, at the time of the expiration of the particular estate. J. Bleakley, Jun., had, indeed, a right to dispose of this reversionary interest, but he never exercised that right. There \*is nothing in his will showing [\*531 an intention to devise it.<sup>2</sup>

Mr. Justice WASHINGTON delivered the opinion of the court, and after stating the case, proceeded as follows:

The material question to be decided is, whether the power given to A. Young, his executors and administrators, to sell the real estate of the testator, was legally exercised? If it was not, then the plaintiff in error, who claims under a sale made by the executor of Young, acquired no title under it, and the judgment below is right.

It was contended by the counsel for the defendant, that by the death of Young, as well as of the brothers and sisters of the testator, in the life-time of John Bleakley, the son, the devises to them to arise out of the power to sell never took effect; and consequently, there being no person in existence, at the death of the son, to receive the proceeds of the sale, or any part of them, the power was unduly exercised. The premises upon which the above argument is founded, as well as the conclusion drawn from them, being controverted by the counsel on the other side, our inquiries will be confined to those two points.

With respect to the devise of the £400 to A. Young, a majority of the court is of opinion that by the words, as well as from the obvious intention of the testator, that sum was not to be raised except in the event of the death of John \*Bleakley, the son, without issue, [\*532 in the life-time of Young. During the joint lives of the son, or his issue, and Young, the latter was to receive an annuity of £30 out of the rents and profits of the real estate. But if the son should die without issue in the life-time of the said Young, the annuity was, in that event, to cease, and the £400 was to be raised for his use, out of the proceeds of the real estate, when the same should be sold, according to the intention of the will, as thereafter mentioned. The contingency on which the devise of the £400 was to take effect, is in no respect connected with that on which the devise of the proceeds to the brothers and sisters was to depend. The £400 is expressly given in lieu of the annuity, in case Young should survive the son, without issue, in which event it was to cease.

The contingency upon which the devise of the proceeds of the real estate to the brothers and sisters was to take effect, was the death of the son without issue; and since it was possible that the particular estate of the son might endure beyond the life of Young, the power to sell, for the benefit of the brothers and sisters, is extended to his executors and administrators. It is true that by the clause which gives the power to sell, taken independent of the devise

1.—Ferne, 466.

2.—Watk. Desc. 110, 153.

to Young, it would seem as if the £400 was, at all events, to be first deducted out of the proceeds of the sale, and paid to him, in the same event as the residue was to be paid to the brothers and sisters; that is, on the death of the son **533\***] without issue. But the \*two clauses must of necessity be taken in connection with each other, the one as containing the bequest to Young, and the contingency upon which it was to take effect; and the other, as pointing out the fund out of which it was to be satisfied. If the former never took effect, it is clear that the latter was relieved from the burthen imposed upon it.

A very good reason appears for making the devise of the £400 to Young, to depend upon his surviving the son without issue, since it would be in that event only that he would want it; the annuity, which it was intended to replace, continuing until that event happened. But no reason is perceived why the devise over to the brothers and sisters of the testator, or the execution of the power for their benefit, should have been made to depend on the same event, a trustee to sell being provided in the executors of Young, in case he should die before the power could be executed.

Having shown, it is believed, that the devise of the £400 to Young never took effect, in consequence of his death in the life-time of John Bleakley, the son, it becomes important to inquire whether the devise to the brothers and sisters of the testator failed, in consequence of their having all died in the life-time of the son. The operative words of the will are: "I give the proceeds thereof [of his real estate] to my said brothers and sisters, and their heirs, forever, or such of them as shall be living at the **534\***] decease of my son, to be divided \*between them in equal proportions, share and share alike."

The court has felt considerable difficulty in construing the above clause, with a view to the intention of the testator, to be collected from the whole of the will, and of the circumstances stated in the special verdict. Some of the judges are of opinion that the devise is confined, both by the words and by the apparent intention of the testator, to the brothers and sisters who should be living at the death of the son without issue, considering the word "heirs" as a word of limitation, according to its general import, and that there is no evidence of an intention in the testator to give the part of a deceased brother or sister to his or her children, which ought to control the legal meaning of that word, when used as it is in this clause. On the contrary, they think that the use of it in the devise of the proceeds of the real estate, and the omission of it in the devise of the personal estate, and yet declaring that the latter is to be divided amongst his brothers and sisters, with the proceeds of his real estate as thereinbefore directed to be divided, strongly indicates the intention of the testator to give the proceeds of the real estate to the same persons who were to take the personal estate. Others of the judges are of opinion that an intention to give the proceeds of the real estate to the children of a deceased brother or sister, as representing their ancestor, is fairly to be collected from the will, which strongly intimates that the testator did not

Wheat. 8.

\*mean to die intestate, as to any part of [**535** his real or personal estate.

Upon a question of so much doubt, this court, which always listens with respect to the adjudications of the courts of the different states, where they apply, is disposed, upon this point, to acquiesce in the decision of the Supreme Court of Pennsylvania, in the case of *Smith's lessee v. Folwell* (1 Bin., 546), that the word *heirs* is to be construed to be a word of limitation, and consequently, that the devise to the brothers and sisters failed to take effect by their deaths in the life-time of the son.

Whether the conclusion to which that court came, and which was pressed upon us by the plaintiff's counsel—that the contingencies on which the power to sell was to arise, having never happened, the sale under the power was without authority—is well founded in a court of law, need not be decided in this case, because the majority of the court are of opinion that, by the express words of the will, the sale was limited to the period of two years after the decease of John Bleakley, the son. The circumstance of time was no doubt considered by the testator as being of some consequence, or else it is not likely that he would so have restricted the exercise of the power. But whether it was so or not, such was the will and pleasure of the creator of the power, and that will could only be fulfilled by a precise and literal exercise of the power. The trustee acts, and could act, only in virtue of a special authority conferred upon him by the will; he must act, then, in the way, \*and under the restrictions [**536** which accompany the authority. If an adjudication were wanted to sanction so plain and obvious a principle of law, it is to be found in a case reported in the year book, 15 Hen. VII., 11, 12.

Under what circumstances a court of equity might relieve, in case the trustee should refuse to exercise the power within the prescribed period, or should exercise the same after that period, need not be adverted to in this case, since this is a question arising in a case purely at law.

The sale in this case, then, having been made about eighteen years after the death of John Bleakley, the son, the trustee acted without authority, and the sale and conveyance was absolutely void at law.

*Mr. Justice JOHNSON.* I have no hesitation in conceding that if all the objects had failed, for which the power in this will was created, the power itself ceased, both at law and in equity. Those objects were,

1. The raising of the legacy of £400 for Young.

2. The sale and distribution of the testator's estate among his own relatives.

If neither of these objects remained to be effected, the power under which the plaintiff makes title was at an end.

The words on which the legacy depends, are these: "But in case of the decease of my said son, without issue, as aforesaid, in the life-time of the said Archibald Young, then the said annuity is to \*ccase; and in lieu thereof, [**537** I give and bequeath unto the said A. Y., and his assigns, the sum of £400, payable out of the proceeds of my real estate, when the



same is sold and disposed of according to the intention of this my will hereinafter mentioned, and before any dividend is made of my said estate."

The question which this clause presents is whether the legacy was given upon the single contingency of the son's death without issue, or upon the double contingency of his death without issue, in the life-time of A. Young.

This question appears to me to be settled by the testator himself; for in a subsequent part of the will, speaking of this same legacy, and of course with reference to the clause bequeathing it, he says "the sum of £400, hereinbefore given and bequeathed to the said A. Young, immediately on the decease of my said son without issue." The testator, then, has attached the construction to his own word; and that the clause containing this bequest will well admit of that construction is obvious; for there is no necessity for joining the first member of the sentence, which contains the double contingency, to the last member, which contains the bequest. And the effect of the will, without this connection (which I cannot but think forced and unnecessary), will be to give the pecuniary legacy absolutely on the event of the son's death without issue, but at the same time to declare that the annuity should no longer run on, whenever this bequest took effect. This would literally be giving it in lieu [\*540] of the annuity, and would fully satisfy those words in the will.

Indeed, this construction appears irresistible when we consider another part of the will.

The power to sell is extended to the executors and administrators of A. Young. They, therefore, were authorized to sell, in the event of the death of the son without issue, although he should survive A. Young. Yet we find the testator, when obviously contemplating the event of the son's surviving Young, expressly directing the payment of this legacy before the proceeds should be distributed among his devisees over. This could only be consistent with a bequest upon the single contingency of the son's death without issue, independently of Young's survivorship.

Nor is there the least ground for contending that this bequest is upon a contingency too remote, since the sale and devise over are expressly limited to take effect upon the death of the son, thereby restricting the generality of the words issue and heirs, so as to mean issue living at his death. This, too, is consistent with those acknowledgments of the testator of a debt of gratitude to A. Young, and not only of a debt to accrue, but of a subsisting debt. The annuity is given *in presenti*, and so is its substitute, the legacy. The words are, "I give and bequeath," thus vesting a present interest, although the payment is deferred to a future time and event. The views of the testator are easily explained: if his son or his issue took the estate, his bounty to Young was to be limited to the annuity. But if it should go over to his [\*539] collateral kindred, the testator enlarges his bounty, and gives this substitute for the annuity, at the same time that he frees his estate from a charge that would embarrass the sale.

Nor can I possibly admit the doctrine that the power to sell was either at law, or in equity,

limited to the duration of two years after the death of the son without issue. The words are: "Then I direct and order my said cousin, A. Young, his executors and administrators, to sell and dispose of my real estate within two years after the decease of my said son." Here the words are clearly imperative, and their effect is, both to confer the power generally, and to exact the execution of it in two years. The intention of the testator must prevail, both at law and in equity, in construing his words; and when they will admit of a construction which will make the power commensurate with the views of the testator in creating it, I hold that to be the true construction, both in law and equity. It is only when the power given admits not of this latitude by construction, that the aid of courts of equity is resorted to, in order to carry into effect the views of the testator. By possibility, the executors of A. Young may have been minors, or may not have proved his will until the two years had expired, or a sale during that time may have been stayed by injunction, or by the want of purchasers; and it would be difficult to show why, in any one of these events, the power should have ceased. Certainly no reason can be extracted from the provisions of the will, whence an intention could be inferred to restrict the power to sell to the period of two years. Every [\*540] thing favors the contrary conclusion. For whose benefit was this injunction to sell within the specified period imposed upon the executor? Clearly for that of the brothers and sisters, in order that, under it, they may have compelled the executor to proceed to sale within the time limited. It would be strange, then, if a provision so clearly intended for their interests, should have put it in the power of the executor, either wilfully, or by *laches*, to defeat their interests, and let in the heir at law.

This is not the case of a mere naked power; it is a power coupled with a trust. The executor was to sell, that he might possess himself of the value in money and distribute it among the *cestuis que trust*. In such cases it has been well observed that "the substantial part is to do the thing," and that "powers of this kind have a favorable construction in law, and are not resembled to conditions, which are strictly expounded."

I am, therefore, of opinion, that the words creating this power will well admit of being construed into a general devise of the power, and that the object intended to be answered necessarily requires that construction.

The *dictum* cited from the year books, therefore (besides that it has not been very correctly translated), has no application to this case: since it supposes the actual restriction under the will, which I deny to be imposed in the present instance, upon the true construction of its words.

Being, therefore, of opinion that both the legacy to Young and the power to sell, subsisted [\*541] at the date of the sale to the plaintiff, if these views of the case are sufficient to sustain the sale to the plaintiff; and the subsequent questions would arise only upon the distribution of the remainder of the purchase money, after satisfying the legacy. Nevertheless, I will make a few remarks upon that part of the will which relates to the devise over to

the testator's family, since it serves to elucidate, by another application, the principle upon which I have formed my opinion respecting the legacy to A. Young.

On the subject of the devise over to his brothers and sisters, the testator has again been his own expositor. It is very clear that if the words, "or such of them as shall be living at the decease of my said son," stood alone and unexplained, the relative *them* might be applied grammatically with more propriety to the word "heirs," than to the words "brothers and sisters," and thus, perhaps, give those words the effect of words of purchase. But the testator himself gives these words a distinct application, in the latter part of his will, when disposing of his personal estate, concerning which he says, that it shall be "divided among my brothers and sisters, with the proceeds of my real estate, as hereinbefore directed to be divided." Under the words here used by the testator, it is clear that the brothers and sisters only could take, and not the brothers' and sisters' children, thus restricting the word "heir" to its natural and appropriate signification, from which it can be converted into a word of purchase only by the clear and controlling intent of the testator. This \*construction is further supported by those words which require a distribution of the proceeds of the real estate equally, share and share alike, to the legatees; a distribution which could not take place *per stirpes*, or in the event of one or more brothers surviving, and the death of the rest, leaving issue living at the death of the son.

On this point, therefore, I concur with the Supreme Court of Pennsylvania; and only regret that I cannot concur both with that court and this on the other bequest.

Upon the question so solemnly pressed upon this court in the argument, how far the decision of the court of Pennsylvania ought to have been considered as obligatory on this court, I would be understood as entertaining the following views: As precedents entitled to high respect, the decisions of the state courts will always be considered; and in all cases of local law, we acknowledge an established and uniform course of decisions of the state courts, in the respective states, as the law of this court; that is to say, that such decisions will be as obligatory upon this court as they would be acknowledged to be in their own courts. But a single decision on the construction of a will cannot be acknowledged as of binding efficacy, however it may be respected as a precedent. In the present instance, I feel myself sustained in my opinion upon the legacy to A. Young, by the opinion of one of the three learned judges who composed the state court.

*Judgment affirmed.*

Cited—12 Wheat. 168; 1 Cliff. 438; 2 Blatchf. 67.

543\*] [\*CONSTITUTIONAL LAW.]

JOHNSON AND GRAHAM'S LESSEE

v.

WILLIAM M'INTOSH.

A title to lands, under grants to private individuals, made by Indian tribes or nations north-west of the river Ohio, in 1773, and 1775, cannot be recognized in the courts of the United States.

uals, made by Indian tribes or nations north-west of the river Ohio, in 1773, and 1775, cannot be recognized in the courts of the United States.

ERROR to the District Court of Illinois.

This was an action of ejectment for lands in the state and district of Illinois, claimed by the plaintiffs under a purchase and conveyance from the Piankeshaw Indians, and by the defendant, under a grant from the United States. It came up on a case stated, upon which there was a judgment below for the defendant. The case stated set out the following facts:

1st. That on the 23d of May, 1609, James I., King of England, by his letters patent of that date, under the great seal of England, did erect, form, and establish Robert, Earl of Salisbury, and others, his associates, in the letters patent named, and their successors, into a body corporate and politic, by the name and style of "The Treasurer and Company of Adventurers and Planters of the City of London, for the first Colony in Virginia," with perpetual succession, and power to make, have, and use a common seal; and did give, grant, and confirm unto this company, and their successors, \*under certain reservations and limitations in the letters patent expressed, [\*544 "All the lands, countries and territories, situate, lying and being in that part of North America called Virginia, from the point of land called Cape or Point Comfort, all along the sea-coast to the northward two hundred miles; and from the said Cape or Point Comfort, all along the sea-coast to the southward, two hundred miles; and all that space and circuit of land lying from the sea-coast of the precinct aforesaid, up into the land throughout from the sea, west and north-west; and also all the islands lying within one hundred miles, along the coast of both seas of the precinct aforesaid; with all the soil, grounds, rights, privileges, and appurtenances to these territories belonging, and in the letters patent particularly enumerated;" and did grant to this corporation, and their successors, various powers of government, in the letters patent particularly expressed.

2d. That the place called in these letters patent Cape or Point Comfort, is the place now called and known by the name of Old Point Comfort, on the Chesapeake Bay and Hampton Roads; and that immediately after the granting of the letters patent, the corporation proceeded, under and by virtue of them, to take possession of parts of the territory which they describe, and to form settlements, plant a colony, and exercise the powers of government therein; which colony was called and known by the name of the colony of Virginia.

3d. That at the time of granting these letters patent, and of the discovery of the continent of \*North America by the Europeans, and [\*545 during the whole intermediate time, the whole of the territory, in the letters patent described, except a small district on James River, where a settlement of Europeans had previously been made, was held, occupied and possessed, in full sovereignty, by various independent tribes or nations of Indians, who were the sovereigns of their respective portions of the territory, and the absolute owners and proprietors of the soil; and who neither acknowledged nor owed any



allegiance or obedience to any European sovereign or state whatever; and that in making settlements within this territory, and in all the other parts of North America, where settlements were made, under the authority of the English government, or by its subjects, the right of soil was previously obtained by purchase or conquest, from the particular Indian tribe or nation by which the soil was claimed and held; or the consent of such tribe or nation was secured.

4th. That in the year 1624, this corporation was dissolved by due course of law, and all its powers, together with its rights of soil and jurisdiction, under the letters patent in question, were revested in the crown of England; whereupon the colony became a royal government, with the same territorial limits and extent which had been established by the letters patent, and so continued until it became a free and independent state; except so far as its limits and extent were altered and curtailed by the treaty of February 10th, 1763, between Great Britain and France, and by the letters patent granted by the King of England for **546\***] \*establishing the colonies of Carolina, Maryland, and Pennsylvania.

5th. That some time previous to the year 1756, the French government, laying a claim to the country west of the Alleghany or Appalachian Mountains, on the Ohio and Mississippi rivers, and their branches, took possession of certain parts of it, with the consent of the several tribes or nations of Indians possessing and owning them; and, with the like consent, established several military posts and settlements therein, particularly at Kaskaskias, on the river Kaskaskias, and at Vincennes, on the river Wabash, within the limits of the colony of Virginia, as described and established in and by the letters patent of May 23d, 1609; and that the government of Great Britain, after complaining of these establishments as encroachments, and remonstrating against them, at length, in the year 1756, took up arms to resist and repel them, which produced a war between those two nations, wherein the Indian tribes inhabiting and holding the countries north-west of the Ohio, and on the Mississippi above the mouth of the Ohio, were the allies of France, and the Indians known by the name of the Six Nations, or the Iroquois, and their tributaries and allies, were the allies of Great Britain; and that on the 10th of February, 1763, this war was terminated by a definitive treaty of peace between Great Britain and France, and their allies, by which it was stipulated and agreed, that the river Mississippi, from its source to the Iberville, should forever after form the boundary between the dominions **547\***] of \*Great Britain and those of France, in that part of North America, and between their respective allies there.

6th. That the government of Virginia, at and before the commencement of this war, and at all times after it became a royal government, claimed and exercised jurisdiction, with the knowledge and assent of the government of Great Britain, in and over the country north-west of the river Ohio, and east of the Mississippi, as being included within the bounds and limits described and established for that colony, by the letters patent of May 23d, 1609; and

that in the year 1749 a grant of six hundred thousand acres of land, within the country north-west of the Ohio, and as part of Virginia, was made by the government of Great Britain to some of its subjects, by the name and style of the Ohio Company.

7th. That at and before the commencement of the war in 1756, and during its whole continuance, and at the time of the treaty of February 10th, 1763, the Indian tribes or nations, inhabiting the country north and north-west of the Ohio, and east of the Mississippi, as far east as the river falling into the Ohio called the Great Miami, were called and known by the name of the Western Confederacy of Indians, and were the allies of France in the war, but not her subjects, never having been in any manner conquered by her, and held the country in absolute sovereignty, as independent nations, both as to the right of jurisdiction and sovereignty, and the right of soil, except a few military posts, and a small territory around each, \*which they had ceded to France, [**548** and she held under them, and among which were the aforesaid posts of Kaskaskias and Vincennes; and that these Indians, after the treaty became the allies of Great Britain, living under her protection as they had before lived under that of France, but were free and independent, owing no allegiance to any foreign power whatever, and holding their lands in absolute property; the territories of the respective tribes being separated from each other, and distinguished by certain natural marks and boundaries to the Indians well known; and each tribe claiming and exercising separate and absolute ownership, in and over its own territory, both as to the right of sovereignty and jurisdiction, and the right of soil.

8th. That among the tribes of Indians thus holding and inhabiting the territory north and north-west of the Ohio, east of the Mississippi, and west of the Great Miami, within the limits of Virginia, as described in the letters patent of May 23d, 1609, were certain independent tribes or nations, called the Illinois or Kaskaskias, and the Piankeshaw or Wabash Indians; the first of which consisted of three several tribes united into one, and called the Kaskaskias, the Pewarias, and the Cahokia; that the Illinois owned, held and inhabited, as their absolute and separate property, a large tract of country within the last-mentioned limits, and situated on the Mississippi, Illinois, and Kaskaskias rivers, and on the Ohio below the mouth of the Wabash; and the Piankeshaws, another large tract of country within the same \*limits, and as their absolute and sep- [**549** arate property, on the Wabash and Ohio rivers; and that these Indians remained in the sole and absolute ownership and possession of the country in question, until the sales made by them in the manner hereinafter set forth.

9th. That on the termination of the war between Great Britain and France, the Illinois Indians, by the name of the Kaskaskias tribes of Indians, as fully representing all the Illinois tribes then remaining, made a treaty of peace with Great Britain, and a treaty of peace, limits and amity, under her mediation, with the Six Nations, or Iroquois, and their allies, then known and distinguished by the name of the Northern Confederacy of Indians; the Illinois



being a part of the confederacy then known and distinguished by the name of the Southern Confederacy, and sometimes by that of the Western Confederacy.

10th. That on the 7th of October, 1763, the King of Great Britain made and published a proclamation for the better regulation of the countries ceded to Great Britain by that treaty, which proclamation is referred to and made part of the ease.

11th. That from time immemorial, and always up to the present time, all the Indian tribes, or nations of North America, and especially the Illinois and Piankeshaws, and other tribes holding, possessing and inhabiting the said countries north and north-east of the Ohio, east of the Mississippi, and west of the Great Miami, held their respective lands and territories each in common, the individuals **550** \*] of each tribe or nation holding the lands and territories of such tribe in common with each other, and there being among them no separate property in the soil; and that there sole method of selling, granting and conveying their lands, whether to governments or individuals, always has been, from time immemorial, and now is, for certain chiefs of the tribe selling, to represent the whole tribe in every part of the transaction; to make the contract and execute the deed on behalf of the whole tribe; to receive for it the consideration, whether in money or commodities, or both; and, finally, to divide such consideration among the individuals of the tribe; and that the authority of the chiefs, so acting for the whole tribe, is attested by the presence and assent of the individuals composing the tribe, or some of them, and by the receipt by the individuals composing the tribe, of their respective shares of the price, and in no other manner.

12th. That on the 5th of July, 1773, certain chiefs of the Illinois Indians, then jointly representing, acting for and being duly authorized by that tribe, in the manner explained above, did, by their deed poll, duly executed and delivered, and bearing date on that day, at the post of Kaskaskias, then being a British military post, and at a public council there held by them, for and on behalf of the said Illinois nation of Indians, with William Murray, of the Illinois country, merchant, acting for himself and for Moses Franks and Jacob Franks, of London, in Great Britain, David Franks, John Inglis, Bernard Gratz, Michael Gratz, **551** \*] Alexander Ross, David Sproat and James Milligan, all of Philadelphia, in the province of Pennsylvania; Moses Franks, Andrew Hamilton, William Hamilton and Edmund Milne, of the same place; Joseph Simons, otherwise called Joseph Simon, and Levi Andrew Levi, of the town of Lancaster, in Pennsylvania; Thomas Minshall, of York county, in the same province; Robert Callender and William Thompson, of Cumberland county, in the same province; John Campbell, of Pittsburgh, in the same province; and George Castles and James Ramsay, of the Illinois country; and for a good and valuable consideration in the said deed stated, grant, bargain, sell, alien, lease, enfeoff and confirm to the said William Murray, Moses Franks, Jacob Franks, David Franks, John Inglis, Bernard Gratz, Michael Gratz, Alexander Ross, David Sproat, James

Milligan, Andrew Hamilton, William Hamilton, Edmund Milne, Joseph Simons, otherwise called Joseph Simon, Levi Andrew Levi, Thomas Minshall, Robert Callender, William Thompson, John Campbell, George Castles and James Ramsay, their heirs and assigns forever, in severalty, or to George III., then King of Great Britain and Ireland, his heirs and successors, for the use, benefit and behoof of the grantees, their heirs and assigns, in severalty, by whichever of those tenures they might most legally hold, all those two several tracts or parcels of land, situated, lying and being within the limits of Virginia, on the east of the Mississippi, north-west of the Ohio, and west of the Great Miami, and this butted \*and bounded: Begin- [**552** ning for one of the said tracts on the east side of the Mississippi, at the mouth of the Heron Creek, called by the French the river of Mary, being about a league below the mouth of the Kaskaskias River, and running thence a northward of east course, in a direct line, back to the Hilly Plains, about eight leagues more or less; thence the same course, in a direct line to the Crab Tree Plains, about seventeen leagues more or less; thence the same course, in a direct line, to a remarkable place known by the name of the Big Buffalo Hoofs, about seventeen leagues more or less; thence the same course, in a direct line to the Salt Lick Creek, about seven leagues more or less; then crossing the Salt Lick Creek, about one league below the ancient Shawanese town, in an easterly, or a little to the north of east, course, in a direct line to the river Ohio, about four leagues more or less; then down the Ohio, by its several courses, until it empties into the Mississippi, about thirty-five leagues more or less; and then up the Mississippi, by its several courses, to the place of beginning, about thirty-three leagues more or less. And beginning for the other tract on the Mississippi, at a point directly opposite to the mouth of the Missouri, and running up the Mississippi, by its several courses, to the mouth of the Illinois, about six leagues more or less; and thence up the Illinois, by its several courses, to Chieagou or Garlie Creek, about ninety leagues, more or less; thence nearly a northerly course, in a direct line, to a certain remarkable place, being the ground on which a \*battle was fought, about forty or fifty [**553** years before that time, between the Pewaria and Renard Indians, about fifty leagues more or less; thence by the same course, in a direct line, to two remarkable hills close together, in the middle of a large prairie or plain, about fourteen leagues more or less; thence in a north of east course, in a direct line, to a remarkable spring, known by the Indians by the name of "Foggy Spring," about fourteen leagues more or less; thence the same course, in a direct line to a great mountain, to the north-west of the White Buffalo Plain, about fifteen leagues more or less; and thence nearly a south-west course to the place of beginning, about forty leagues more or less. To have and to hold the said two tracts of land, with all and singular their appurtenances, to the grantees, their heirs and assigns, forever, in severalty, or to the King, his heirs and successors, to and for the use, benefit or behoof of the grantees, their heirs and assigns, forever, in severalty; as will more fully appear by the said deed poll, duly exe-



cuted under the hands and seals of the grantors, and duly recorded at Kaskaskias, on the 2d of September, 1773, in the office of Vicerault Lemerand, a notary public duly appointed and authorized. This deed, with the several certificates annexed to or indorsed on it, was set out at length in the case.

13th. That the consideration in this deed expressed, was of the value of \$24,000, current money of the United States, and upwards, and was paid and delivered, at the time of the execution of the deed, by William Murray, one **554** \*] of the grantees, in behalf of himself and the other grantees, to the Illinois Indians, who freely accepted it, and divided it among themselves; that the conferences in which the sale of these lands was agreed on and made, and in which it was agreed that the deed should be executed, were publicly held, for the space of a month, at the post of Kaskaskias, and were attended by many individuals of all the tribes of Illinois Indians, besides the chiefs named as grantors in the deed; that the whole transaction was open, public and fair, and the deed fully explained to the grantors and other Indians by the sworn interpreters of the government, and fully understood by the grantors and other Indians, before it was executed; that the several witnesses to the deed, and the grantees named in it, were such persons, and of such quality and stations, respectively, as they are described to be in the deed, the attestation, and the other indorsements on it; that the grantees did duly authorize William Murray to act for and represent them, in the purchase of the lands, and the acceptance of the deed; and that the two tracts or parcels of land to which it describes, and purports to grant, were then part of the lands held, possessed and inhabited by the Illinois Indians, from time immemorial, in the manner already stated.

14th. That all the persons named as grantees in this deed, were, at the time of its execution, and long before, subjects of the crown of Great Britain, and residents of the several places named in the deed as their places of residence; **555** \*] and that \*they entered into the land, under and by virtue of the deed, and became seized as the law requires.

15th. That on the 18th of October, 1775, Tabac, and certain other Indians, all being chiefs of the Piankeshaws, and jointly representing, acting for and duly authorized by that nation, in the manner stated above, did, by their deed poll, duly executed, and bearing date on the day last mentioned, at the post of Vincennes, otherwise called Post St. Vincent, then being a British military post, and at a public council there held by them, for and on behalf of the Piankeshaw Indians, with Louis Viviat, of the Illinois country, acting for himself, and for the Right Honorable John, Earl of Dunmore, then Governor of Virginia; the Honorable John Murray, son of the said earl; Moses Franks and Jacob Franks, of London, in Great Britain; Thomas Johnson, Jr., and John Davidson, both of Annapolis, in Maryland; William Russel, Matthew Ridley, Robert Christie, Sr., and Robert Christie, Jr., of Baltimore town, in the same province; Peter Campbell, of Piscataway, in the same province; William Geddes, of Newtown Chester, in the same province, collector of His Majesty's customs; David Franks and

Moses Franks, both of Philadelphia, in Pennsylvania; William Murray and Daniel Murray, of the Illinois country; Nicholas St. Martin and Joseph Page, of the same place; Francis Perthuis, late of Quebec, in Canada, but then of Post St. Vincent, and for good and valuable considerations, in the deed poll mentioned and enumerated, grant, bargain, sell, alien, enfeoff, release, ratify and \*confirm to the said [**556** Louis Viviat, and the other persons last mentioned, their heirs and assigns, equally to be divided, or to George III., then King of Great Britain and Ireland, his heirs and successors, for the use, benefit and behoof of all the above-mentioned grantees, their heirs and assigns, in severalty, by whichever of those tenures they might most legally hold, all those two several tracts of land in the deed particularly described, situate, lying and being north-west of the Ohio, east of the Mississippi, and west of the Great Miami, within the limits of Virginia, and on both sides of the Ouabache, otherwise called the Wabash; which two tracts of land are contained respectively within the following metes and bounds, courses and distances, that is to say: Beginning for one of the said tracts at the mouth of a rivulet called Riviere du Chat, or Cat River, where it empties itself into the Ouabache or Wabash, by its several courses, to a place called Point Coupee, about twelve leagues above Post St. Vincent, being forty leagues, or thereabouts, in length, on the said river Ouabache, from the place of beginning, with forty leagues in width or breadth on the east side, and thirty leagues in width or breadth on the west side of that river, to be continued along from the place of beginning to Point Coupee. And beginning for the other tract at the mouth of White River, where it empties into the Ouabache, about twelve leagues below Post St. Vincent, and running thence down the Ouabache, by its several courses, until it empties into the Ohio; being from White River to the Ohio about fifty-three leagues in length more or less, with forty \*leagues [**557** in width or breadth on the east side, and thirty in width or breadth on the west side of the Ouabache, to be continued along from the White River to the Ohio; with all the rights, liberties, privileges, hereditaments and appurtenances to the said tract belonging; to have and to hold to the grantees, their heirs and assigns forever, in severalty, or to the King, his heirs and successors, for the use, benefit and behoof of the grantees, their heirs and assigns, as will more fully appear by the deed itself, duly executed under the hands and seals of the grantors, and duly recorded at Kaskaskias, on the 5th of December, 1775, in the office of Louis Bomer, a notary public duly appointed and authorized. This deed, with the several certificates annexed to or indorsed on it, was set out at length.

16th. That the consideration in this deed expressed was of the value of \$31,000, current money of the United States, and upwards, and was paid and delivered at the time of the execution of the deed, by the grantee, Lewis Viviat, in behalf of himself and the other grantees, to the Piankeshaw Indians, who freely accepted it, and divided it among themselves; that the conferences in which the sale of these two tracts of land was agreed on and made, and

in which it was agreed that the deed should be executed, were publicly held for the space of a month, at the post of Vincennes, or Post St. Vincent, and were attested by many individuals of the Piankeshaw nation of Indians, besides the chiefs named as grantors in the deed; **558\*** that the whole \*transaction was open, public and fair, and the deed fully explained to the grantors and other Indians by skillful interpreters, and fully understood by them before it was executed; that it was executed in the presence of the several witnesses by whom it purports to have been attested, and was attested by them; that the grantees were all subjects of the crown of Great Britain, and were of such quality, station and residence, respectively, as they are described in the deed to be; that the grantees did duly authorize Lewis Viviat to act for and represent them in the purchase of these two tracts of land, and in the acceptance of the deed; that these tracts of land were then part of the lands held, possessed and inhabited by the Piankeshaw Indians, from time immemorial, as is stated above; and that the several grantees under this deed entered into the land which it purports to grant, and became seized as the law requires.

17th. That on the 6th of May, 1776, the colony of Virginia threw off its dependence on the crown and government of Great Britain, and declared itself an independent state and government, with the limits prescribed and established by the letters patent of May 23d, 1609, as curtailed and restricted by the letters patent establishing the colonies of Pennsylvania, Maryland, and Carolina, and by the treaty of February 10th, 1763, between Great Britain and France; which limits, so curtailed and restricted, the state of Virginia, by its constitution and form of government, declared should be and remain the limits of the state, and should bound its western and north-western extent.

**559\*** 18th. That on the 5th of October, 1778, the general assembly of Virginia, having taken by arms the posts of Kaskaskias and Vincennes, or St. Vincent, from the British forces, by whom they were then held, and driven those forces from the country north-west of the Ohio, east of the Mississippi, and west of the Great Miami, did, by an act of assembly of that date, entitled, "An act for establishing the county of Illinois, and for the more effectual protection and defense thereof," erect that country, with certain other portions of territory within the limits of the state, and north-west of the Ohio, into a county, by the name of the county of Illinois.

19th. That on the 20th of December, 1783, the state of Virginia, by an act of assembly of that date, authorized their delegates in the Congress of the United States, or such of them, to the number of three at least, as should be assembled in Congress, on behalf of the state, and by proper deeds or instruments in writing under their hands and seals, to convey, transfer, assign and make over to the United States, in Congress assembled, for the benefit of the said states, all right, title and claim, as well of soil as jurisdiction, which Virginia had to the territory or tract of country within her limits, as defined and prescribed by the letters patent of May, 23d, 1609, and lying to the north-west of the Wheat. 8.

Ohio; subject to certain limitations and conditions in the act prescribed and specified; and that on the 1st of March, 1784, Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe, then being four of the delegates \*of Virginia, to the Congress of the **[\*560** United States, did, by their deed poll, under their hands and seals, in pursuance and execution of the authority to them given by this act of assembly, convey, transfer, assign and make over to the United States, in Congress assembled for the benefit of the said states, all right, title and claim, as well of soil as jurisdiction, which that state had to the territory north-west of the Ohio, with the reservations, limitations, and conditions, in the act of assembly prescribed; which cession the United States accepted.

20th. That on the twentieth day of July, in the year of our Lord one thousand eight hundred and eighteen, the United States, by their officers duly authorized for that purpose, did sell, grant and convey to the defendant in this action, William M'Intosh, all those several tracts or parcels of land, containing 11,560 acres, and butted, bounded and described as will fully appear in and by the patent for the said lands, duly executed, which was set out at length.

21st. That the lands described and granted in and by this patent are situated within the state of Illinois, and are contained within the lines of the last, or second of the two tracts, described and purporting to be granted and conveyed to Louis Viviat and others, by the deed of October 18th, 1775; and that William M'Intosh, the defendant, entered upon these lands under and by virtue of his patent, and became possessed thereof before the institution of this suit.

22d. That Thomas Johnson, one of the grantees, \*in and under the deed of **[\*561** October 18th, 1775, departed this life on or about the first day of October, 1819, seized of all his undivided part or share of and in the two several tracts of land, described and purporting to be granted and conveyed to him and others by that deed, having first duly made and published his last will and testament in writing, attested by three credible witnesses, which he left in full force, and by which he devised all his undivided share and part of those two tracts of land to his son, Joshua Johnson, and his heirs, and his grandson, Thomas J. Graham, and his heirs, the lessors of the plaintiff in this action, as tenants in common.

23d. That Joshua Johnson and Thomas J. Graham, and devisees, entered into the two tracts of land last above mentioned, under and by virtue of the will, and became thereof seized as the law requires. That Thomas Johnson, the grantee and deviser, during his whole life, and at the time of his death, was an inhabitant and citizen of the state of Maryland; that Joshua Johnson and Thomas J. Graham, the lessors of the plaintiff, now are, and always have been, citizens of the same state; that the defendant, William M'Intosh, now is, and at and before the time of bringing this action was, a citizen of the state of Illinois; and that the matter in dispute in this action is of the value of \$2,000, current money of the United States, and upwards.



24th. And that neither William Murray, nor any other of the grantees under the deed of July the 5th, 1773, nor Louis Viviat, nor any other **562\***] of the \*grantees under the deed of October the 8th, 1775, nor any person for them, or any of them, ever obtained, or had the actual possession, under and by virtue of those deeds, or either of them, of any part of the lands in them, or either of them, described and purporting to be granted; but were prevented by the war of the American revolution, which soon after commenced, and by the disputes and troubles which preceded it, from obtaining such possession; and that since the termination of the war, and before it, they have repeatedly, and at various times, from the year 1781 till the year 1816, petitioned the Congress of the United States to acknowledge and confirm their title to those lands, under the purchases and deeds in question, but without success.

Judgment being given for the defendant on the case stated, the plaintiffs brought this writ of error.

The cause was argued by *Mr. Harper* and *Mr. Webster* for the plaintiffs, and by *Mr. Win-der* and *Mr. Murray* for the defendants. But as the arguments are so fully stated in the opinion of the court, it is deemed unnecessary to give anything more than the following summary:

On the part of the plaintiffs it was contended, 1. That upon the facts stated in the case, the Piankeshaw Indians were the owners of the lands in dispute, at the time of executing the deed of October 10th, 1775, and had power to sell. But as the United States had purchased the same lands of the same Indians, both parties claim from the same source. It would seem, therefore, to be unnecessary, and merely specu-**563\***] lative, to discuss \*the question respecting the sort of title or ownership which may be thought to belong to savage tribes, in the lands on which they live. Probably, however, their title by occupancy is to be respected, as much as that of an individual, obtained by the same right, in a civilized state. The circumstance that the members of the society held in common, did not affect the strength of their title by occupancy.<sup>1</sup> In the memorial, or manifesto, of the British government, in 1755, a right of soil in the Indians is admitted. It is also admitted in the treaties of Utrecht and Aix la Chapelle. The same opinion has been expressed by this court,<sup>2</sup> and by the Supreme Court of New York.<sup>3</sup> In short, all, or nearly all, the lands in the United States is holden

under purchases from the Indian nations; and the only question in this case must be, whether it be competent to individuals to make such purchases, or whether that be the exclusive prerogative of government.

2. That the British King's proclamation of October 7th, 1763, could not affect this right of the Indians to sell, because they were not British subjects, nor in any manner bound by the authority of the British government, legislative or executive. And, because, even admitting them to be British subjects, absolutely, or *sub modo*, they were still proprietors of the soil, and could not be divested of their rights of property, or any of its \*incidents, by a mere act of [**\*564** the executive government, such as this proclamation.

3. That the proclamation of 1763 could not restrain the purchasers under these deeds from purchasing; because the lands lay within the limits of the colony of Virginia, of which, or of some other British colony, the purchasers, all being British subjects, were inhabitants. And because the king had not, within the limits of that colonial government, or any other, any power of prerogative legislation, which is confined to countries newly conquered, and remaining in the military possession of the monarch, as supreme chief of the military forces of the nation. The present claim has long been known to the government of the United States, and is mentioned in the collection land laws, published under public authority. The compiler of those laws supposes this title void, by virtue of the proclamation of 1763. But we have the positive authority of a solemn determination of the Court of King's Bench, on this very proclamation, in the celebrated *Grenada* case, for asserting that it could have no such effect.<sup>4</sup> This country being a new conquest, and a military possession, the crown might exercise legislative powers, until a local legislature was established. But the establishment of a government establishes a system of laws, and excludes the power of legislating by proclamation. The proclamation could not have the force of law within the chartered limits of Virginia. A proclamation \*that no person [**\*565** should purchase land in England or Canada, would be clearly void.

4. That the act of assembly of Virginia, passed in May, 1779,<sup>5</sup> cannot affect the right of the plaintiffs, and others claiming under these deeds; because on general principles, and by the constitution of Virginia, the legislature was not competent to take away private, vested

1.—Grotius, de J. B. ac P., l. 2, c. 2, s. 4; l. 2, c. 24, s. 9; Puffen., l. 4, c. 5, s. 1, 3.

2.—Fletcher v. Peck, 6 Cranch's Rep. 646.

3.—Jackson v. Wood, 7 Johns. Rep. 296.

4.—Campbell v. Hall, 1 Cowp. Rep. 204.

5.—This statute is as follows: "An act for declaring and asserting the rights of this commonwealth, concerning purchasing lands from Indian natives. To remove and prevent all doubt concerning purchases of lands from the Indian natives, Be it declared by the general assembly, that this commonwealth hath the exclusive right of pre-emption from the Indians, of all the lands within the limits of its own chartered territory, as described by the act and constitution of government, in the year 1776. That no person or persons whatsoever, have, or ever had, a right to purchase any lands within the same, from any Indian nation,

except only persons duly authorized to make such purchases on the public account, formerly for the use and benefit of the colony, and lately of the commonwealth; and that such exclusive right or pre-emption, will and ought to be maintained by this commonwealth, to the utmost of its power.

"And be it further declared and enacted, That every purchase of lands heretofore made, by, or on behalf of, the crown of England or Great Britain, from any Indian nation or nations, within the before-mentioned limits, doth and ought to enure forever, to and for the use and benefit of this commonwealth, and to or for no other use or purpose whatsoever; and that all sales and deeds which have been, or shall be made by any Indian or Indians, or by any Indian nation or nations, for lands within the said limits, to or for the separate use of any person or persons whatsoever, shall be, and the same, are hereby declared utterly void and of no effect."

rights, or appropriate private property to public use under the circumstances of this case. **566\***] And because the act is not \*contained in the revival of 1794, and must, therefore, be considered as repealed; and the repeal re-instates all rights that might have been affected by the act, although the territory, in which the lands in question lie, was ceded to the United States before the repeal. The act of 1779 was passed after the sales were made, and it cannot affect titles previously obtained. At the time of the purchases there was no law of Virginia rendering such purchases void. If, therefore, the purchases were not affected by the proclamation of 1763, nor by the act of 1779, the question of their validity comes to the general inquiry, whether individuals, in Virginia, at the time of this purchase, could legally obtain Indian titles. In New England, titles have certainly been obtained in this mode. But whatever may be said on the more general question, and in reference to other colonies or states, the fact being that in Virginia there was no statute existing at the time against such purchases, mere general considerations would not apply. It may be true that, in almost all the colonies, individual purchases from the Indians were illegal; but they were rendered so by express provisions of the local law. In Virginia, also, it may be true that such purchases have generally been prohibited; but at the time the purchases now in question were made, there was no prohibitory law in existence. The old colonial laws on the subject had all been repealed. The act of 1779 was a private act, so far as respects this case. It is the same as if it had enacted that these particular deeds **567\***] were void. Such acts \*bind only those who are parties to them, who submit their case to the legislature.

On the part of the defendants, it was insisted that the uniform understanding and practice of European nations, and the settled law, as laid down by the tribunals of civilized states, denied the right of the Indians to be considered as independent communities, having a permanent property in the soil, capable of alienation to private individuals. They remain in a state of nature, and have never been admitted into the general society of nations.<sup>1</sup> All the treaties and negotiations between the civilized powers of Europe and of this continent, from the treaty of Utrecht, in 1713, to that of Ghent, in 1814, have uniformly disregarded their supposed right to the territory included within the jurisdictional limits of those powers.<sup>2</sup> Not only has the practice of all civilized nations been in conformity with this doctrine, but the whole theory of their titles to lands in America rests upon the hypothesis that the Indians had no right of soil as sovereign, independent states. Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives.<sup>3</sup> The sovereignty and

\*eminent domain thus acquired, necessarily precludes the idea of any other sovereignty existing within the same limits. The subjects of the discovering nation must necessarily be bound by the declared sense of their own government, as to the extent of this sovereignty and the domain acquired with it. Even if it should be admitted that the Indians were originally an independent people, they have ceased to be so. A nation that has passed under the dominion of another is no longer a sovereign state.<sup>4</sup> The same treaties and negotiations, before referred to, show their dependent condition. Or, if it be admitted that they are now independent and foreign states, the title of the plaintiffs would still be invalid; as grantees from the Indians, they must take according to their laws of property, and as Indian subjects. The law of every dominion affects all persons and property situate within it;<sup>5</sup> and the Indians never had any idea of individual property in lands. It cannot be said that the lands conveyed were disjoined from their dominion, because the grantees could not take the sovereignty and eminent domain to themselves.

Such, then, being the nature of the Indian title to lands, the extent of their right of alienation must depend upon the laws of the dominion under which they live. They are subject to the sovereignty of the United States. The subjection proceeds from their residence within our territory \*and jurisdiction. It is **[\*569** unnecessary to show that they are not citizens in the ordinary sense of that term, since they are destitute of the most essential rights which belong to that character. They are of that class who are said by jurists not to be citizens, but perpetual inhabitants with diminutive rights.<sup>6</sup> The statutes of Virginia, and of all the other colonies, and of the United States, treat them as an inferior race of people, without the privileges of citizens, and under the perpetual protection and pupillage of the government. The act of Virginia of 1662, forbade purchases from the Indians, and it does not appear that it was ever repealed. The act of 1779 is rather to be regarded as a declaratory act, founded upon what had always been regarded as the settled law. These statutes seem to define sufficiently the nature of the Indian title to lands; a mere right of usufruct and habitation, without power of alienation. By the law of nature, they had not acquired a fixed property capable of being transferred. The measure of property acquired by occupancy is determined, according to the law of nature, by the extent of men's wants, and their capacity of using it to supply them.<sup>7</sup> It is a violation of the rights of others to exclude them from the use of what we do not want, and they have an occasion for. Upon this principle the North American Indians could have acquired no proprietary interest in the vast tracts of \*territory which they wandered over; **[\*570** and their right to the lands on which they hunt-

1.—Penn v. Lord Baltimore, 1 Ves. 445; 2 Rutherford's Inst., 29; Locke, Government, b. 2, c. 7, s. 87, 89, c. 12, s. 143, c. 9, s. 123, 130; Jefferson's Notes, 126; Colden's Hist. Five Nations, 2-16; Smith's Hist. New York, 35-41; Montesquieu Esprit des Loix, l. 18, c. 11, 12, 13; Smith's Wealth of Nations, b. 5, c. 1.

2.—5 Annual Reg. 56, 233; 7 Niles' Reg. 229. Wheat. 8.

3.—Marten's Law of Nations, 67, 69; Vattel, Droit des Gens., l. 2, c. 7, s. 83, l. 1, c. 18, s. 204, 205.

4.—Vattel, l. 1, c. 1, s. 11.

5.—Cowp. Rep. 204.

6.—Vattel, l. 1, c. 19, s. 213.

7.—Grotius, l. 2, c. 11; Barbeyr. Puffend. l. 4, c. 4, s. 2, 4; 2 Bl. Comm. 2; Puffend. l. 4, c. 6, s. 3; Locke on Government, b. 2, c. 5, s. 26, 34-40.



ed could not be considered as superior to that which is acquired to the sea by fishing in it. The use in the one case, as well as the other, is not exclusive.<sup>1</sup> According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity; for the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators. All the proprietary rights of civilized nations on this continent are founded on this principle. The right derived from discovery and conquest can rest on no other basis; and all existing titles depend on the fundamental title of the crown by discovery. The title of the crown (as representing the nation) passed to the colonists by charters, which were absolute grants of the soil; and it was a first principle in colonial law that all titles must be derived from the crown. It is true that, in some cases, purchases were made by the colonies from the Indians; but this was merely a measure of policy to prevent hostilities; and William Penn's purchase, which was the most remarkable transaction of this kind, was not deemed to add to the strength of his title.<sup>2</sup> In [\*571\*] most of the colonies the \*doctrine was received that all titles to land must be derived exclusively from the crown, upon the principle that the settlers carried with them, not only all the rights, but all the duties of Englishmen; and particularly the laws of property, so far as they are suitable to their new condition.<sup>3</sup> In New England alone, some lands have been held under Indian deeds. But this was an anomaly arising from peculiar local and political causes.<sup>4</sup>

As to the effect of the proclamation of 1763: If the Indians are to be regarded as independent sovereign states, then, by the treaty of peace, they became subject to the prerogative legislation of the crown, as a conquered people, in a territory acquired, *jure belli*, and ceded at the peace.<sup>5</sup> If, on the contrary, this country be regarded as a royal colony, then the crown had a direct power of legislation; or at least the power of prescribing the limits within which grants of land and settlements should be made within the colony. The same practice always prevailed under the proprietary governments, and has been followed by the government of the United States.

Mr. Chief Justice MARSHALL delivered the opinion of the court:

The plaintiffs in this cause claim the land, in their declaration mentioned, under two grants, purporting to be made, the first in 1773, and the [\*572\*] last in 1775, by the chiefs of certain \*Indian tribes, constituting the Illinois and the Piankeshaw nations; and the question is, whether this title can be recognized in the courts of the United States?

The facts as stated in the case agreed, show the authority of the chiefs who executed this conveyance, so far as it could be given by their own people; and likewise show that the particular tribes for whom these chiefs acted were in rightful possession of the land they sold. The

inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the courts of this country.

As the right of society to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision.

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition [\*573] and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

\*In the establishment of these rela- [\*574] tions, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but

1.—Locke, c. 5, s. 36-48; Grotius, l. 2, e. 11, s. 2; Montesquieu, tom. 2, p. 63; Chalmers' Polit. Annals, 5; 6 Cranch's Rep. 87.

2.—Penn v. Lord Baltimore, 1 Ves. 444; Chalmers'

Polit. Annals, 644; Sullivan's Land Tit. c. 2; Smith's Hist. N. Y. 145, 184.

3.—1 Bl. Comm. 107; 2 P. Wms. 75; 1 Salk. 411, 616.

4.—Sulliv. Land Tit. 45.

5.—Cowp. 204; 7 Co. Rep. 17 b; 2 Meriv. Rep. 143.

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their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.

The history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.

Spain did not rest her title solely on the grant of the Pope. Her discussions respecting boundary, with France, with Great Britain, and with the United States, all show that she placed it on the rights given by discovery. Portugal sustained her claim to the Brazils by the same title.

France, also, founded her title to the vast territories she claimed in America on discovery. <sup>[575\*]</sup> However <sup>\*</sup>conciliatory her conduct to the natives may have been, she still asserted her right of dominion over a great extent of country not actually settled by Frenchmen, and her exclusive right to acquire and dispose of the soil which remained in the occupation of Indians. Her monarch claimed all Canada and Acadie, as colonies of France, at a time when the French population was very inconsiderable, and the Indians occupied almost the whole country. He also claimed Louisiana, comprehending the immense territories watered by the Mississippi, and the rivers which empty into it, by the title of discovery. The letters patent granted to the Sieur Demonts, in 1603, constitute him Lieutenant-General, and the representative of the King in Acadie, which is described as stretching from the fortieth to the forty-sixth degree of north latitude; with authority to extend the power of the French over that country, and its inhabitants; to give laws to the people; to treat with the natives, and enforce the observance of treaties, and to parcel out and give title to lands, according to his own judgment.

The states of Holland also made acquisitions in America, and sustained their right on the common principle adopted by all Europe. They allege, as we are told by Smith, in his History of New York, that Henry Hudson, who sailed, as they say, under the orders of their East India Company, discovered the country from the Delaware to the Hudson, up which he sailed to the forty-third degree of north latitude; and this country they claimed under the title acquired by this voyage. Their <sup>[576\*]</sup> <sup>\*</sup>first object was commercial, as appears by a grant made to a company of merchants in 1614; but in 1621, the States-General made, as we are told by Mr. Smith, a grant of the country to the West India Company, by the name of New Netherlands.

The claim of the Dutch was always contested by the English; not because they questioned the title given by discovery, but because they

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insisted on being themselves the rightful claimants under that title. Their pretensions were finally decided by the sword.

No one of the powers of Europe gave its full assent to this principle more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to Christian people, and to take possession of them in the name of the King of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title.

In this first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle which has been mentioned. The right of discovery given by this commission is confined to countries "then unknown to all Christian people;" and of these countries Cabot was empowered to take possession in the name of the King of England, thus asserting a right to take possession, <sup>\*</sup>notwithstanding the occupancy of the natives, who were heathens, and at the same time admitting the prior title of any Christian people who may have made a previous discovery.

The same principle continued to be recognized. The charter granted to Sir Humphrey Gilbert, in 1578, authorizes him to discover and take possession of such remote, heathen and barbarous lands as were not actually possessed by any Christian prince or people. This charter was afterwards renewed to Sir Walter Raleigh, in nearly the same terms.

By the charter of 1606, under which the first permanent English settlement on this continent was made, James I. granted to Sir Thomas Gates and others, those territories in America lying on the sea-coast, between the thirty-fourth and forty-fifth degrees of north latitude, and which either belonged to that monarch, or were not then possessed by any other Christian prince or people. The grantees were divided into two companies at their own request. The first, or southern colony, was directed to settle between the thirty-fourth and forty-first degrees of north latitude; and the second, or northern colony, between the thirty-eighth and forty-fifth degrees.

In 1609, after some expensive and not very successful attempts at settlement had been made, a new and more enlarged charter was given by the crown to the first colony, in which the king granted to the "Treasurer and Company of Adventurers of the city of London for the first Colony in Virginia," in absolute property, the lands extending along the sea-coast four hundred miles, and <sup>\*</sup>into the land <sup>[578]</sup> throughout from sea to sea. This charter, which is a part of the special verdict in this cause, was annulled, so far as respected the rights of the company, by the judgment of the Court of King's Bench on a writ of *quo warranto*; but the whole effect allowed to this judgment was to revest in the crown the powers of government, and the title to the land within its limits.

At the solicitation of those who held under the grant to the second or northern colony, a



new and more enlarged charter was granted to the Duke of Lenox and others, in 1620, who were denominated the Plymouth Company, conveying to them in absolute property all the lands between the fortieth and forty-eighth degrees of north latitude.

Under this patent, New England has been in a great measure settled. The company conveyed to Henry Rosewell and others, in 1627, that territory which is now Massachusetts; and in 1628, a charter of incorporation, comprehending the powers of government, was granted to the purchasers.

Great part of New England was granted by this company, which, at length, divided their remaining lands among themselves; and, in 1635, surrendered their charter to the crown. A patent was granted to Gorges for Maine, which was allotted to him in the division of property.

All the grants made by the Plymouth Company, so far as we can learn, have been respected. In pursuance of the same principle, the King, in 1664, granted to the Duke of York the country of New England as far south as **579\*** the Delaware Bay. His Royal Highness transferred New Jersey to Lord Berkeley and Sir George Carteret.

In 1663, the crown granted to Lord Clarendon and others, the country lying between the thirty-sixth degree of north latitude and the river St. Mathes; and, in 1666, the proprietors obtained from the crown a new charter, granting to them that province in the King's dominions in North America which lies from thirty-six degrees thirty minutes north latitude to the twenty-ninth degree, and from the Atlantic Ocean to the South Sea.

Thus has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees. In those governments which were denominated royal, where the right to the soil was not vested in individuals, but remained in the crown, or was vested in the colonial government, the king claimed and exercised the right of granting lands, and of dismembering the government at his will. The grants made out of the two original colonies, after the resumption of their charters by the crown, are examples of this. The governments of New England, New York, New Jersey, Pennsylvania, Maryland, and a part of Carolina, were thus created. In all of them, the soil, at the time the grants were made, was occupied by the Indians. Yet almost every title within those governments is dependent on these grants. In some instances, the soil was conveyed by the crown unaccompanied by the powers of government, as in the case of the northern neck of **580\*** Virginia. It has never been objected to this, or to any other similar grant, that the title as well as possession was in the Indians when it was made, and that it passed nothing on that account.

These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. A charter intended to convey political power only, would never contain words expressly granting the land, the soil and the waters. Some of them purport to convey the soil alone; and in those

cases in which the powers of government, as well as the soil, are conveyed to individuals, the crown has always acknowledged itself to be bound by the grant. Though the power to dismember regal governments was asserted and exercised, the power to dismember proprietary governments was not claimed; and, in some instances, even after the powers of government were revested in the crown, the title of the proprietors to the soil was respected.

Charles II. was extremely anxious to acquire the property of Maine, but the grantees sold it to Massachusetts, and he did not venture to contest the right of that colony to the soil. The Carolinas were originally proprietary governments. In 1721 a revolution was effected by the people, who shook off their obedience to the proprietors, and declared their dependence immediately on the crown. The king, however, purchased the title of those who were disposed to sell. One of them, Lord Carteret, surrendered his interest in the government, but retained his title to the soil. That title **\*581** was respected till the revolution, when it was forfeited by the laws of war.

Further proofs of the extent to which this principle has been recognized, will be found in the history of the wars, negotiations and treaties which the different nations, claiming territory in America, have carried on and held with each other.

The contests between the cabinets of Versailles and Madrid, respecting the territory on the northern coast of the Gulf of Mexico, were fierce and bloody, and continued until the establishment of a Bourbon on the throne of Spain produced such amicable dispositions in the two crowns as to suspend or terminate them.

Between France and Great Britain, whose discoveries as well as settlements were nearly contemporaneous, contests for the country, actually covered by the Indians, began as soon as their settlements approached each other, and were continued until finally settled in the year 1763, by the treaty of Paris.

Each nation had granted and partially settled the country, denominated by the French, Arcadie, and by the English, Nova Scotia. By the twelfth article of the treaty of Utrecht, made in 1703, His Most Christian Majesty ceded to the Queen of Great Britain, "all Nova Scotia or Acadie, with its ancient boundaries." A great part of the ceded territory was in the possession of the Indians, and the extent of the cession could not be adjusted by the commissioners to whom it was to be referred.

The treaty of Aix la Chapelle, which was made on the principle of the *status* **\*582 ante bellum**, did not remove this subject of controversy. Commissioners for its adjustment were appointed, whose very able and elaborate, though unsuccessful arguments, in favor of the title of their respective sovereigns, show how entirely each relied on the title given by discovery to lands remaining in the possession of Indians.

After the termination of this fruitless discussion, the subject was transferred to Europe, and taken up by the cabinets of Versailles and London. This controversy embraced not only the boundaries of New England, Nova Scotia, and that part of Canada which adjoined those

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colonies, but embraced our whole western country also. France contended not only that the St. Lawrence was to be considered as the center of Canada, but that the Ohio was within that colony. She founded this claim on discovery, and on having used that river for the transportation of troops, in a war with some southern Indians.

This river was comprehended in the chartered limits of Virginia; but, though the right of England to a reasonable extent of country, in virtue of her discovery of the sea-coast, and of the settlements she made on it, was not to be questioned; her claim of all the lands to the Pacific Ocean, because she had discovered the country washed by the Atlantic, might, without derogating from the principle recognized by all, be deemed extravagant. It interfered, too, with the claims of France, founded on the same principle. She therefore sought to **583** strengthen her original title to \*the lands in controversy, by insisting that it had been acknowledged by France in the fifteenth article of the treaty of Utrecht. The dispute respecting the construction of that article has no tendency to impair the principle that discovery gave a title to lands still remaining in the possession of the Indians. Whichever title prevailed, it was still a title to lands occupied by the Indians, whose right of occupancy neither controverted, and neither had then extinguished.

These conflicting claims produced a long and bloody war, which was terminated by the conquest of the whole country east of the Mississippi. In the treaty of 1763, France ceded and guaranteed to Great Britain, all Nova Scotia, or Acadie, and Canada, with their dependencies; and it was agreed that the boundaries between the territories of the two nations, in America, should be irrevocably fixed by a line drawn from the source of the Mississippi, through the middle of that river and the lakes Maurepas and Ponchartrain, to the sea. This treaty expressly cedes, and has always been understood to cede, the whole country, on the English side of the dividing line, between the two nations, although a great and valuable part of it was occupied by the Indians. Great Britain, on her part, surrendered to France all her pretensions to the country west of the Mississippi. It has never been supposed that she surrendered nothing, although she was not in actual possession of a foot of land. She surrendered all right to acquire the country; and any after attempt to purchase it from the Indians **584** would have been considered \*and treated as an invasion of the territories of France.

By the twentieth article of the same treaty, Spain ceded Florida, with its dependencies, and all the country she claimed east or south-east of the Mississippi, to Great Britain. Great part of this territory also was in possession of the Indians.

By a secret treaty, which was executed about the same time, France ceded Louisiana to Spain; and Spain has since retroceded the same country to France. At the time both of its cession and retrocession, it was occupied chiefly by the Indians.

Thus, all the nations of Europe, who have acquired territory on this continent, have asserted

in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American states rejected or adopted this principle?

By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the "propriety and territorial rights of the United States," whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitively to these states. We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It \*has never been doubted, that either [**585** the United States, or the several states, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it.

Virginia, particularly, within whose chartered limits the land in controversy lay, passed an act in the year 1779, declaring her "exclusive right of pre-emption from the Indians, of all the lands within the limits of her own chartered territory, and that no person or persons whatsoever, have, or ever had, a right to purchase any lands within the same, from any Indian nation, except only persons duly authorized to make such purchase, formerly for the use and benefit of the colony, and lately for the commonwealth." The act then proceeds to annul all deeds made by Indians to individuals, for the private use of the purchasers.

Without ascribing to this act the power of annulling vested rights, or admitting it to countervail the testimony furnished by the marginal note opposite to the title of the law, forbidding purchases from the Indians, in the revisals of the Virginia statutes, stating that law to be repealed, it may safely be considered as an unequivocal affirmance, on the part of Virginia, of the broad principle which had always been maintained that the exclusive right to purchase from the Indians resided in the government.

In pursuance of the same idea, Virginia proceeded, at the same session, to open her land-office, \*for the sale of that country [**586** which now constitutes Kentucky—a country, every acre of which was then claimed and possessed by Indians, who maintained their title with as much persevering courage as was ever manifested by any people.

The states, having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on conditions expressed in their deeds of cession, which demonstrate the opinion that they ceded the soil as well as jurisdiction, and that in doing so they granted a productive fund to the government of the Union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country north-west of the river Ohio. This grant contained reservations and stipulations which could only be made by the owners



of the soil; and concluded with a stipulation that "all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become, members of the confederation," &c., "according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever."

The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.

**587\*]** \*After these states became independent, a controversy subsisted between them and Spain respecting boundary. By the treaty of 1795, this controversy was adjusted, and Spain ceded to the United States the territory in question. This territory, though claimed by both nations, was chiefly in the actual occupation of Indians.

The magnificent purchase of Louisiana was the purchase from France of a country almost entirely occupied by numerous tribes of Indians, who are in fact independent. Yet any attempt of others to intrude into that country would be considered as an aggression which would justify war.

Our late acquisitions from Spain are of the same character; and the negotiations which preceded those acquisitions recognize and elucidate the principle which has been received as the foundation of all European title in America.

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.

The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by **588\*]** either has never \*been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognized the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.

We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot

deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by Indians within the chartered limits of the British colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the title which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi, by the sword. The title \*to a vast portion [**589** of the lands we now hold, originates in them. It is not for the courts of this country to question the validity of this title, or to sustain one which is incompatible with it.

Although we do not mean to engage in the defense of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.

The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually they are incorporated with the victorious nation and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other; the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections, and united by force to strangers.

When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, \*or safely governed as a [**590** distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness; to govern them as a distinct people was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their

neighborhood and exposing themselves and their families to the perpetual hazard of being massacred.

Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturalists became unfit for **591\*** them. The game fled \*into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parceled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.

That law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances. The resort to some new and different rule, better adapted to the actual state of things, was unavoidable. Every rule which can be suggested will be found to be attended with great difficulty.

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been **592\*** settled, and be \*adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.

This question is not entirely new in this court. The case of *Fletcher v. Peck* grew out of a sale made by the state of Georgia of a large tract of country within the limits of that state, the grant of which was afterwards resumed. The action was brought by a sub-purchaser, on the contract of sale, and one of the covenants in the deed was, that the state of Georgia was, at the time of sale, seized in fee of the premises. The real question presented by the issue was, whether the seisin in fee was in the state of Georgia, or in the United States. After stating that this controversy between the several states and the United States had been compromised, the court thought it necessary to notice the Indian title, which, although entitled to the respect of all courts until it should be legitimately extinguished, was declared not to be such as to be absolutely repugnant to a seisin in fee on the part of the state.

This opinion conforms precisely to the principle which has been supposed to be recognized by all European governments, from the first Wheat. 8.

settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee than a lease for years, and might as effectually bar an ejectment.

Another view has been taken of this question, \*which deserves to be considered. [**593** The title of the crown, whatever it might be, could be acquired only by a conveyance from the crown. If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty.

As such a grant could not separate the Indian from his nation, nor give a title which our courts could distinguish from the title of his tribe, as it might still be conquered from, or ceded by his tribe, we can perceive no legal principle which will authorize a court to say that different consequences are attached to this purchase, because it was made by a stranger. By the treaties concluded \*between the [**594** United States and the Indian nations, whose title the plaintiffs claim, the country comprehending the lands in controversy has been ceded to the United States, without any reservation of their title. These nations had been at war with the United States, and had an unquestionable right to annul any grant they had made to American citizens. Their cession of the country, without a reservation of this land, affords a fair presumption that they considered it as of no validity. They ceded to the United States this very property, after having used it in common with other lands, as their own, from the date of their deeds to the time of cession; and the attempt now made is to set up their title against that of the United States.

The proclamation issued by the King of Great Britain, in 1763, has been considered, and we think with reason, as constituting an additional objection to the title of the plaintiffs.

By that proclamation, the crown reserved under its own dominion and protection, for the use of the Indians, "all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west," and strictly forbade all British subjects from making any purchases or settle-



ments whatever, or taking possession of the reserved lands.

It has been contended that, in this proclamation, the King transcended his constitutional powers; and the case of *Campbell v. Hall* (reported by Cowper) is relied on to support this position.

**595\*** It is supposed to be a principle of universal law that, if an uninhabited country be discovered by a number of individuals, who acknowledge no connection with, and owe no allegiance to, any government whatever, the country becomes the property of the discoverers, so far at least as they can use it. They acquire a title in common. The title of the whole land is in the whole society. It is to be divided and parceled out according to the will of the society, expressed by the whole body, or by that organ which is authorized by the whole to express it.

If the discovery be made, and possession of the country be taken, under the authority of an existing government, which is acknowledged by the emigrants, it is supposed to be equally well settled that the discovery is made for the whole nation, that the country becomes a part of the nation, and that the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national domains, by that organ in which all vacant territory is vested by law.

According to the theory of the British constitution, all vacant lands are vested in the crown, as representing the nation; and the exclusive power to grant them is admitted to reside in the crown, as a branch of the royal prerogative. It has been already shown that this principle was as fully recognized in America as in the island of Great Britain. All the lands we hold were originally granted by the crown; and the establishment of a regal government has never been considered as \*impairing its right to grant lands within the chartered limits of such colony. In addition to the proof of this principle, furnished by the immense grants, already mentioned, of lands lying within the chartered limits of Virginia, the continuing right of the crown to grant lands lying within that colony was always admitted. A title might be obtained, either by making an entry with the surveyor of a county, in pursuance of law, or by an order of the governor in council, who was the deputy of the King, or by an immediate grant from the crown. In Virginia, therefore, as well as elsewhere in the British dominions, the complete title of the crown to vacant lands was acknowledged.

So far as respected the authority of the crown, no distinction was taken between vacant lands and lands occupied by the Indians. The title, subject only to the right of occupancy by the Indians, was admitted to be in the King, as was his right to grant that title. The lands, then, to which this proclamation referred, were lands which the King had a right to grant, or to reserve for the Indians.

According to the theory of the British constitution, the royal prerogative is very extensive so far as respects the political relations between Great Britain and foreign nations. The peculiar situation of the Indians, necessarily considered in some respects, as a dependent, and in some respects as a distinct people, occupying

a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies, required that means should be adopted for \*the preservation of peace, [**597** and that their friendship should be secured by quieting their alarms for their property. This was to be effected by restraining the encroachments of the whites; and the power to do this was never, we believe, denied by the colonies to the crown.

In the case of *Campbell* against *Hall*, that part of the proclamation was determined to be illegal which imposed a tax on a conquered province, after a government had been bestowed upon it. The correctness of this decision cannot be questioned, but its application to the case at bar cannot be admitted. Since the expulsion of the Stuart family, the power of imposing taxes, by proclamation, has never been claimed as a branch of regal prerogative; but the powers of granting, or refusing to grant, vacant lands, and of restraining encroachments on the Indians, have always been asserted and admitted.

The authority of this proclamation, so far as it respected this continent, has never been denied, and the titles it gave to lands have always been sustained in our courts.

In the argument of this cause, the counsel for the plaintiffs have relied very much on the opinions expressed by men holding offices of trust, and on various proceedings in America, to sustain titles to land derived from the Indians.

The collection of claims to lands lying in the western country, made in the first volume of the Laws of the United States, has been referred to; but we find nothing in that collection to support the argument. Most of the titles were derived \*from persons professing to act [**598** under the authority of the government existing at the time; and the two grants under which the plaintiffs claim are supposed, by the person under whose inspection the collection was made, to be void because forbidden by the royal proclamation of 1763. It is not unworthy of remark that the usual mode adopted by the Indians for granting lands to individuals has been to reserve them in the treaty, or to grant them under the sanction of the commissioners with whom the treaty was negotiated. The practice, in such case, to grant to the crown, for the use of the individual, is some evidence of a general understanding that the validity even of such a grant depended on its receiving the royal sanction.

The controversy between the colony of Connecticut and the Mohegan Indians, depended on the nature and extent of a grant made by those Indians, to the colony; on the nature and extent of the reservations made by the Indians in their several deeds and treaties, which were alleged to be recognized by the legitimate authority, and on the violation by the colony of rights thus reserved and secured. We do not perceive, in that case, any assertion of the principle that individuals might obtain a complete and valid title from the Indians.

It has been stated, that in the memorial transmitted from the cabinet of London to that of Versailles, during the controversy between the two nations respecting boundary, which took place in 1755, the Indian right to the soil is rec-

**599**]\* ognized. \*But this recognition was made with reference to their character as Indians, and for the purpose of showing that they were fixed to a particular territory. It was made for the purpose of sustaining the claim of His Britannic Majesty to dominion over them.

The opinion of the Attorney and Solicitor-General, Pratt and Yorke, have been adduced to prove, that in the opinion of those great law officers, the Indian grant could convey a title to the soil without a patent emanating from the crown. The opinion of those persons would certainly be of great authority on such a question, and we were not a little surprised, when it was read, at the doctrine it seemed to advance. An opinion so contrary to the whole practice of the crown, and to the uniform opinions given on all other occasions by its great law officers, ought to be very explicit, and accompanied by the circumstances under which it was given and to which it was applied, before we can be assured that it is properly understood. In a pamphlet, written for the purpose of asserting the Indian title, styled "Plain Facts," the same opinion is quoted, and is said to relate to purchases made in the East Indies. It is, of course, entirely inapplicable to purchases made in America. Chalmers, in whose collection this opinion is found, does not say to whom it applies; but there is reason to believe, that the author of "Plain Facts" is, in this respect, correct. The opinion commences thus: "In respect to such places as have been, or shall be acquired, by treaty or grant, from any of the Indian princes or governments, your **600**]\* \*majesty's letters patent are not necessary." The words "princes or governments" are usually applied to the East Indians, but not to those of North America. We speak of their sachems, their warriors, their chiefs, their nations or tribes, not of their "princes or governments." The question on which the opinion was given, too, and to which it relates, was whether the King's subjects carry with them the common law wherever they may form settlements. The opinion is given with a view to this point, and its object must be kept in mind while construing its expressions.

Much reliance is also placed on the fact that many tracts are now held in the United States under the Indian title, the validity of which is not questioned.

Before the importance attached to this fact is conceded, the circumstances under which such grants were obtained, and such titles are supported, ought to be considered. These lands lie chiefly in the eastern states. It is known that the Plymouth Company made many extensive grants, which, from their ignorance of the country, interfered with each other. It is also known that Mason, to whom New Hampshire, and Gorges, to whom Maine was granted, found great difficulty in managing such unwieldy property. The country was settled by emigrants, some from Europe, but chiefly from Massachusetts, who took possession of lands they found unoccupied, and secured themselves in that possession by the best means in their **601**]\* power. The disturbances in \*England, and the civil war and revolution which followed those disturbances, prevented any interference on the part of the mother country, and the proprietors were unable to maintain their Wheat. 8.

title. In the meantime, Massachusetts claimed the country and governed it. As her claim was adversary to that of the proprietors, she encouraged the settlement of persons made under her authority, and encouraged, likewise, their securing themselves in possession, by purchasing the acquiescence and forbearance of the Indians.

After the restoration of Charles II., Gorges and Mason, when they attempted to establish their title, found themselves opposed by men, who held under Massachusetts and under the Indians. The title of the proprietors was resisted; and though, in some cases, compromises were made, and in some, the opinion of a court was given ultimately in their favor, the juries found uniformly against them. They became wearied with the struggle, and sold their property. The titles held under the Indians were sanctioned by length of possession; but there is no case, so far as we are informed, of a judicial decision in their favor.

Much reliance has also been placed on a recital contained in the charter of Rhode Island, and on a letter addressed to the governors of the neighboring colonies by the King's command, in which some expressions are inserted, indicating the royal approbation of titles acquired from the Indians.

The charter to Rhode Island recites "that the said John Clark, and others, had transplanted \*themselves into the midst of [**602** the Indian nations, and were seized and possessed, by purchase and consent of the said natives, to their full content, of such lands," &c. And the letter recites that "Thomas Chifflinch, and others, having, in the right of Major Aspertown, a just propriety in the Narragansett country, in New England, by grants from the native princes of that country, and being desirous to improve it into an English colony," &c., "are yet daily disturbed."

The impression this language might make, if viewed apart from the circumstances under which it was employed, will be effaced, when considered in connection with those circumstances.

In the year 1635, the Plymouth Company surrendered their charter to the crown. About the same time, the religious dissensions of Massachusetts expelled from that colony several societies of individuals, one of which settled in Rhode Island, on lands purchased from the Indians. They were not within the chartered limits of Massachusetts, and the English government was too much occupied at home to bestow its attention on this subject. There existed no authority to arrest their settlement of the country. If they obtained the Indian title, there were none to assert the title of the crown. Under these circumstances, the settlement became considerable. Individuals acquired separate property in lands which they cultivated and improved; a government was established among themselves; and no power existed in America which could rightfully interfere with it.

On the restoration of Charles II., this small society \*hastened to acknowledge his [**603** authority, and to solicit his confirmation of their title to the soil, and to jurisdiction over the country. Their solicitations were successful, and a charter was granted to them, containing the recital which has been mentioned.



It is obvious that this transaction can amount to no acknowledgment that the Indian grant could convey a title paramount to that of the crown, or could, in itself, constitute a complete title. On the contrary, the charter of the crown was considered as indispensable to its completion.

It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right. The object of the crown was to settle the sea-coast of America; and when a portion of it was settled, without violating the rights of others, by persons professing their loyalty, and soliciting the royal sanction of an act, the consequences of which were ascertained to be beneficial, it would have been as unwise as ungracious to expel them from their habitations because they had obtained the Indian title otherwise than through the agency of government. The very grant of a charter is an assertion of the title of the crown, and its words convey the same idea. The country granted is said to be "our island called Rhode Island;" and the charter contains an actual grant of the soil, as well as of the powers of government.

**604\***] The letter was written a few months before the charter was issued, apparently at the request of the agents of the intended colony, for the sole purpose of preventing the trespasses of neighbors, who were disposed to claim some authority over them. The King, being willing himself to ratify and confirm their title, was, of course, inclined to quiet them in their possession.

This charter, and this letter, certainly sanction a previous unauthorized purchase from Indians, under the circumstances attending that particular purchase, but are far from supporting the general proposition that a title acquired from the Indians would be valid against a title acquired from the crown, or without the confirmation of the crown.

The acts of the several colonial assemblies, prohibiting purchases from the Indians, have also been relied on, as proving that, independent of such prohibitions, Indian deeds would be valid. But we think this fact, at most, equivocal. While the existence of such purchases would justify their prohibition, even by colonies which considered Indian deeds as previously invalid, the fact that such acts have been generally passed, is strong evidence of the general opinion that such purchases are opposed by the soundest principles of wisdom and national policy.

After bestowing on this subject a degree of attention which was more required by the magnitude of the interest in litigation, and the able and elaborate arguments of the bar, than by its intrinsic difficulty, the court is decidedly of opinion that the plaintiffs do not exhibit a title **605\***] which can be sustained in the courts of the United States, and that there is no error in the judgment which was rendered against them in the District Court of Illinois.

*Judgment affirmed with costs.*

ARCHIBALD GRACIE ET AL., *Plaintiffs*  
*in Error.*

*v.*

JOHN PALMER ET AL., *Defendants in*  
*Error.*

By a charter-party, the sum of \$30,000 was agreed to be paid for the use or hire of the ship, on a voyage from Philadelphia to Madeira, and thence to Bombay, and at the option of the charterer to Calcutta, and back to Philadelphia (with an addition of \$2,000, if she should proceed to Calcutta), the whole payable on the return of the ship to Philadelphia and before the discharge of her cargo there, in approved notes, not exceeding an average time of ninety days from the time at which she should be ready to discharge her cargo. The charterer proceeded in the ship to Calcutta, and, with the consent of the master (who was appointed by the ship-owners), entered into an agreement with P. & Co., merchants there, that if they would make him an advance of money, he would deliver to them a bill of lading stipulating for the delivery of the goods purchased therewith to their agents in Philadelphia, free of freight, who should be authorized to sell the same and apply the proceeds to the repayment of the said advance, unless the charterer's bills, drawn on G. & S., of Philadelphia, should be accepted, in which event the agents of P. & Co. should deliver the goods to the charterer. The goods were shipped accordingly, and a bill of lading signed by the master, with the clause "freight for the said goods having been settled here." The bills of exchange drawn by the charterer were refused acceptance, and the agents of P. & Co. demanded the goods, which the owners of the ship refused to deliver without the payment of freight. Held, that the owners of the ship had a lien on these goods for the freight.

**\*ERROR** to the Circuit Court for the **[\*606**  
Eastern District of Pennsylvania.

This was an action of *assumpsit*, brought by the defendants in error against the plaintiffs in error, to recover back the sum of \$10,500, paid under the circumstances stated in the following case, to be considered as a special verdict:

On the 23d of October, 1818, the defendants, being the owners of the ship *America*, chartered her to Hugh Chambers, by the following charter-party: "This charter-party, indented, made and entered upon, this 23d day of October, in the year of our Lord 1818, between Archibald Gracie, William Graeie and Charles King, the persons constituting the copartnership or house of trade, under the firm and style of Archibald Gracie & Sons, of the city of New York, owners of the ship or vessel called the *America*, of New York, of the burden of 460 tons, or thereabouts, register admeasurement, of the first part, and Hugh Chambers, of the city of Philadelphia, merchant, of the other part, witnesseth, that the said owners have let, and the said Hugh Chambers hath taken and hired the said vessel, to freight for the voyage, upon the terms and conditions following: Whereupon the said owners do covenant, promise and agree, to and with the said charterer, by these presents, that the said vessel shall be tight, staunch and strong, well and sufficiently fitted, manned, provided and furnished with all things needful and necessary for such vessel, on her intended voyage, hereinafter mentioned, and provisioned for the



**607** term of eighteen months, and \*fully and properly armed with large and small arms, and with sufficient ammunition for the same; and that she shall, on or before the 15th day of November next, be in readiness, at the port of Philadelphia, to receive and take on board, and shall there, when tendered within reach of her tackle, receive and take on board all such lawful goods and merchandise as the said charterer may think proper to ship, not exceeding what she can reasonably store and carry, over and above her tackle, apparel, provisions, armament and other necessities, and the privileges hereinafter reserved for the master, and first and second officers, and the lading of the dollars to be shipped by the owners, as hereinafter mentioned; and that the said ship shall be in readiness to sail from Philadelphia aforesaid, and, on being loaded and afterwards despatched, shall and will (wind and weather permitting) set sail from the said port of Philadelphia, on or before the 30th day of November next, and proceed to the Island of Madeira; and shall and will there make a right and true delivery of such quantities of goods and merchandise, as shall be there deliverable, loaded at Philadelphia aforesaid, to such persons as the same shall have been consigned to; and the same being so unloaded, the said ship shall and will receive and take on board all such legal goods, wares and merchandise whatsoever, as shall be offered and tendered, within reach of her tackle, by or for account of the said Hugh Chambers, not exceeding as aforesaid. And as soon as the said ship shall be **608** thus loaded at Madeira aforesaid, \*she shall and will set sail and depart from thence (wind and weather permitting), and directly proceed on her voyage, and put into the port of Bombay, in the East Indies; and that she shall, at the option of the said Hugh Chambers, his agent or agents, be allowed also to put into Calcutta, and deliver her cargo, and take in returns there. And at the said ports of Bombay and Calcutta, respectively, unlade all such goods and merchandise as shall remain on board, and relade such lawful goods, wares and merchandise as the said charterer, his agents, factors or assigns, shall think fit to charge and lade on board, over and above, and not exceeding as aforesaid, and the lading, for account of the said owners, in respect of the returns for the said funds, in dollars, to be shipped by them; and that the said ship shall and will, with her said return loading (wind and weather permitting), sail and proceed back to the said port of Philadelphia, and there deliver unto the said charterer, his executors, administrators or assigns, the full and entire cargo laden and taken on board the said ship at Bombay and Calcutta, aforesaid, for his account; upon the entire delivery whereof, the said intended voyage shall end and be determined. (The dangers of the seas, restraints of princes and rulers, and all other unavoidable casualties, always being excepted by these presents.) And it is hereby agreed, that the said owners shall load and ship, on board the said vessel, for the said voyage, fifteen thousand Spanish milled dollars, to be invested in goods and merchandise in India, in **609** like manner \*as the residue of the cargo in general, and that they shall be chargeable with freight on the returns thereof, at the rate of \$50 per ton; or, if the said returns shall be in goods and Wheat. 8.

merchandise, usually chargeable with, or taken on, freight, by weight, that the same shall be estimated at such rate as shall be equivalent to that sum by the ton; and also, that the commission to be allowed the supercargo of the said ship, shall be a clear commission of five per centum on the amount of the investment in India. And it is further agreed, that the said charterer shall furnish and supply the needful and sufficient cabin stores to and for the supercargo, master and officers of the said ship, for the said voyage, and that the owners shall and will allow, and pay to him therefor, the sum of \$1,500; and, also, that the cabin shall belong to the said charterer, excepting the respective state-rooms in which the master and officers shall sleep. And it is hereby further agreed, and granted and reserved, that the master shall have a privilege of six cubic tons, freight free; the first officer a like free privilege of three cubic tons, and the second officer a like free privilege of two cubic tons, provided, that neither of the said privileges shall be used for the purpose of shipping flour out in the said ship. And the said charterer, for himself, his heirs, executors and administrators, doth hereby covenant and agree with the said owners, that the said charterer will well and truly pay and satisfy all the port charges and expenses of the said ship, as well abroad as at Philadelphia aforesaid, until she shall have discharged \*her return [**610** cargo, excepting always the sea-stores, the wages of the master, officers, and crew, and the repairs and outfits of the said ship, with all which she is to be chargeable. And it is hereby further agreed, that there be allowed, and are granted one hundred and twenty working days in all, for the loading and unloading of the said ship at the ports and places of loading and delivery, and that the time not used and occupied at one port or place, may be taken or made up at the others, so that the whole do not exceed the number allowed as above mentioned; and that for every detention, over and above the said one hundred and twenty days, the said charterers shall pay to the said owners the sum of \$75 per day, to be paid in like manner as the freight. And the said charterer, for himself, his heirs, executors and administrators, doth hereby promise and agree, with the said owners, their executors, administrators and assigns, that he will cause the said ship or vessel to be loaded at the said port of Philadelphia, on her being in readiness to receive her funds and cargo there, and reloaded at the Island of Madeira, and at Bombay, and Calcutta, in the manner above expressed; and that he will pay to them, on the return of the said ship to Philadelphia, and before the discharge of her cargo there, in approved notes, not exceeding an average time of ninety days from the time at which she shall be ready to discharge her cargo, the clear sum of \$30,000; and if she shall have proceeded to Calcutta, the further sum of \$2,000, for the hire and freight of the said ship, for \*the [**611** said voyage. In witness whereof, the said owners and charterer have to these presents, in duplicate, set their hands and seals, the day and year first above written.

"ARCH. GRACIE & SONS. [L. S.]  
"HUGH CHAMBERS." [L. S.]

On the 28th of November, 1818, the America



sailed from Philadelphia, upon the voyage in the charter-party mentioned, laden with sundry goods, and also \$15,000 in specie, the property of the defendants. The flour and other merchandisc were delivered at Madeira, and the quantity of 207 pipes of wine, purchased with the proceeds, or part thereof, was there laden on board the America, and made deliverable in India. The America proceeded from Madeira to Calcutta, where the quantity of about 324 tons of her burthen was filled up from the proceeds of the outward cargo, and with such parts of the wine, taken in at Madeira, as was not disposed of at Calcutta; and the merchandisc so taken in was made deliverable to sundry consignees in the port of Philadelphia. Hugh Chambers, the charterer, was on board the said ship at Calcutta, and it was impracticable to obtain any freight for the said ship at the said port, beyond the amount so laden as aforesaid; nor could any person be induced there to ship on board of her any other goods, deliverable in the United States, upon the condition of paying, or being liable, for any freight whatever. Whereupon, the said Chambers applied to the plaintiffs to make him an advance for the purpose of purchasing merchandisc to ship on **612**\*] board the \*ship America, and did then and there, with the knowledge and consent of Edward Rosseter, the captain or master of the said ship America, enter into an agreement with the plaintiffs that if they would make such an advance, he would leave the merchandisc purchased therewith in their hands, as a security for the said advance while in Calcutta, and would, when shipped on board the America, deliver to them a bill of lading, stipulating for the delivery thereof to their agents in Philadelphia, free of freight, who should be authorized to sell the same and apply the proceeds to the payment of the said advance, unless the said Hugh Chambers' bills for the same, drawn upon Messrs. Grants & Stone, of Philadelphia, should be accepted, and the consignor should feel perfectly assured they would be paid at maturity; in which event the said agents should deliver the said merchandisc to him. That the said plaintiffs accordingly made the said advance, received the said goods as they were purchased, and shipped them on board the said ship America; for which shipment the said master signed and delivered the following bill of lading to the plaintiffs, which the said Chambers indorsed:

"Shipped, in good order, and well conditioned, by Hugh Chambers, in and upon the good ship, called the America, whereof is master for this present voyage, Edward Rosseter, and now lying in the port of Calcutta, and bound for Philadelphia, to say, seven hundred and forty-six bags, and sixty-five boxes of sugar, five hundred and eighty-nine bags of **613**\*] saltpetre, ten hundred and sixty \*bags of ginger, thirty-five bags of aniseed, thirty-two boxes of borax, thirty-two of castor oil, three hundred and three bundles of twine, thirty-five bales of goat skins, six thousand one hundred and sixty horns and horn tips, two hundred and sixty cow hides, fifteen hundred and sixty-nine gunny bags, two bales of seersuckers, two boxes of choppas, six bales of sannahs, five bales of checks, twenty-two bales of gurrahs, and one box of mull muslins, on account and risk of

Hugh Chambers, of Philadelphia, being marked and numbered as in the margin; and are to be delivered in the like good order, and well conditioned, at the aforesaid port of Philadelphia (the danger of the seas only excepted), unto Messrs. T. M. & R. Willing, or to their assigns. Freight for the said goods having been settled here.

"In witness whereof, the master or purser of the said ship hath affirmed to five bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void. Dated, Calcutta, 7th of September, 1819.

"Contents unknown.

"EDWARD ROSSETER."

"Marks and numbers on the back of this bill, countersigned. Hugh Chambers."

That the said Chambers, at the same time, drew and delivered to the plaintiffs, the said bills of exchange upon Messrs. Grants & Stone, for the sum of £8,042 8 4, being the amount of the said advance; which said bills were afterwards duly presented to Grants & Stone for acceptance, who refused to accept the same, and they were afterwards duly protested for \*non-payment, and now remain unpaid. **\*614** That the said agreement to deliver the said goods without paying freight, and the said bill of lading and indorsements, were made by the said Chambers, by Edward Rosseter, and by the plaintiffs, in good faith; and without them the said plaintiffs would not have made the said advance, nor shipped the said goods; and the receipt of the said goods on board the America, by the said master, under the said agreement, and signing the bill of lading in the terms aforesaid, were, under the circumstances of the case at the time, the best he could do for the interest of the owners of the ship. That the said plaintiffs were informed by Hugh Chambers, that the America was chartered by the said Chambers for a specific sum, and that the stock or merchandisc originally placed on board of her at the commencement of the voyage, and its proceeds, were solely and sufficiently a pledge for the payment of the same. That the America arrived in the port of Philadelphia, on or about the 29th of February, 1820, when the defendants gave notice to the said Chambers that they had entered the ship, and were ready to deliver the goods, after payment of the freight stipulated by the charter-party. On the 1st of March, 1820, the said Chambers replied to the defendants, that he was unable to comply with the requisitions of the charter-party. On the 2d of March, 1820, the defendants gave notice to all the consignees of goods on board the America, as by letter of that date to T. M. & R. Willing. On the 3d of March, 1820, Thomas M. & R. Willing, the consignees of the merchandisc shipped by the plaintiffs, demanded \*of **\*615** the defendants, and of Edward Rosseter, the master, the delivery thereof, without paying freight, and protested against the payment of any freight. On the 6th of March, 1820, the defendants refused to deliver the said merchandisc without paying freight. On the same day, the said T. M. & R. Willing, on behalf of the plaintiffs, replied to the defendants, and repeated the protest against paying any freight for the said merchandisc, and their refusal to pay any freight, unless they should be com-

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pelled to do it, in order to obtain possession of the said goods. The said T. M. & R. Willing, being unable otherwise to obtain the said merchandises from on board the ship *America*, paid, as the agents of the plaintiffs, and in their behalf, to the defendants, the sum of \$10,000; which payment was made in acceptances of the defendant's drafts, dated the 29th of March, 1820, at ninety days, and duly paid the 30th of June, 1820. The said payment was compelled by the defendants, under their claim of freight, and in consequence of their having the custody of the said merchandises, and was made under protest by the said T. M. & R. Willing. In consequence of the said payment, the said merchandises were delivered by the defendants to the said T. M. & R. Willing, as agents and consignees of the plaintiffs. There were other merchandises on board the said ship, exclusive of those consigned to the said T. M. & R. Willing, sufficient in value to pay the whole freight due by the said charter-party. If, upon the whole matter, the court shall be of opinion that the defendants had no right to detain the **616**]\* said \*goods for freight, judgment to be entered for the plaintiffs for the sum of \$10,500, with costs of suit.

If, upon the contrary, the court shall be of opinion that the defendants had such right, then judgment to be entered for the defendants.

Judgment being given upon this case for the plaintiffs below, the cause was brought by writ of error to this court.

*Mr. D. B. Ogden*, for the plaintiffs in error, stated that the general principle being that the ship-owners have a lien for the freight, it must be shown that they have parted with it in this case, either by the terms of the charter-party, or are deprived of it by the particular circumstances of the case.

1. As to the terms of the charter-party, the question is whether the possession is fully parted with, so that the charterer has the complete control of the ship.<sup>1</sup> The entire instrument must be taken together, and by that it will appear that the ship-owners hired and paid the master and crew; and there is an express covenant, on the part of the owners, for the carriage and delivery of the goods, and on the part of the charterer for the payment of the freight before the goods are delivered.

2. As to the particular circumstances of the

\*case, the question is, was any freight [**617** due? By the charter-party, the vessel was bound to receive all goods shipped by the charterer or his agent. This cargo was of that description. He borrowed money, and purchased the goods on his own account. They were to be delivered to the Messrs. Willings, as a security for the repayment of the money borrowed, and to be sold by them as the agents of the lender. Can the charterer, by any separate act of his, vary the right of the owner? Must not all the goods shipped by the charterer be considered as under the charter-party? It is not within the scope of the master's authority to dispense with the conditions of the charter-party. The moment the goods were put on board the ship, they were in possession of the owners, who had a lien on them for the freight. The bill of lading could not discharge this lien. The consignees alone were capable of indorsing the bill of lading, so as to operate a valid transfer. The charterer had no right to pay his own debt with the freight due to the owners, and the master had no right to bring goods free of freight.

But suppose the goods were the property of the Messrs. Palmers, the right to freight must depend on the circumstances. The master has power to bind the owner as to the contract of affreightment, but not to transport without freight. The owner may limit his powers by the charter-party; and all that can be required is, that the shipper of goods should know, or have an opportunity of knowing, the restrictions upon the master's authority. The master was not on a general \*voyage, seeking [**618** for freight, but was to perform his duty to the owners under that charter-party. The shippers knew this, and had an opportunity of inspecting the charter-party, and judging for themselves whether the master was authorized to assent to such a contract. They knew that the cargo was pledged for the freight, both by the general law, and by the particular provisions of this charter-party. This case is precisely similar to the very recent case of *Faith v. The East India Company*, where the English Court of K. B. held that the ship-owner could not be divested of his lien for freight, by such a transaction between the charterer and shipper, who were cognizant of the terms of the charter-party.<sup>2</sup> The \*case of *Hutton* [**619** v. *Bragg*,<sup>3</sup> which determined against the lien,

1.—*Hoe v. Groverman*, 1 Cranch's Rep. 237; *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch's Rep. 39, 49; *Christie v. Lewis*, 2 Brod. & Bingh. 410; *The Nereide*, 9 Cranch's Rep. 388, 424.

2.—4 Barnw. & Ald. 630. [The case of *Faith v. The East India Company*, was as follows: The plaintiff, Faith, was the owner of the ship *Eliza*, of which Sivrac was master, and entered into a charter-party with Gooch, by which freight was agreed to be paid, for the use or hire of the ship, at a certain rate per ton, for a voyage to India, out and home, in the following manner, viz., a certain sum in advance, on the ship's clearing outwards, and the residue, half in cash and half in approved bills, upon the delivery of the homeward cargo. The owner appointed Sivrac master, at the request of Gooch, the charterer, who executed a bond, conditioned for the faithful performance of the master's duty; and the owner instructed the master to be careful to sign all bills of lading with the clause "freight payable as by charter-party." The ship was consigned to Colvins & Co., in Calcutta, by whom she was put up, for her homeward voyage, as a gener-  
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al ship, and different merchants shipped goods by her, C. & Co. taking, for homeward freight, bills payable sixty days after delivery of the cargo; and a new master having been appointed by C. & Co., in conjunction with Sivrac, signed bills of lading with the clause "paying freight agreeable to freight bill." The freight bills were made payable in London, to Bazett & Co., to whom the charterer was indebted for advances on the outward cargo, and who, as well as Colvins & Co., were cognizant of the terms of the charter-party. The Court of King's Bench held that the owner of the ship had a lien on these goods to the extent of the homeward freight. Colvins & Co. also put on board the ship goods purchased by them on account of the charterer; but he being indebted to them, and Bazett & Co., their agents, those goods were, by the bill of lading, consigned to B. & Co. The court also held, that as between the owner of the ship and Bazett & Co., the goods were to be considered as the goods of the charterer, and liable to the owner's lien on them for the freight due by charter-party.]

3.—2 Marsh. Rep. 339; 7 Taunt. 14.



in a case of a general letting of the ship, has been since overruled.<sup>1</sup>

*Mr. Sergeant*, contra, contended, 1. That the goods of a third person, carried in a chartered ship, are not liable for the freight due by charter-party, but only for what is due for their own carriage, as stipulated by the bill of lading at the time of shipment. It would follow that if the freight be paid beforehand, *bona fide*, or it be stipulated that they shall be carried free of freight, they are not liable at all.

2. That the goods in question were, both at law and in equity, the goods of a third person. It would follow, that, having been fairly shipped under an agreement made with the charterer and the master that they should pay no freight, the ship-owners had no lieu upon them.

1. The first position is equally supported by authority, by principle, and by the convenience **620** \*and necessities of trade. The case of *Paul v. Birch*,<sup>2</sup> decided by Lord Hardwicke, in 1743, seems less the introduction of a new doctrine, than an authoritative declaration of what had been before, and was then, understood to be the usage and law. It has since frequently been cited with approbation by elementary writers, and confirmed by judicial authority.<sup>3</sup> The only question growing out of this undeniable position is whether, in the case of a general letting and hiring of a ship, the goods of the charterer himself are liable for the freight.

In *Hutton v. Bragg*,<sup>4</sup> it was determined by the English Court of C. B., that there was no lien in such a case. This authority has, however, been very much weakened by subsequent decisions,<sup>5</sup> and at last solemnly overruled (Lord Ch. J. Dallas dissenting) by the same court.<sup>6</sup> But in none of these cases is it even intimated that there is any lien upon other goods than those of the charterer for the charter freight. The word *freight* is used in two different senses. (1) To signify the price or consideration of the carriage of goods on board a ship. (2) To signify the price or hire of a ship for a given time, or for a given employment. The first, which is the appropriate sense of the word, may be, by contract, express or implied; but **621** \*the form of the contract is not material. It may be by bill of lading, or it may be by agreement or charter-party; or without stipulating a price.

Now, to constitute a lien, it is necessary. (1) That there be a debt due, on account of the goods of the shipper, for the carriage of those goods. (2) That the goods be in the possession of the creditor, with the assent of the debtor, for the purpose of the carriage from which the debt arises. How is the lien acquired at all, or whenec is the right of lien derived, for freight due by charter-party? If it be asked, how it is derived in the case of a bill of lading, stipulating freight or not, or where there is no bill of lading, the answer is readily furnished. It

is a particular lien for the carriage of the goods; the same which a common carrier has by the custom of the realm, and given by the common law, or by the law merchant, which is a part of the common law. It is restricted to the very goods carried; for the common law knows of no such thing as a general lien. The utmost extension it has ever received, is to all the goods in the same bill of lading, and, by a modern decision in England, to goods of the same shipper on board the same ship, though in a different bill of lading.<sup>7</sup> And that is upon the ground of an understanding to that effect, when the first goods are delivered.

The lien for freight due by charter-party stands \*precisely on the same founda- **622** tion. A general lien can only be by general usage, by a particular usage, or by contract.<sup>8</sup> The charter-party gives no lien in terms. The ship and goods are (commonly) mutually bound for the performance of the covenants, among which is the covenant for the payment of freight. But here the goods are not so bound; and if they were, it would only extend to the goods of the charterer. But even the goods of the charterer are not bound for the performance of covenants; because, (1) There is no lien for port dues, or demurrage, or any other charges of a similar nature. (2) There is no lien till freight actually earned, and, therefore, not if prevented by the freighter, or by a stranger. Yet the owner can recover on the covenant.<sup>9</sup> (3) There is no lien upon the goods of the charterer for what is termed dead freight, *i. e.*, of the unoccupied space.<sup>10</sup> And this lien has no greater extent in equity than at law.<sup>11</sup> The cases cited, while they disaffirm the lien by contract, equally negative the existence of a general usage, operative either at law or in equity. How, then, can it be that there is a lien upon the goods of a third person for the charter freight? They do not owe it by contract. The shipper, or the consignee, is not liable for it. Equity first gave the owner a lien for the freight reserved by bill of \*lad- **623** ing, and the law has followed equity. But neither law nor equity have ever gone farther. It follows, that, if the freight be paid beforehand, or the bill be freight free, and this be fairly done, there is no lien at all.

If it be competent to the master, with the assent of the charterer, to receive goods on board, on other terms than those of the charter-party, it will follow that he must be the conclusive judge of the terms. The authority of the master, in this respect, in a foreign port, is the same in the case of a chartered ship as in the case of a ship not chartered. The only difference is, that he must have the assent of the charterer. If it were not so, the ship must, in many cases, return home empty, which would be neither for the interest of the owner and charterer, nor would it promote the general interests of commerce and navigation.

1.—*Christie v. Lewis*, 2 Brod. & Bingh. 510.

2.—2 Atk. 621.

3.—*Abbott Shipp*, 192, 193; 2 Barnw. & Ald. 509; 3 Camp. N. P. Rep. 202; 2 Brod. & Bingh. 410.

4.—2 Marsh. Rep. 339; 7 Taunt. 14.

5.—2 Barnw. & Ald. 503.

6.—*Christie v. Lewis*, 2 Brod. & Bingh. 510.

7.—*Abbott. Shipp*, 245; *Birley v. Gladstone*, 3 Maule & Selw. 220.

8.—2 Meriv. 401.

9.—2 Holt. Shipp. 178.

10.—*Id.* Philips v. Rodie, 15 East's Rep. 547; *Birley v. Gladstone*, 3 Maule & Selw. 205.

11.—*Birley v. Gladstone*, 2 Meriv. 401.

The agreement between the charterer and shippers, in this case, was fairly made with the assent of the master, and for the manifest benefit of the owners. Was it, then, competent for the master to bind the owners by his assent? The authority of the master of a chartered ship, in this respect, is no further restricted by the charter-party than to require the assent of the charterer, and to receive the goods of the charterer himself, only on the terms of the charter-party. In the event, then, of the failure, in whole or in part, by the charterer, is it not competent for him to fill up the ship? The only limitation is where goods are put on board, under or in pursuance of the charter-party; or where the conduct of the **624\*** master *is* collusive and fraudulent, and intended to injure his owner. The express contract, then, was that the goods should be free of freight; and there can be no implied, where there is an express contract.

If there was no freight due by contract, express or implied, for the carriage of these goods, it follows, from the principles already stated, that there could be no lien. It follows, also, from another principle. There can be no lien created or continued without a rightful possession. The possession acquired by the agreement, if held in violation of the agreement, would thereby become a tortious possession.

Could any action be maintained against the consignee for the carriage of these goods? It is well settled, that where freight is due for the carriage of goods, the consignee to whom they are delivered, impliedly contracts to pay the freight, and *assumpsit* may be maintained against him.<sup>1</sup> But here no action could be maintained upon the charter-party, for he is no party to it; nor on the bill of lading, for it stipulates that no freight is to be paid; nor on the implied *assumpsit*, for there is none.

The case is thus reduced to a single point, and that is, whether the goods in question were the property of Chambers, so that they could not be carried in the ship on any other terms than that of paying the charter freight. Wherever the interest of a third person intervenes, and is connected with the power of control, the master has a discretion, *and* **625\*** may trol or reject. If he accepts, he is bound, and so is the owner, as against such third persons, by the terms he agrees to. Suppose the charterer's goods to be pledged in a foreign port, and the pawnee (the charterer being unable to redeem) to refuse to ship under the charter-party, or unless he has priority; or suppose them to be attached, or arrested by a creditor; the master has an election, and the owner must abide by the decision.

But it is unnecessary to discuss this question further; for it is plain that the property, before the shipment, at the time of the shipment, and upon the arrival of the vessel, was, and continued to be, the property of the plaintiffs below. Admit that the surplus, in case of sale, would belong to Chambers, and the plaintiffs were only mortgagees; still, as mortgagees, in

possession, they are owners, and Chambers had only an equity of redemption. Nor does a mere interest in the profit and loss make any difference;<sup>2</sup> nor that they were shipped for account and risk of Chambers.<sup>3</sup>

Mr. Webster, for the plaintiffs in error, in reply, stated that it was not contended that these particular goods were bound for all the freight of the ship; but considering them as the goods of Messrs. Palmer & Co., the claim was for a *pro rata* freight only. It is clear, by the charter-party, that the *ship-owners* [**626** retained possession of the ship, so as to have a lien for the freight; and that this lien was also expressly reserved by the terms of that instrument. It is equally clear that this lien extends to all sub-shippers or strangers. There is no difference as to the validity and strength of this lien, whether it is on the goods of a charterer, or on those of other shippers, although there may be as to its extent; the goods of other shippers being liable for the freight stipulated by them, and the charterer's goods being liable for the whole amount of the charter freight. Have the ship-owners, then, waived the lien which is thus secured to them by the general law, and by this particular contract? If they have done so, it is by some act subsequent to the charter-party. All that is relied on, is what the master did at Calcutta. But supposing the goods to be Palmer's, could the master bind the owners by this agreement? We contend he could not, because he was limited by the express terms of the charter-party, which provided that freight should be paid at Philadelphia before the delivery of the cargo. The contract was, that whatever goods were brought should not be delivered till freight was paid. The shippers, and the master, were cognizant of this contract. This provision was a direct limitation of the master's power. He was as much bound by it as by any other part of the charter-party. It is said, that if the master may take goods for diminished freight, the same reason authorizes him to take goods for no freight. But it is very obvious that a freight diminished by *circumstances*, [**627** may still be just and reasonable; whilst a contract to carry goods without any freight cannot be so under any circumstances whatever. It necessarily supposes that freight is paid to the charterer in some other way, to the prejudice of the owners' rights; since it is absurd to suppose an agreement to carry goods without any compensation. If the charterer might take part of a cargo in this way, he might take the whole, and then what becomes of the owners' rights? Of what use, in such a case, would be the covenant to load the ship? The shippers here assist the charterer in an attempt to break his contract with the owners, by which he had stipulated that the goods should be holden for freight. The master cannot, where there is a charter-party, vary the rights and duties of the owner by the bill of lading. If he cannot vary the contract in favor of the charterer, neither can he in favor of anybody else. If goods be brought with the assent of the owner, though there be no contract, and not even a knowledge

1.—Abbott Shipp. 277; 2 Holt Shipp. 163.

2.—Haile v. Smith, 1 Bos. & Pull. 563; Evans v. Maclett, 1 Lord Raym. 271.

Wheat. 8.

3.—The St. Jose Indiano, 1 Wheat. Rep. 208; The Aurora, 4 Rob. 218, cited in note; 1 Wheat. 214; 13 Mass. Rep. 76.



of the master, the lien attaches. Nobody was authorized under the charter-party to receive the owners' freight before it was earned, or elsewhere than in Philadelphia.

We contend, then, that the owners' lien is not lost by the agreement made at Calcutta with the assent of the master. (1) Because it is, in effect, an agreement made between the shippers and charter, to violate the charter-party, to which the master was not competent to assent. [\*628\*] sent. (2) Because \*the general authority of the master, as agent of the owners, was limited by the charter-party. The shippers knew of this limitation, and could not, consequently, derive any right under an agreement made with him, beyond the scope of his authority. (3) There is no ground here for saying that the master was acting independent of the charter-party, as setting up a general ship; nor could he do this, under the circumstances of the case.

But the true view is, that these goods were the goods of Chambers, the charterer, as between him and the ship-owners. They were purchased and shipped by him, and for his account. They were at his risk *in transitu*. There is no document showing any interest whatever in Palmer & Co. But there was a parol agreement, that the goods should go consigned to the Messrs. Willings, and that the latter should hold them against the bills drawn by Chambers. The legal property was either in Chambers, or the Willings. The general residuary property was in Chambers; a pledge or lien only existed in favor of Palmer. If there was a loss, Chambers was to bear it; if a gain, it was to be his. If the goods have been sold for more than Palmer's debt, Chambers is entitled to the balance. Before the plaintiffs recover back this money, ought they not to show that the goods, paying freight, do not leave them enough to pay their debt? The lien claimed by them may exist, and yet, in commercial law, the goods may be the property of Chambers. It is so in the contract of insurance; else no [\*629\*] man \*would ever insure goods liable to freight, or commissions, or duties, or any other species of lien.

No goods are brought across the seas without being subject to liens of various sorts; some arising from express contracts, others from the operation of general principles. No one could own goods, if the ownership implied an absence of all liens. Therefore, in the commercial world, he is esteemed owner, for whose account, and at whose risk, they come. Chambers had a clear insurable interest in those goods to the whole amount of their value, whatever that might be. Palmer had an insurable interest only to the amount of the bills of exchange. The plaintiffs' claim rests on the operation of the bill of lading; but that very bill of lading says that the goods are shipped on account and risk of Chambers. This circumstance alone is conclusive. It would be so in the law of prize. The consignee would not be allowed to show an interest by a lien for advances.<sup>1</sup> But Palmer's interest was contingent; he was to have no proprietary interest in the goods, until failure of the acceptance of the bills of exchange, or equivalent security; *i. e.*,

until after the arrival of the goods. Whatever the words are, that is the legal effect. Now, it has been repeatedly determined in this court that where goods are sent to a vendee, to be received at his option, or conditionally, they are the goods of the vendor until that option be expressed, or \*that condition happen.<sup>2</sup> [\*630\*] So, if goods be shipped, to be sold on joint account of the shipper and consignee, or the latter alone, at his option, the property is not vested until the election is made.<sup>3</sup>

Mr. Justice JOHNSON delivered the opinion of the court:

This is a writ of error from the Circuit Court of Pennsylvania, on a judgment, in which the defendants in this court were plaintiffs in the inferior court. The suit instituted in that court, was for the recovery of a sum of money paid under the following circumstances:

The Gracies, being owners of the ship *America*, chartered her to one Chambers, on a voyage to India. Chambers accompanied the vessel, and, at Calcutta, put her up as a general ship, with notice, however, of his being charterer, not owner. Finding it difficult there to obtain freight, he entered into an arrangement with Palmer, in pursuance of which, the latter supplied him with a quantity of goods, to the value of £8,000, upon the following stipulations: "That Chambers should draw bills, in favor of Palmer & Co., upon his correspondent in Philadelphia, and that the goods should be consigned to the Willings, correspondents of Palmer, in the same place; to whom they should be delivered, freight free, in pledge for the due payment of Chambers' bills."

When the goods were laden on board the *America*, \*the ship-master signed bills [\*631\*] of lading, stating them to be shipped on account and risk of Chambers, to be delivered to the Messrs. Willings, of Philadelphia. And in that part of the bill of lading in which the freight is usually specified, are inserted these words: "Freight for the said goods having been settled here." Indorsed on the bill of lading are the marks and numbers of the several packages, and on its face are written these words: "Marks and numbers on the back of this bill, countersigned. Hugh Chambers." This is the indorsement noticed in the stated case. A charter-party, with all the usual covenants and formalities, was entered into by the parties, in which the owner undertakes to furnish and navigate the ship, and the charterer to pay the sum of \$32,000 for the use of her, with certain specific reservations not material to the decision of any of the questions raised in argument. The clause which stipulates for the payment of the compensation is in these words: "The said charterer covenants," &c., "that he will pay to the owners, on the return of the said ship to Philadelphia, and before the discharge of her cargo there, in approved notes," &c., the sum stipulated for.

The case stated affirms that the whole transaction in Calcutta was effected in good faith; that it was done with the knowledge and assent of the ship-master, and was, under all circum-

2.—The *Venus*, (Magee's claim,) 8 Cranch, 253, 275; The *Merrimack*, (claim of Kimmel & Alberts,) *Id.* 328.

3.—The *Frances*, (Dunham's claim,) 8 Cranch, 354; S. C. 9 Cranch, 183.

1.—The *Frances*, 8 Cranch's Rep. 335, 418.

stances, "the best he could do for the interest of the owners of the ship."

The bill of lading was inclosed to the Willings, \*with information of the arrangement between Palmer and Chambers; and the drawees of Chambers' bill, having refused to accept them, the Willings demanded the delivery of the goods, freight free. The Gracies refused to deliver the goods, insisting on their right to the freight usually paid on such goods from India, whether they were the property of Palmer, or of Chambers. And in order to get possession of the goods, the freight was accordingly advanced by the Willings, and this action brought to recover it back.

The cause was decided in the court below upon a case stated, in nature of a special verdict, which finds alternatively for the one or the other party, according to the law of the case. The judgment of the Circuit Court was in favor of the defendants.

Much of the argument below appears to have turned upon the general rights and liabilities of owner and charterer under the contract of affreightment; but the learned and elaborate argument of the presiding judge in the court below, has relieved this court from much discussion on that part of the subject. The doctrine, as laid down there, and as stated by the counsel here, exhibits no material shades of distinction. It is, in fact, the common law doctrine of bailment, and common carriers, applied to transportation on the ocean.

The carrier may hire his vehicle, or his team, or his servant, for the purposes of transportation; or he may undertake to employ them himself in the act of transporting the goods of **633\*** another. It is \*in the latter case only that he assumes the liabilities, and acquires the rights of a common carrier. So the ship-owner, who let his ship to hire to another, whether manned and equipped or not, enters into a contract totally distinct from that of him who engages to employ her himself in the transportation of the goods of another. In the former case, he parts with the possession to another, and that other becomes the carrier; in the latter, he retains the possession of the ship, although the hold may be the property of the charterer; and being subject to the liabilities, he retains the rights incident to the character of a common carrier.

On examining the cases in which this subject has engaged the attention of courts of justice, it will be found that the great difficulty generally has been to decide in which of these two relations the ship-owner had placed himself, under the particular stipulations of the charter-party; and how far he has put it in the power of the charterer to defeat his acknowledged right to a lien for the freight. The present case suggests the additional question, how far it lies in the power of the ship-master to defeat this lien, or otherwise sanction a departure from the letter of the charter-party.

The cause has been argued as one vitally important to the commercial world; and very strong views have been presented of the injuries that might be sustained by foreign shippers on the one hand, and by ship-owners on the other, as the one or the other alternative of the **634\*** stated case \*shall obtain the sanction of this court. But it is obvious that most, if not

all of these suggestions, have been the offspring of a zealous, rather than a calm survey of possible consequences.

The contract of affreightment, like every other contract, is the creature of the will of the contracting parties. It may be varied to infinity, and easily adapted to the exigencies of either party, or of any trade. It is only where the express contract is silent, that the implied contract can arise. It is possible that a captain and a charterer might connive at a fraud, and pass a chartered vessel upon foreigners as an unchartered vessel; but it is not very probable, and would be extremely difficult. Yet it is not easy to conceive any other case in which a foreign affreighter can be exposed to imposition, while it is always in his power to inspect the charter-party, and determine, from its stipulations, how far he may venture to ship his goods upon a special contract. The general liability of goods for freight is known to all mercantile men; and a stipulation in a charter-party, "that no goods shall be landed from the vessel until the freight is paid," will always alarm the fears of any prudent shipper.

But this case does not imperiously call for a decision upon the general question. The goods are expressly laden on board as the property of Chambers, "on his account and risk." And the question is not how far his contract may exempt the goods of another from freight, but how far he may encumber his own goods with a lien, which \*shall ride over or super- [**635** sede their general liability for the freight.

We turn, in the first place, to the express contract of the parties, to afford a solution of the question. But there we find that the charterer cannot, without an express violation of his contract, deliver to the consignee a single article, not only until its own peculiar freight be paid, but until the payment of the sum of \$32,000, the whole of the freight reserved to the owner.

On what principles rests the general lien of goods for freight? The master is the agent of the ship-owner, to receive and transport; the goods are improved in value, by the costs and cares of transportation. As the bailee of the shipper, the goods are in the custody and possession of the master and ship-owner, and the law will not suffer that possession to be violated, until the laborer has received his hire. But this is literally the effect of that provision in the charter-party which deprives the charterer of the right of landing the cargo until the stipulated hire be paid; or rather, it would seem to go beyond it, and impose a liability beyond what the common law exacts. It may, therefore, be fairly construed into a stipulation, that the charterer should, under no circumstances, dispense with the legal lien of the ship-owner.

The question, then, is, who has trusted this charterer? for he that trusts must pay.

That the ship-owner would not confide in the charterer to land his goods without buying off his right to detain, is expressly proved by the contract. \*That contract was ac- [**636** cessible to the foreign shipper, and ought to have been looked into to determine the extent of the power vested in the charterer. Whether he neglected this precaution, or contracted with the charterer knowing of this restriction on his power to contract, he is the party that trusts.



The charterer has contracted with the shipper to do an act, which he could not perform without violating his own contract to the ship-owner, and must therefore be considered as having entered into a contract, subordinate in its nature to that previously existing between the owner and charterer. And as the undertaking of the charterer to Palmer could only be performed upon first complying with his undertakings to the owner, he must be considered as having rested on the personal responsibility of the charterer for the removal of that obstacle.

That, in ordinary cases of the hypothecation of goods, the lien for freight would take precedence, cannot be questioned; and in a late adjudication, on a case strikingly similar to the present, and in the courts of a nation which thoroughly understands the laws and interests of commerce (*Faith v. The East India Company*, 4 Barnw. & Ald., 630), it has been held that goods so circumstanced were bound to the whole extent of the liability of the charterer to the ship-owner for freight. In the present instance, a *pro rata* freight only is demanded. In the same case, it was further decided that the ship-owner retained his lien for freight on **637\*** goods shipped by third \*persons, even after the drawing of freight-bills in favor of another, by previous agreement.

But it is contended that the case where goods are shipped freight free, or the freight has been actually paid, remains undecided; that the lien for freight attaches only where freight was actually due, but in neither of those cases (that of payment or redemption) could it be predicated of freight that it was due.

Had the reasoning of the judges in the case of *Faith v. The East India Company* been followed out to its unavoidable consequences, it would seem that no doubt should have been expressed by them upon such a case. For, if the ground of that decision was that the ship-owner was not bound to deliver the goods until his freight was paid, it would seem to be immaterial whether it had been previously paid to the charterer, or to any other not authorized to receive it on account of the owner. But whatever might be the opinion of this court upon a cause so circumstanced, it is obvious that this is not a case of that nature.

These goods were not shipped freight free, nor was the freight actually paid upon them. The words upon the bill of lading are, "freight settled here." And their ambiguity being explained by other parts of the case stated, there is made out a case, in which the freight was no farther settled than by the arrangement made with Palmer, for the purpose of postponing the freight to the defendants' lien for advances of money, or the payment of bills. The compensation for carriage, although disguised under the form of possible profits upon the sales of the goods shipped, still existed; for freight is one of the charges which the consumer pays. It is, then, only an evasion of the rights of the owner, and presents a facility to evasion which ought not to be encouraged. If it be said that the payment of freight was, nevertheless, contingent and uncertain, the reply still is, that this is a subject for consideration between the charterer and the shipper, and could not be sanctioned as the means of evading the express provision in the charter-party

against the right of delivery before the payment of freight. Although no freight had been due to the charterer, there was unquestionably a large sum due the owner; and by the terms of his agreement, literally construed, he was not bound to open the hatches until the whole sum was paid. This, however, is more than is contended for upon the plaintiffs' construction of the contract; and more, unquestionably, than would have been sustained as against other shippers; it is not, in this instance, insisted upon as against the charterer himself. But, in fact, this memorandum of the captain on the subject of freight is altogether an immaterial circumstance in a bill of lading made to the charter himself. With whom was he at liberty to settle the freight upon his own shipments, to the prejudice of the ship-owner?

And this leads to the consideration of the last point made in argument for the defendants, to wit, that the acts of the captain bound the ship-owner to a compliance with the stipulations made to the \*defendants, Palmer [**639** & Co., to the prejudice of the lien insisted on by the present plaintiffs; that is, that either the captain alone, or the captain and charterer together, could divest the owner both of his implied and express right to detain these goods.

Whence is such a power to be deduced? Not from the charterer's rights in the ship, nor from the master's power over the ship; but it is supposed to result from the necessity of the case, the nature of the interest acquired by the charterer, and the general powers of a ship-master, as incident to the duties which he is called upon to perform.

But it is perfectly clear that it is not in the power of the master to release the charterer from his contract to the owner. It is only when the contract is at an end by misfortune, or by the acts of the charterer, that he is called to the exercise of that latitude of power over the ship, which may lead to a resumption of the right to lade her for the benefit of all concerned. In the meantime, he has no power to modify the contract entered into with his owner; since all the power delegated to him, while the charter-party continues to operate, is to perform the undertakings of his employer in the fulfillment of the contract. When abandoned by his charterer, he is of necessity cast upon himself to do the best he can for all concerned; and whether that be to return empty, or to take in such freight as may offer, he is still acting under his original relations with his owner; for if not actually carrying into effect the \*stipulations of the charter-party, his general duty is to do nothing that can release the charterer from his liability under it. This is altogether inconsistent with the idea of his being authorized to modify or dispense with the terms of the charter-party.

So far as the interests of the charterer may be affected by the want of power to modify contracts for freight, in any manner that exigencies may require, it has been before observed that this should have been attended to in making his contract with the owner. And as it is very certain that a release from the ordinary security of the carrier must have been purchased by an enhanced price or personal security, so it would be highly unjust to subject the owners to a loss of their ordinary security,

without compensation in price, or extraordinary security as the substitute. As to the interests of ship-owners themselves, it is enough, for the present case, to say, "let them judge for themselves."

But there is very great reason to think that the acts of the master, in this case, have had views and effects attributed to them, directly the reverse of his intention and understanding in performing those acts. It is observed by one of the judges, in the decision before alluded to, "that had the captain done his duty, he never would have taken goods on board on which the owner would have no lien." It is right that a construction should be given to the conduct of the master, which may comport both with a knowledge and a due observance of his duty. And in this view of the case, **641\*** notwithstanding his privity to the arrangement between the charterer and shipper, as he was himself called upon to do no act that could deprive his owner of his lien, he might well have considered the stipulation between the charterer and shipper as a matter *inter alios*; in pursuance of which his employer could sustain no loss, however the charterer might render himself liable to the shipper for consequences. Such was certainly not the understanding of the shipper as to the effect of his contract with the charterer, but he might have been better informed by studying the charter-party; and, *non constat*, if the captain had been required to sign a bill of lading to the shipper, with an express stipulation that the goods should be free from liability to his owner, that he would have been betrayed into such a breach of duty, or assumption of power. He might well have supposed that in signing this bill of lading to Chambers, and not to Palmer, he was doing no act that could impair the rights and interests of his employer.

We are therefore of opinion that there is error in the judgment of the Circuit Court; that it must be reversed, and a mandate issue to enter judgment for the defendants below, agreeably to the case stated.

*Judgment reversed.*

See S. C. 4 Wash. 110.

Cited—17 How. 60, 62; 18 How. 192; 19 How. 31; 5 Wall. 551; 11 Wall. 601; McAll. 17; 1 Cliff. 139; 2 Cliff. 15; 1 Sumn., 568 570; 2 Sumn. 596; 1 Low. 84; Newb. 314; Alcott, 148, 362; 1 Curt. 106; 6 Blatchf. 219; 2 Bond. 17, 18; Taney, 516; 2 Wood. & M. 165; 3 Mason, 160; 1 Story, 540.

**642\***

[\*PRACTICE. PLEADING. JURISDICTION.]

ANDERSON CHILDRESS, Executor of  
JOEL CHILDRESS, Plaintiff in Error,

v.

EMORY AND M'CLEUR, Executors of  
JOHN G. COMEGYS, surviving partner  
of WILLIAM COCHRAN & COMEGYS,  
Defendants in Error.

The courts of the United States have jurisdiction of suits by or against executors and administrators, if they are citizens of different states, &c., although

their testators or intestates might not have been entitled to sue, or liable to be sued in those courts.

It is, in general, not necessary, in deriving title to a bill or note, through the indorsement of a partnership firm, or from the surviving partner, through the act of the law, to state particularly the names of the persons composing the firm.

A declaration, averring that "J. C., by his agent, A. C., made" the note, &c., is good.

A general profert of letters testamentary is sufficient, and if the defendant would object to their insufficiency, he must crave oyer; or if it be alleged that the plaintiffs are not executors, the objection must be taken by plea in abatement.

Debt, against an executor, should be in the *detinet* only, unless he has made himself personally responsible, as by a *devastavit*.

An action of debt lies, upon a promissory note, against executors.

The wager of law, if it ever had a legal existence in the United States, is now completely abolished.

**E**RROR to the Circuit Court of Tennessee.

The defendants in error, citizens of the state of Maryland, and executors of John G. Comegys, the surviving partner of the late firm of "William Cochran & Comegys," brought an action of debt in the *detinet*, on a promissory note, executed by \*the said Anderson [**643** Childress, as the agent of said Joel Childress; both of whom are citizens of the state of Tennessee. The declaration stated the plaintiffs in said suit (now defendants in error), to be the executors of the last will and testament of John G. Comegys, deceased, who was the surviving partner of the late firm of William Cochran & Comegys; that on the first of May, 1817, the said Joel Childress, by his agent, A. Childress, made his promissory note to the firm of William Cochran & Comegys, and thereby promised to pay to William Cochran & Comegys, or order, the sum of \$1,897.28, for value received. That the said Joel, in his life-time, did not pay the said firm of William Cochran & Comegys, nor did he pay the said John G. Comegys, surviving partner of said late firm of William Cochran & Comegys, the said sum of money, or any part thereof, nor has he paid the same, or any part thereof to the said plaintiffs, executors as aforesaid, nor hath the said Anderson Childress's executors as aforesaid, paid the said sum, or any part thereof, to the late firm of William Cochran & Comegys, nor to John G. Comegys, surviving partner of the said firm, nor hath he paid the said sum, or any part thereof, unto the said plaintiffs, executors aforesaid, but so to do hath wholly refused, and still doth, to the damage of said plaintiffs \$500; and therefore they sue, and they bring here into court the letters testamentary, by which it will appear they are qualified, &c.

To this declaration, the defendant, now plaintiff \*in error, demurred, and as- [**644** signed for demurrer the following causes:

1st. That said declaration alleges that said note was made to a late firm of William Cochran & Comegys, and that the plaintiffs are executors of the surviving partner of that firm; but whom said partner survived, or who comprised that firm, does not appear.

2d. That an action of debt cannot be maintained against the defendant (now plaintiff in error), as executor upon a promissory note.

NOTE.—As to the jurisdiction of the federal courts dependent upon the residence of the parties, see note to Emory v. Greenough, 3 Dall. 369; Wheat. 8.

U. S., Book 5.

and note to Strawbridge v. Curtiss, 3 Cranch, 267; and note to Hope Insurance Co. v. Boardman, 5 Cranch, 57.



3d. That it is not alleged that said pretended promissory note was signed by said Joel Childress, or the defendant.

4th. That the declaration omits to state any damages.

5th. There is no sufficient proof of any letters testamentary, to show the right of said plaintiffs to maintain this suit.

Joinder in demurrer. After argument, the court overruled all the said causes of demurrer, and gave judgment, that the plaintiffs do recover the sum of \$1,897.28, debt, together with \$360.47 for their damages, sustained by reason of the detention thereof, as also their costs, to be levied of the goods and chattels of Joel Childress, deceased, in the possession of said Anderson Childress; and on default thereof, the costs to be levied of the proper goods of said defendant.

*Mr. Webster*, for the plaintiff in error, argued, 1. That the action was misconceived, **645\*** debt not being an appropriate remedy against an executor or administrator, on a simple contract. He conceived it unnecessary to inquire into the origin of this rule, or the principle which sustained it, as it rested on the clearest authorities of the English law, and had become an established doctrine, from which this court would not be inclined to depart; as it was of more consequence that the law should be certain and fixed, than that plaintiffs should be allowed a choice of remedies. Because the reason, on which a remedy may have been originally given or refused by the law, may have ceased, it does not, therefore, follow that the established rules of practice and pleading are to be altered. The wager of law has ceased, but many rules of practice and pleading, founded upon it, have survived, and have become rules of property, which cannot be now safely disturbed. The statute of limitations may or may not apply, according to the form of the action, and the party has a right to the benefit of the distinction. On the English law it is clear that debt cannot be maintained in this case, as the testator might have waged his law, which none can do who defend in a representative character; hence it is that, in the case of simple contracts, debt has been superseded by the action of *assumpsit*, in which, as the testator could not have waged his law, his executor is not deprived of any defense which might have been used by the testator.<sup>1</sup>

**646\*** \*2. The next cause of demurrer, in this case, is the want of certainty in the declaration, which states the note to have been made to a late firm of "William Cochran & Comegys," and that the plaintiffs are executors of the surviving partner of that firm; but of whom that firm was composed, or whom the said partner survived, do not appear. It cannot be inferred that the firm of William Cochran & Comegys was composed of William Cochran and John G. Comegys, nor that the latter survived the former, and is the Comegys alluded to in the firm, and in the note in controversy. These are matters which should have been stated with sufficient certainty and not have been left to mere conjecture.<sup>2</sup>

3. This declaration is defective, also, in not stating that the note was either signed by Joel Childress, or by Anderson Childress, or by him as the lawfully authorized agent of Joel.

4. There is no sufficient proof of any letters testamentary, evincing the right of the defendants in error to maintain this suit. The authority whence they emanated does not appear. An executor must show by whom his letters were granted; and here it does not appear whether they were granted in Maryland, or in the state of Tennessee.<sup>3</sup>

5. The declaration states the defendants in error to be citizens of the state of Maryland, and the plaintiff in error to be a citizen of the state of Tennessee; but it is not stated **647** that the testators of either party were citizens of different states; *non constat*, but they were all citizens of the state of Tennessee.<sup>4</sup> The case, therefore, may be considered as falling within the provisions of the judiciary act of 1789, ch. 20.

*Mr. D. Hoffman*, contra, argued that the action of debt was an appropriate remedy on a promissory note, against the personal representatives of the maker or indorser of such note. The reason assigned in England for denying this remedy against an executor or administrator, does not apply even in that country to the case of a promissory note, which is not that species of simple contract to which the books allude, when speaking of the trial by wager of law.

The question is altogether new, even in that country whence we are to derive our law on this obsolete subject; and has never received a judicial discussion or determination in this country. Some research, therefore, into this ancient subject, will be essential to its due determination. It is said that debt will not lie against an executor, on the simple contract debt of his testator; and, in England, this, as a general proposition, is undoubtedly true. Still, however, it can, with no propriety, be compared to a rule of property, which, though now, in many instances arbitrary and unmeaning, must be maintained as long possessions, valuable estates, and the firmest titles may be dependent on it. But whether a **648** creditor by simple contract resorts to the one remedy or the other, is of no consequence to anyone but himself. This election of remedy, then, will not be denied, unless for an adequate reason. This court is under no necessity to sanction an unmeaning *dictum* of English law, at all times absurd, and at no period either approved by the lawyers of the times, or settled on any fixed principle. No reason has ever been assigned for exempting executors from responsibility on this remedy, except the one, that as none who defend *jure representationis*, can wage their law, and as the testator, in debt on simple contract, had this privilege, the executor shall not be thus sued. But it will be endeavored to be shown that this was originally a gross perversion of reason; that the rule should have been either the reverse, or that, in order to preserve anything like consistency in the law, executors and administrators ought never to have been responsible, in any form of

1—Barry v. Robinson, 1 New. Rep. 294; 1 Chitty's Plead. 84, 93, 107.

2.—1 Chitty's Plead. 236, 256; 3 Caines' Rep. 170.

3.—3 Bac. Abr. 94.

4.—4 Cranch's Rep. 46; 6 Cranch, 332.

action, for the simple contracts of those whom they represent.

The inquiry then will be, (1) Whether the testator was ever permitted, even in England, to wage his law, in debt on a promissory note. (2) If he were allowed, whether this antiquated doctrine of the common law is proper to be adopted as a part of our jurisprudence. (3) Whether in law, or in practice, it ever has been recognized or used, in the state of Tennessee, or elsewhere in this country.

1. On examining the history and progress of **649\*** this singular species of trial, it will be found to have been uniformly applied to the evidence of the demand, and was in no case an incident to the nature of the action or remedy. Whenever the debt or demand was sufficiently evidenced; whenever it was notorious in its nature, or defined in its extent; or finally, whenever it did not rest merely *in verbis*, there wager of law did not obtain. We may then inquire, first, in what cases wager of law was not allowed by the common law: and, second, in what description of cases it was permitted; and, from an examination of the reasons which sustained or repudiated wager of law in these cases, we shall find that, in principle, it never could have been applied to the case of a promissory note, and that, in fact, it never has been so applied.

First, then, wager of law was not allowed in the following cases: (1) In an action of debt on any specialty; for here, as Plowden observes, a debt is contracted by three distinct acts of solemn consent, signing, sealing, and delivery of the instrument; each act strengthens the evidence of consideration, and adds force and efficacy to the demand. It would not be proper, therefore, that a mere act *in pais*, or the oath of the party, should render that inoperative which has been guarded by so many acts of deliberation. The maxim in such case being *unumquod que dissolvitur eo modo quo colligatur*. (2) In debt on any record, there can be no wager of law for similar reasons. The debt has become notorious and certain; the record brought it into existence, and, at law, **650\*** the record should ordinarily declare its annihilation. (3) In an action of debt for rent, even on a parol lease, the defendant is not permitted to wage his law, because, as it is said, the demand savours of the *realty*, which, in fact, means that the claim arises from the defendant's preception of the profits of the land; that his occupation is notorious his entry into the land was, perhaps, *coram paribus curiæ*, and if not, that the notoriety of his occupation should, on the principle I have stated, oust the wager of law. (4) So, in an action of account, where the receipts have been by the hands of a third person, and not from the plaintiff himself, wager of law will not lie; and the reason assigned is, that this third person may well be supposed competent to prove the receipts, and this supposition, *per se*, is sufficient to exclude the wager of law. (5) In debt by a goaler against his prisoner, or by an innkeeper against his guest,

for board, &c., the defendant cannot resort to this mode of trial; and the principle which excludes it in these cases, is essentially the same, viz., the presumed notoriety of the demand. Prisons and inns are *quasi publici juris*; the prisoner and the guest must be received, and their reception is not a matter of privacy, but is presumed to be provable. *Aliter*, in the case of a victualler, who serves for matters furnished to his customers; his claim may be defeated by the defendant's oath.<sup>1</sup> (6) Wager of law is not permitted in debt for any \*penalty given by statute, for this is a **651** matter *in consimili casu* with debts by specialty or record. (7) Nor was it allowed against an account settled by auditors, for here the debt becomes susceptible of proof, is rendered certain, and still though a simple contract debt, yet, as it does not rest *in verbis* merely, it shall not be left to the conscience only of the defendant. (8) Where the claim or demand was in any degree connected with the realty, wager of law would not lie; for the *pares curiæ* were supposed to be cognizant of such matters. Hence, for example, where the plaintiff leased a room to the defendant, and then took him and his wife to board; in debt, for the boarding, it was held that even this accidental connection of the matter with the realty, was sufficient to rescue it from the operation of the wager of law.<sup>2</sup> (9) So, in debt for wages due for serving under the statute of laborers; as the service is compulsory and notorious, the defendant cannot wage his law. (10) Likewise, in debt by an attorney for his fees, though there be no writing, yet, as he is an officer of the court, his demand cannot be defeated by wager of law.<sup>3</sup> (11) Wager of law is never permitted in the case of contempt, trespass, or deceit, for these, *per se*, charge the defendant with immoral conduct, which renders his oath suspicious.<sup>4</sup> (12) Nor will it lie in a *quo minus*, for reasons similar to those already suggested.<sup>5</sup> (13) Nor against **652** any claim founded on prescription, for this is notorious, and susceptible of proof.<sup>6</sup> (14) Lastly, in an action of debt by a merchant stranger, or any species of simple contract, the defendant was not permitted to wage his law. Even in those early times, the courts were strongly disposed to rescue commercial contracts and dealings from this species of trial, as may be seen by the intended operation of the statute *de mercatoribus*, and particularly in the case of foreign creditors, who, it was presumed, could not so easily obtain the requisite evidence of their claims as resident merchants; and this may be seen in *Godfrey* and *Dixon's* case.<sup>7</sup>

From the cases enumerated, it appears that wherever the plaintiff's demand is certain, and is so evidenced as to exclude the idea of a mere secret or verbal contract between the parties, there the defendant could neither deny the contract, nor maintain its discharge by his oath and that of his compurgators.

If we examine the cases in which the defendant has been allowed this mode of trial, we shall find the same principle strongly manifested. The books furnish us with only six classes of

1.—Pinchon's case, 9 Co. Rep. 87 b; City of London v. Wood, 12 Mod. 634.

2.—28 Henry VI., 4; 9 Edward IV., 1.

3.—39 Henry VI., pl. 34.

Wheat. 8.

4.—Co. Litt. 295, a.

5.—Slade's case, 4 Co. Rep. 95, b.

6.—2 Ventr. 261; 1 Mod. 121.

7.—Palmer's Rep. 14; Fleta, 136.



cases in which a defendant is permitted to wage his laws. (1) In debt, on simple contract; by which we are not to understand (as I shall presently show) every species of simple contract, but such only which, as the authorities express **653\***] themselves, “are \*dependent on the slippery memory of man, or the uncertainty of verbal agreements.” (2) In debt on an award, under a parol submission. It has, indeed, been urged that wager of law ought not, on principle, to be permitted in such a case, as the action is grounded on a notorious transaction, and by the interposition of third persons. But it was held that the award is not the ground of action, but the submission, which may be private.<sup>1</sup> (3) In an action of account against a receiver, on receipts from the plaintiff himself, the defendant may wage his law, for here the action itself shows that the matter is private between the parties; and this differs from the case already adverted to, where the receipts were by the hands of third persons. (4) In *detinue*, where the matter is no way connected with reality, the defendant may wage his law. Here the gist of the action is the detainer. But in *detinue* for a charter of feoffment, wager of law will not lie, as it concerns the freehold; everything regarding which is presumed to be matter of notoriety.<sup>2</sup> (5) In debt for an *amerceament*, in a court not of record, it is said by some that the defendant may wage his law. But an enlightened baron of the exchequer says that if this be law, it must be on the ground of the insignificance of the debt, which seldom exceeds 40s., and which can be safely left to **654\***] the consciences of men, and ought not \*to trouble the country in the trial thereof.<sup>3</sup> Holt, Ch. J., however, is decidedly of opinion that the defendant cannot wage his law in this case; for, says he, “the plaintiff hath now sufficient proof to make out his cause; it hath ceased to be a matter of secrecy, and hence cannot be defeated by the oath of the defendant.” (6) and lastly: In real actions, the defendant may wage his law of non-summons, this being often in secret, and not vouched by any writing.<sup>4</sup>

From the cases enumerated, of the allowance or denial of this mode of trial, it is manifest that it has only been tolerated in a few special cases; and these (to use the language of Holt) “are all grounded on a feeble foundation, or are of small consideration in the law.” They abundantly prove that wager of law originated in the “unstable evidence of the demand,” in the “feebleness and exility of the plaintiff’s cause of action” and that it had no connection whatever with the particular nature of the remedy by which the demand was sought to be enforced.

My position, then, is, that wager of law, in its origin, principle, and practice, never did apply to written, though unsealed evidences of debt; and, *a multo fortiori*, not to promissory notes. It is conceded, however, that a different opinion has been entertained, and that it has been supposed that the principle which regulates the admission or rejection of wager of law, is the **655\***] presence \*or absence of a seal, or some-

thing equivalent thereto; and that all contracts, not of record, or not under seal, are parol or simple contracts, in reference to this mode of trial. That this opinion is erroneous, has already been partly shown; and, that it is altogether unsound, I shall now endeavor further to illustrate.

As to the origin of this “temper to corrupt perjury,” Lord Coke confidently refers it to the law of God, which permitted the bailee of an ox, or other cattle, to discharge himself, by his own oath, from all responsibility for the death or loss of the animal. Others have regarded it as a mistaken application, by the early ecclesiastics of England, of the decisory oath of the civilians; and some have supposed that it was introduced by them with the oath *ex officio*, so often used in cases of ecclesiastical cognizance. But whether it be the offspring of Saxon rudeness, or finds its exemplar in the more refined code of imperial Rome, is not very material; certain it is, that the simple contracts alluded to in the books, mean nothing more than such an unsustained or unevidenced contract, as ought, in conscience, to be outweighed by the oath of the party sought to be charged. In the first Edward’s reign, we find that if a creditor sued on a *verbal* demand, he was required to make *rationabilem monstracionem* that a debt existed. For this purpose he produced his *secta*; the defendant might then *vadiare legem*, that is, wage his law against the plaintiff’s *secta*. We find, also, that no *secta* was ever required where the plaintiff could produce any writing; \*and as the wager of law was for the [**656** purpose of disproving the testimony of the *secta*, according to the then prevailing maxim. *lex vincit sectam*, it seems to follow that no wager of law was ever allowed where the plaintiff’s claim was evidenced by any writing. The waging of law, therefore, may be considered as springing from the *secta*, and was a proof to silence the presumption raised by this preliminary evidence, adduced in support of mere verbal contracts.<sup>5</sup> The *secta*, and the defendant’s oath, and compurgators, appear to have been requisite only “in respect of the weakness and inconsiderableness of the plaintiff’s evidence of debt.” This view of the subject is strongly shown in the well-known case on this antiquated learning, *The City of London v. Wood*.<sup>6</sup> In that case, Holt, Ch. J., remarks that wager of law is allowable, not because the debt may be discharged, or paid in private, but because the ground of action is itself secret; for, that if the privacy of payment, or the possibility thereof, were the occasion of wager of law, that might be a reason, in all cases where it is admitted, that this trial will not be allowed. The theory of this subject clearly evinces that wager of law could at no time have been applicable to the species of simple contract now under consideration. Promissory notes surely are entitled to as much respect as a stated account by auditors, against which, we have seen, there could be no wager of \*law; and they [**657** have all that certainty, notoriety and evidence in their nature, so often alluded to, and which

1.—Co. Litt. 295; 12 Mod. 681.

2.—Cro. Eliz. 790; 2 Rolls’ Abr. 108; Year Book, 14 Hen. VI., pl. 1.

3.—12 Mod. 681.

4.—Br. Ley. Gager., pl. 27, 57, 103.

5.—Bract., 409; Fleta, 136, 188.

6.—12 Mod. 670, 680, 682.

constitute the only basis on which the admission or rejection of this summary proceeding can rest.

If we for a moment inquire into the nature of this species of simple contract, we cannot fail to perceive that it has no one feature in common with those in which the defendant has been permitted to wage his law. Notes and bills are contracts *sui generis*; they are instruments of a peculiar character, neither specialties, nor parol contracts. They cannot be regarded as mere parol or simple contracts, neither before, nor since the statute 3 and 4 Anne, c. 9., and, consequently, ought not to be embraced within the principle which sustains the wager of law, allowing this to be even broader than has been stated. For, first, even prior to the statute of Anne, the plaintiff need not have averred nor proved any consideration; the mere statement of the promise, and the defendant's liability, constituted a sufficient *prima facie* evidence of debt. Even between the original parties they imported a consideration; and the *onus probandi* of the absence, or failure of consideration, lies on the defendant.<sup>1</sup>

The doctrine, then, of *Rann v. Hughes*,<sup>2</sup> which qualified the *obiter* opinion of Mr. Justice Wilmot, in *Pillans v. Van Meirop*, is itself **658\*** too broad; \*for, though the common law has not adopted the well known distinction of the civilians, between contracts *ex literis* and *ex verbis*, yet notes and bills are exceptions, firmly ingrafted on the general rule. Second. If, then, these instruments, at all times, imported a *prima facie* consideration, the statute has clothed them with an additional property. They are no longer mere choses in action; their simple negotiability, though they remain in the hands of the original parties, imparts to them a further dignity which distinguishes them from all other simple contracts; they are originally evidences of debt, and, after indorsement, the statute raises an irresistible presumption in favor of honest holders, a *presumptio iuris et de jure*.

May we not, then, assert, with confidence, that these instruments, which have sprung into life end utility long after the wager of law had gone into almost desuetude, cannot be those "secret contracts, whose feebleness and exility" should subject them to avoidance by the defendant's oath?

Again, It will be borne in mind, that when wager of law was first practiced, the principle which would not allow an action of debt on simple contract, against an executor, also deprived the creditor of every other remedy. The maxim then applied was *actio personalis moritur cum persona*. But, after the introduction of the action of *assumpsit*, it was held by the courts, not only that the debt survived against the personal representatives of the deceased, **659\*** but the debtor himself \*was not permitted to wage his law in this form of action. It is manifest, however, that both of these opin-

ions originated in the mistaken application of the principle which sustained wager of law, viz., to the form of the remedy instead of the evidence of the debt; and that, in truth, there was no legal necessity to resort to such refinements to get rid, either of the maxim or of wager of law.

When case on *assumpsit* was introduced, promissory notes were scarcely known. Prior to Elizabeth's reign, debt was the only remedy on simple contract. The year books furnish no instance of the action of *assumpsit*, and *Slade's case*<sup>3</sup> is the first judicial sanction of this form of action. This was shortly after followed by *Pinchon's case*,<sup>4</sup> in which *assumpsit* was enforced against executors, and wager of law was denied to the testator. But in introducing the remedy by *assumpsit*, it was by no means the design of the courts to abolish the remedy by debt on simple contract. It was an additional remedy, intended to avoid an inconvenient maxim in one case, and a no less inconvenient mode of trial in another. The action of debt, however, remained a suitable remedy in all cases of simple contract, where wager of law would not lie. In the case now under consideration, *assumpsit* might, indeed, have been brought against the executors of Childress. If, in debt against Childress himself, he \*could not [**660** have waged his law, why should this remedy be denied against his executors? If the testator had not this privilege, the plaintiff had his election to sue in debt or *assumpsit*. Of late, debt on simple contract has become a more favorite and practiced remedy. In some respects, it is preferable to *assumpsit*; for, in debt, the judgment is final, and not interlocutory, as in *assumpsit*. The defendant, also, in some cases, is compellable to find bail in error, though the judgment be by *nil dicit*, or on demurrer.<sup>5</sup> Both in England and this country, debt is brought on notes and bills, wherever the responsibility is not merely collateral;<sup>6</sup> and no reason can be assigned for refusing it in the present case, except the one I have endeavored to show was never applicable to this species of simple contract. It is material to be recollected, that wager of law was not at any time a well fixed or established privilege. In the reign of Edward III. the courts very consistently held, that where a testator might wage his law, his executors might also.<sup>7</sup> The grounds of its application were always, in a degree, uncertain; and its admission or rejection, was under the sound discretion of the court. Wager of law, says Ch. Baron Ward, is a matter *ex gratia curiæ*. Judges are to use a sort of discretion in admitting people to it.<sup>8</sup>

\*As to the recent case of *Barry v. [661 Robinson]*,<sup>9</sup> it does, indeed, decide that an action of debt cannot be maintained against an executor or administrator, on the simple contract debt of his testator or intestate, such as a promissory note; and the reason assigned for denying the remedy was the one I have endeav-

1.—2 Lord Raym. 1481; Chitty. Bills. 7, 12, 87, 452; 1 Chitty's Plead. 295; 2 Phil. Evid. 6, 10; 3 Maule & Selw. 352; 5 Cranch, 332; 5 Wheat. Rep. 277; 9 Johns. Rep. 217.

2.—7 T. R. 350.

3.—4 Co. Rep. 92; 44 Eliz.

4.—9 Co. 86.

Wheat. 8.

5.—1 H. Bl. 550; 3 East's Rep. 359; 2 Saund. 216; 1 Chitty's Plead. 107.

6.—Bishop v. Young, 2 Bos. & Pull. 78; Rabourg v. Peyton, 2 Wheat. Rep. 385.

7.—29 Edw. III., 36 b., 37 a.

8.—12 Mod. 676.

9.—1 New. Rep. 293.



ored to refute. But ought this case to outweigh those which have been advanced in support of a contrary opinion? It is a solitary case, standing amidst the accumulated decisions of centuries. From the days of Elizabeth to the year 1805, and since, no case can be found in which wager of law has been applied to the case of a promissory note, though debt has been frequently brought on notes and bills. The point now under consideration passed *sub silentio* in the case of *Barry v. Robinson*; it was not adverted to, either in the argument at the bar, or by the court. Had the question been made, and the mind of the court been expressly directed to the distinction between these evidences of debt and other simple contracts, the decision must have been different. In that case, perhaps, there was no objection to resort to another form of action; but in the circumstances of the present case, if this action cannot be sustained, it will be of little avail to prosecute in another form. Sir James Mansfield, in that case, rested his opinion on the distinction between debt and *assumpsit*, as applicable to the case of executors; but no inquiry was made as to the nature of the **662**\*] proof to sustain \*the action. He admitted that the distinction was not founded in good sense, but denied his power to alter the law. I have endeavored to show that the law needed no alteration, as this summary mode of trial was not applicable, and never had been applied to such substantial evidences of debt as notes and bills.

2. But even supposing that, by the common law of England, the testator could have waged his law in this case, is it proper that this antiquated doctrine should be adopted as a part of our jurisprudence? The wager of battle, and the various other barbarous modes of trial invented by a superstitious age, are equally portions of the common law; yet all will allow that they are wholly at variance with the genius and spirit of our institutions, and are not fit to be incorporated with our jurisprudence. At one time the plaintiff was obliged to produce his *secta*; and though our declarations still conclude with an *inde producit sectam*, in compliance with the fashion of former times, yet an attempt at this day, practically to revive this preliminary proof, would, no doubt, be regarded as the result of a most adventurous and indiscriminate admiration of the common law.

3. The wager of law has never been adopted in this country. The reported adjudications of this country do not allude to the distinction between debt and *assumpsit* on simple contracts, nor is wager of law once mentioned in any of them. The statutes of the various states are **663**\*] equally \*silent, with the exception of New Jersey<sup>1</sup> and South Carolina.<sup>2</sup> In the former state, wager of law is abolished in all cases except of non-summons in real actions; and in South Carolina, wager of law is abolished in the action of *detinue*. This provision, no doubt, was *ex abundanti cautela*. *Detinue* is there a practiced remedy for the recovery of slaves, being preferable to *replevin* or *trover*. As slaves are not connected with the realty, so as to oust

the wager of law, if it otherwise obtained, it might have been supposed that this mode of trial would be attempted in *detinue* for slaves, and to remove this possibility the statute was enacted, for there is no instance of its adoption in this, or any other action; nor does the present record furnish any reason for supposing that it is known to the law or practice of the courts of Tennessee. It is also proper to remark that promissory notes, in the state of Tennessee, rest on precisely the same principles as in England; and the statute of Anne is there in force. Wager of law is a mode of trial hostile to the liberal spirit of our laws. By this trial the defendant becomes not only a witness in his own cause, but the only witness: and one, too, who cannot be contradicted either by proofs or circumstances. The judgment thereon is final; more conclusive than a verdict; for, when the defendant is sworn *de fidelitate*, and his eleven compurgators *de credulitate*, \*all contro- [**664** versy is terminated. There could be no new trial, for any cause whatever.<sup>3</sup> If ever so flagrantly abused by perjury, there can be no remedy; for it was a well-established maxim that "indictment for perjury lies not for false swearing in the trial by wager of law."<sup>4</sup> The mock solemnity in the manner of waging law would ill suit the simplicity of judicial proceedings in this enlightened age and country.<sup>5</sup> Trial by jury is the only mode of trial known to our common law jurisprudence. The judiciary act of 1789, c. 20, s. 34, provides that the laws of the several states shall be rules of decision on all trials at common law, except where the laws of the United States shall otherwise require. The constitution expressly guaranties trial by jury in all common law cases, where the amount exceeds twenty dollars. And though the phraseology of this article of the constitution seems to aim at the preservation of that which was before the admitted mode of trial, yet there can be no doubt that it was a primary object to abolish all summary trials, all barbarous and unsuitable modes of judicial investigation.

The other causes of demurrer may be more briefly examined. It is clear, from the declaration, that the firm of William Cochran & Comegys was composed of but two persons, viz., William Cochran & Comegys. The declaration alleges that John G. Comegys was the surviving partner of this firm, and this is equivalent to an \*express averment that the [**665** Comegys of the firm, and John G. Comegys, who survived, are the same persons; that the firm was composed of none else, and that John G. Comegys survived William Cochran. The forms of declaring or pleading do not require that every possible inference should be negatived. All that is required, is "certainty to a common intent," or at most, "certainty to a certain intent in general;" by which is meant, what, upon a fair and reasonable construction may be called certain, without recurring to possible facts which do not appear.<sup>6</sup> This species of certainty is sufficient in all declarations, replications, and even indictments. If there be sufficient certainty to enable the de-

1.—Rev. Laws of N. J. 1795.

2.—Grimke's Laws of S. Car.

3.—2 Salk. 682; 2 Vent. 171; 12 Mod. 676.

4.—1 Vent. 296; Co. Litt. 295.

5.—Bract. 411; Fleta, 137; 2 Lill. Abr. 824.

6.—2 H. Bl. 530; Cowp. 682; 1 Saund. 276; 1 Chitty's Plead. 237.

defendant to answer, the jury to decide, and the court to render judgment, it is well, though the nicety of critics may not be gratified. It is said, that a more rigid certainty is sometimes required, but this is doubtful; and if not, it obtains only in two cases, viz., in pleas of estoppel, and alien enemy, which are not favored, and are, therefore, said to demand a certainty to "a certain intent in every particular."<sup>1</sup> On inspecting this declaration, could a reasonable doubt be entertained by the defendant below, the court or jury, that this firm was composed of any but the two persons mentioned, and that John G. Comegys is the person alluded to in the firm, and in the note, and that he survived William Cochran?

The next objection to the declaration regards **666\*** the mode in which Joel Childress is alleged to have made this note. But it would not have been proper to have stated that the note was signed by Joel Childress, for this was not the fact; nor that it was made by A. Childress, for the debt was not his, but Joel's. The declaration might have stated that the note was made by Joel, without noting the agency, for this is its legal operation. But the allegation in this case is according to the fact, viz., that "the said Joel Childress, by his agent, A. Childress, made," &c., and this is the safest and usual mode. Whether A. Childress were the lawfully authorized agent of Joel, is matter of proof, not of pleading.<sup>2</sup>

It is also objected, that there is no sufficient profert of the letters testamentary; and that it does not appear from what authority they emanated. The omission of profert is, no doubt, cause of special demurrer; but, where profert is made, its sufficiency is matter of evidence only, and a demurrer to it, as evidence, would lie. But the demurrer in this case, is not for the omission, nor for defectively making the profert, nor does it appear in the shape of a demurrer to evidence, complaining of the insufficiency of the authority granting the letters. But were this the case, *non constat* from this record, by whom they were granted, which surely was the fault of the plaintiff in error, not of the defendant; how the court below was to have judged this matter, or how this court **667\*** can judge of the sufficiency of the letters, for they do not appear to have been legally before the court below, and they are not before this in any form. This was the fault of the defendant below. After the profert, he should have cravedoyer, and then demurred.<sup>3</sup>

But this demurrer, I presume, cannot be sustained on any ground; for if the letters proffered were those of the state of Tennessee, the plaintiffs' right to sue will not be questioned; and if the letters were granted in Maryland, the statute of 1809, c. 121, s. 1, 2, of Tennessee, expressly authorizes executors or administrators to sue in the courts of that state, under letters granted by any of the sister states.

The last objection which has been made, is to the jurisdiction of the court, viz., that the declaration only avers the parties to this suit to be citizens of different states, but has not stated their respective testators to be citizens

of different states. But this is not a case embraced by the eleventh section of the judiciary act of 1789, c. 20. Executors are not assignees, within the letter or spirit of that act; they are something more than assignees; they are representatives, who are not mere instruments, for they have the property of their testator, both legal and equitable, vested in them. They are the absolute owners of the property, as to all strangers; they are the lords of all the contracts made with their testator; they may release, sue, or receive payment on them; and, \*until the estate is settled, not even **668** the legatees, or distributees, can interfere with them. This is a case, then, under the constitution; and the controversy is between citizens of different states, not nominally merely, but substantially. It is therefore immaterial to inquire whether their respective testators were citizens of the same, or of different states.<sup>4</sup>

Mr. Justice STORY delivered the opinion of the court:

This is an action brought by the executors of John G. Comegys, who was surviving partner of the firm of William Cochran & Comegys, to recover the contents of a promissory note, made by Joel Childress, deceased (whose executor the plaintiff in error is), payable to the firm of William Cochran & Comegys. The cause came before the Circuit Court for the District of West Tennessee, upon a special demurrer to the declaration; and the court having overruled the demurrer, it has been brought here by writ of error.

The several causes assigned for special demurrer have been argued at the bar; but before we proceed to the consideration of them, we may as well dispose of the objection taken to the jurisdiction. The parties, executors, are, in the writ and declaration, averred to be citizens of different states; but it is not alleged that their testators were citizens of different states; and the case \*has therefore been **669** supposed to be affected by the eleventh section of the judiciary act of 1789, c. 20. But that section has never been construed to apply to executors and administrators. They are the real parties in interest before the court, and succeed to all the rights of their testators, by operation of law, and no other persons are the representatives of the personality, capable of suing and being sued. They are contradistinguished, therefore, from assignees, who claim by the act of the parties. The point was expressly adjudged in *Chappedelaine v. Dechenaux* (4 Cranch's Rep., 306), and, indeed, has not been seriously pressed on the present occasion.

The first cause of demurrer is, that the declaration states the note to have been made to the firm of William Cochran & Comegys, but does not state who in particular the persons composing that firm were. Upon consideration we do not think this objection ought to prevail. The firm are not parties to the suit; and if Comegys was, as the declaration asserts, the surviving partner of the firm, his executor is the sole party entitled to sue. It is not

1.—8 Term Rep. 167; Dougl. 159.

2.—1 H. Bl. 313; 6 Term Rep. 659; 2 Phill. Evid. 4, 5, 5, note a; Chitty. Bills, 627, note a, note b.

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3.—2 Wils. Rep. 413; 1 Chitty's Plead. 416.

4.—Chappedelaine v. Dechenaux, 4 Cranch's Rep. 306; Serg. Const. Law, 113, 117.



necessary, in general, in deriving a title through the indorsement of a firm, to allege, in particular, who the persons are composing that firm; for, if the indorsement be made in the name of the firm, by a person duly authorized, it gives a complete title, whoever may compose the firm. (See 3 Chitty's Plead., 2, 39.) If this be so, in respect to a derivative title, from the act of the parties, more particularity and certainty do not seem essential in a derivative title by the **670**]\* act of the law. A more technical averment might, indeed, have been framed upon the rules of good pleading; but the substance is preserved. And there is some convenience in not imposing any unnecessary particularity, since it would add to the proofs; and it is not always easy to ascertain or prove the persons composing firms, whose names are on negotiable instruments, especially where they reside at a distance; and every embarrassment in the proofs would materially diminish the circulation of these valuable facilities of commerce.

Another cause of demurrer is, that the declaration does not aver that the note was signed by Joel Childress. To this it is sufficient to answer that the declaration does state, that "Joel Childress, by his agent, A. Childress, made" the note; and it is not necessary to state that he signed it; it is sufficient if he made it. The note might have been declared on as the note of the principal, according to its legal operation, without noticing the agency; and though it would have been technically more accurate to have averred that the principal, by his agent, in that behalf duly authorized, made the note, yet it is not indispensable; for, if he makes it by his agent, it is a necessary inference of law that the agent is authorized, for otherwise, the note would not be made by the principal; and that the demurrer itself admits. (See Chitty on Bills, Appx. Sect. p. 528, and notes, Id; Bayley on Bills, 103; 2 Phillips' Evid., ch. 1, s. 1, p. 4, 6.)

Another cause of demurrer is, that the declaration **671**]\* omits to state any damages; but this, if in any respect material in an action of debt, is cured by the writ, which avers an *ad damnum* of \$500.

Another cause of demurrer is, that the letters testamentary are not sufficiently set forth to show the right of the plaintiffs to sue. But profert is made of the letters testamentary, in the usual form; and if the defendant would have objected to them as insufficient, he should have craved oyer, so as to have brought them before the court. Unless oyer be craved and granted, they cannot be judicially examined. And if the plaintiffs were not executors, that objection should have been taken by way of abatement, and does not arise upon a demurrer in bar. It may be added, that, by the laws of Tennessee, executors and administrators, under grants of administration by other states of the Union, are entitled to sue in the courts of Tennessee without such letters granted by the state. (Act of Tennessee, 1809, ch. 121, s. 1, 2.)

It was also suggested at the bar, but not assigned as cause of demurrer, that the action ought not to have been in the *detinet* only; but in the *debet et detinet*. This is a mistake. Debt against an executor, in general, should be in the *detinet* only, unless he has made himself personally responsible, as by *devastavit*. (Comyn's

Dig. Pleader, 2 D., 2, 1 Chitty's Plead., 292, 344; 2 Chitty's Plead., 141, note *f*; *Hope v. Bague*, 3 East, 6; 1 Saund. Rep., 1, note 1; 1 Saund., 112, note 1.) And if it had been otherwise, the objection could only have been [\***672** taken advantage of on special demurrer, for it is but matter of form, and cured by our statute of jeofails. (*Burland v. Tyler*, 2 Lord Raym., 1391; 2 Chitty's Pl., 141, note *f*; Act of 1789, ch. 20, s. 32.)

But the most important objection remains to be considered; and that is, that an action of debt does not lie upon a promissory note against executors. It is argued that debt does not lie upon a simple contract generally against executors; and the case of *Barry v. Robinson*, in 4 Bos. & Pull., 293, has been cited as directly in point. Certainly, if this be the settled rule of the common law, we are not at liberty to disregard it, even though the reason of the rule may appear to be frivolous, or may have ceased to be felt as just in its practical operation. But we do not admit that the rule of the common law is as it has been stated at the bar. We understand, on the contrary, that the general rule is, that debt does lie against executors upon a simple contract; and that an exception is, that it does not lie in the particular case, where the testator may wage his law. When, therefore, it is established in any given case that there can be no wager of law by the testator, debt is a proper remedy. Lord Chief Baron Comyns lays down the doctrine that debt lies against executors upon any debt or contract without specialty, where the testator could not have waged his law; and he puts the case of debt for rent upon a parol lease to exemplify it. (Com. Dig. Administration, B. 14; see also Com. Dig. Pleader, 2 W., 45, tit. 2, D. 2.) The same doctrine is laid down in ele- [\***673** mentary writers. (1 Chitty's Plead., 106; Chitty on Bills, ch. 6, p. 426.) Upon this ground the action of debt is admitted to lie against executors in cases of simple contract, in courts where the wager of law is not admitted, as in the courts of London, by custom. So, in the Court of Exchequer, upon a more general principle, the wager of law is not allowed upon a *quo minus*. (Com. Dig. Plead., 2 W., 45; Godbolt, 291; 1 Chitty's Plead., 106, 93; Bohun's Hist. of London, 86.) The reason is obvious: the plaintiff shall not, by the form of his action, deprive the executor of any lawful plea, that might have been pleaded by his testator; and as the executor can in no case wage his law (Com. Dig. Pleader, 2 W., 45), he shall not be compelled to answer to an action in which his testator might have used that defense. Even the doctrine, with these limitations, is so purely artificial, that the executor may waive the benefit of it; and, therefore, if he omits to demur, and pleads in bar to the action; and a verdict is found against him, he cannot take advantage of the objection, either in arrest of judgment, or upon a writ of error. (2 Saund. Rep., 74, note 2, by Williams and the authorities there cited; *Norwood v. Read*, Plowd., 182; Cro. Eliz., 557.) Style, in his Practical Register, lays down the rule with its exact limitations. "No action," says he, "shall ever lie against an executor or administrator, where the testator or intestate might have waged their law; because they have lost

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the benefit of making that defense, which is a **674** good defense in that action; \*and if their intestate or testator had been living, they might have taken advantage of it." (Style's Pr. Reg. and Comp. Atty. in Courts of Common Law, [1707,] p. 666.)

In the view, therefore, which we take of this case, we do not think it necessary to enter into the consideration, whether the case in 4 Bos. & Pull., 293, which denies that debt will lie against executors upon a promissory note of the testator, is law. There is, indeed, some reason to question, at least since the statute of Anne, which has put negotiable instruments upon a new and peculiar footing, whether, upon the authorities and general doctrines which regulate that defense, it ought to be applied to such instruments. The cases cited at the bar by the plaintiff's counsel, contain reasoning on this point which would deserve very serious consideration. But waiving any discussion of this point, and assuming the case in 4 Bos. & Pull., 293, to have been rightly decided, it does not govern the case now before the court; for that case does not effect to assert or decide that the action of debt will not lie in cases where there can be no wager of law.

Now, whatever may be said upon the question, whether the wager of law was ever introduced into the common law of our country by the emigration of our ancestors, it is perfectly clear that it cannot, since the establishment of the state of Tennessee, have had a legal existence in its jurisprudence. The constitution of that state has expressly declared that the trial by jury shall remain inviolate; and the constitution of the United **675** States has also declared, that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. Any attempt to set up the wager of law would be utterly inconsistent with this acknowledged right. So that the wager of law, if it ever had a legal existence in the United States, is now completely abolished. If, then, we apply the rule of the common law to the present case, we shall arrive, necessarily, at the conclusion that the action of debt does lie against the executor, because the testator could never have waged his law in this case.

*Upon the whole, the judgment of the Circuit Court is affirmed, with six per cent. damages and costs.*

Cited—12 Pet. 171; 14 Pet. 42; 2 How. 15; 16 How. 350; 17 How. 499; 9 Wall. 401, 408; 11 Wall. 175; 13 Wall. 67; McCahon, 241; 1 Cliff. 131; 2 Cliff. 562; 2 Summ. 263; 2 McLean, 20, 134; Blatchf. & H. 314.

#### [PRACTICE. PLEADINGS.]

SIGLAR AND NALL, Administrators of WILLIAM NALL, deceased, *Plaintiffs*  
*in Error.*

v.

JOHN HAYWOOD, Public Treasurer of the State of North Carolina, *Defendant*  
*in Error.*

An executor or administrator is not liable to a judgment beyond the assets to be administered, unless he pleads a false plea.

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If he fail to sustain his plea of *plene administravit*, it is not necessarily a false plea, within his own knowledge; and, if it be found against him, the verdict ought to find the amount of assets unadministered, and the defendant is liable for that sum only.

In such a case, the judgment is *de bonis testatoris*, and not *de bonis propriis*.

**\*ERROR** to the Circuit Court of Tennessee. [**676**]

This was an action of debt, brought in the court below by Haywood, the defendant in error, against Siglar and Nall, the plaintiffs in error, upon a judgment obtained against their intestate, William Nall, in the Superior Court for the District of Hillsborough, in the state of North Carolina, for the sum of \$2,980.05. The defendants pleaded, (1) *Nil debet*, and (2) *Plene administravit*. The plaintiff replied to the second plea, that the defendants have, and on the day of commencing this suit had, divers goods, &c., whereof they could have satisfied the plaintiff for the debt aforesaid. On the trial, it appeared by the accounts exhibited by the defendants, that a part of the intestate's goods and chattels remained in their hands unadministered. On which, the plaintiff's counsel moved the court to instruct the jury that the plea of *plene administravit* was therefore false, and that, on that ground, the plaintiff was entitled to his verdict on the whole issue. The instruction was given by the court, to which the counsel for the defendants excepted. The jury returned a verdict for the plaintiff, for the sum of \$2,565.16 debt, and \$4,429.53 damages, for the detention thereof; and also found "that the defendants have not fully administered all and singular the goods and chattels, rights and credits, which were of the decedent, and which came to their hands to be administered, previous to the issuing of the writ of *capias* in this cause, as the plaintiff in replying hath alleged."

\*Upon which, judgment was entered [**677**] as follows: "Therefore it is considered by the court, that the plaintiff recover against the defendants \$2,565.16, the residue of the debt aforesaid, in form aforesaid assessed, and also his costs," &c. And the cause was brought by writ of error to this court.

*Mr. Sergeant*, for the plaintiffs in error (no counsel appearing for the defendant in error), made the following points, together with several others, which it is not thought necessary to state, because they are not noticed in the opinion of the court:

1. That the court erred in the above instruction given to the jury.

2. That the verdict was erroneous, because it did not find what goods and chattels, rights and credits of the intestate, or what amount thereof, remained in the defendants' hands unadministered.

3. The judgment was erroneous, because it is against the defendants generally, and *de bonis propriis*, when it ought to have been *de bonis testatoris*.

Under the first point he argued that the law was well settled that executors are no further chargeable than they have assets, unless they make themselves so by pleading a false plea, *i. e.*, such a plea as would be a perpetual bar to the plaintiff, and which they know to be false, as *ne unques executor*, or a release to them-



**678\***] selves. But if they \*plead a former judgment by another person, *et nil ultra*, and the plaintiff replies *per fraudem*, yet judgment shall be *de bonis testatoris*.<sup>1</sup> The only plea that can involve the defendant in personal responsibility (except as above stated), and that only for costs, is a plea disputing the debt.<sup>2</sup> *Harrison v. Beecles*<sup>3</sup> is in point. The plea there was *plene administravit*. It was proved that the defendant had assets, but of less amount than the plaintiff's claim. It was contended that the plaintiff was entitled to recover the whole amount. Lord Mansfield decided, after consultation with the other judges, that he could only recover the amount of assets proved, which has been the law ever since.

Upon the second point, if an executor plead *plene administravit*, and issue is joined thereon, and the jury find that the defendant had goods in his hands, but do not find the value, the verdict is void for uncertainty.<sup>4</sup>

As to the mode of entering judgment against an executor or administrator, and afterwards proceeding thereon, he cited 2 Tidd's Pract., 842, 894, 929, 1017-1020.

**679\***] *Mr. Chief Justice MARSHALL* delivered the opinion of the court:

This case presents several questions of some difficulty; but, as the argument has been *ex parte*, and there are other points on which the judgment must necessarily be reversed, the court will confine its opinion to those on which no doubt can arise.

At the trial of the issue of fully administered, the plaintiff's counsel moved the court to instruct the jury "that as it appeared, by the accounts exhibited by the defendants, that a part remained in their hands unadministered, that the plea was therefore false, and that on that ground he was entitled to their verdict on the whole issue." This instruction was given by the court, and to this opinion the counsel for the defendants excepted.

It is now well settled, and the case cited from Cranch, in the argument, is founded on the principle that if an administrator fails to sustain his plea of fully administered, he is not, on that account, liable to a judgment beyond the assets to be administered. The plea is not necessarily false within his own knowledge; he may have failed to adduce proof of payments actually made. It is not required that the plea should state with precision the assets remaining unadministered; and an executor or administrator would always incur great hazard, if he were required to state and prove the precise sum remaining in his hands, under the penalty of being exposed to a judgment for the whole amount claimed, whatever it might be. To state a full administration, without proving it, would be useless. The rule and usage, **680\***] therefore, \*is, that if the plea of fully administered be found against the defendant, the verdict ought to find the amount of assets unadministered, and the defendant is liable for that sum only. The instruction of the court,

on this point, is erroneous, and, consequently, the verdict and judgment founded on it, must be set aside and reversed.

The same error is in the verdict. Instead of finding the amount of assets remaining unadministered, it finds the whole amount claimed, which, as was decided in the case already mentioned, is clearly erroneous.

There is also additional error in the judgment which is rendered against the administrators, *de bonis propriis* instead of being *de bonis testatoris*. For these errors, the judgment must be reversed, and the verdict set aside, and the cause remanded for farther proceedings according to law.

*Judgment reversed.*

**JUDGMENT.**—This cause came on to be heard on the transcript of the record of the Court of the United States for the Seventh Circuit in the District of East Tennessee, and was argued by counsel on the part of the plaintiffs in error. On consideration whereof, this court is of opinion that there is error in the record and proceedings of the said Circuit Court, in this, that the said court instructed the jury, on the trial of the issue, on the plea of fully administered, that as it appears by the accounts exhibited by the defendants, a part remained in their hands unadministered, \*the plea was therefore **681** false, and that, on that ground, the plaintiff was entitled to their verdict on the whole issue; and also in this, that the jury have found a verdict, on the plea of fully administered, against the defendants, without finding the sum unadministered; and also in this, that the judgment on the said verdict is absolute against the administrators themselves, instead of being, to be levied of the goods and chattels of their intestate, in their hands to be administered.

Whereupon it is considered by the court, that the said judgment be reversed, and the verdict be set aside, and the cause remanded to the said Circuit Court, that further proceedings may be had therein according to law.

Cited—3 Otto, 42; 2 Wood. & M. 546.

#### [LOCAL LAW.]

THE CORPORATION OF THE CITY OF WASHINGTON ET AL., *Appellants*,

v.

PRATT, FRANCIS ET AL., *Respondents*.

Under the eighth section of the act of 1812, to amend the act for the incorporation of the city of Washington, a sale of unimproved squares or lots in the city, for the payment of taxes, is illegal, unless such squares and lots have been assessed to the true and lawful proprietors thereof.

The lien upon each lot, for the taxes, is several and distinct, and the purchaser of each holds his lot unencumbered with the taxes due on the other lots held by his vendor.

give in evidence any due administration of assets. 2 Saund. 220, note 3; Chitty, *ut sup*.

3.—Cited 3 Term Rep. 685, 690.

4.—Co. Litt. 227 a; Fairfax v. Fairfax, 5 Cranch's Rep. 19; Booth v. Armstrong, 2 Wash. Rep. 301; Harrison v. Beecles, 3 Term Rep. 688, 689, note.

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1.—1 Roll. Abr. 931.

2.—1 Chitty's Pl. 485. See form of plea, and note on it in 2 Chitty, 499. It agrees with the form used in this action. Under this allegation "hath not, nor on the day, &c., had," &c., the defendant may

**682\*]** \*The advertisement must contain a particular statement of the amount of taxes due on each lot separately.

If the sale of one or more lots produce the amount of taxes actually due on the whole by the same proprietor, the corporation cannot proceed to sell further.

**A** PPEAL from the Circuit Court for the District of Columbia.

This cause was argued by the *Attorney-General* and *Mr. Key* for the appellants, and by *Mr. Jones* for the respondents.

*Mr. Justice JOHNSON* delivered the opinion of the court:

A number of lots in the city of Washington, the property of the respondents, having been sold for payment of taxes, assessed under authority of the appellants, to the use of the city, this bill was filed by the respondents, in the Circuit Court of the District, to enjoin the corporation from executing conveyances to the purchasers.

The allegations on which the claim for relief was asserted, presented to the view of the court below a variety of irregularities, previous to, or accompanying the sale, which that court decided to be deviations from the provisions of the law of Congress, authorizing the sale. A perpetual injunction was therefore decreed, and from that decree the defendants below have appealed.

There have been various questions submitted to the consideration of this court, in the argument, which, with a view to precision, shall be stated in the parties' own language, in their order.

**683\*]** \*1. The first is, whether sales of unimproved squares, or lots, in the city of Washington, to pay two years' taxes thereon, pursuant to the 8th section of the act of Congress, passed in the year 1812, entitled, "An act, further to amend the act for the incorporation of the city," would be illegal, merely because such squares and lots had not been assessed to the true and lawful proprietors thereof, without any wilful mistake or neglect on the part of the persons who made the assessment, the assessors having used due diligence to ascertain the true proprietors.

This question, as well as every other in the cause, must find a solution in the provisions of the law which vests the power to sell. Where these are explicit and consistent, there is no ground for adjudication but their literal meaning. That they must be construed strictly, follows from their affecting private rights, and particularly rights of freehold; and that they must be pursued strictly, is the consequence of their being the sole foundation of the powers executed under them.

The 7th section of the act of incorporation of 1802, vests in the corporation a very general power to lay and collect taxes; but the next section of the same act limits their power in enforcing payment of taxes to a distress and sale of goods, and contains an express prohibition against subjecting vacant lots to a sale for taxes. As no goods could be expected to be found on such lots, it became necessary to pass this act of 1812, the 8th section of which is in these words: "That unimproved lots in the city of

**684\*]** Washington, on which two years' taxes remain due and unpaid, or so much thereof as

may be necessary to pay such taxes, may be sold at public sale, for such taxes due thereon. Provided, that public notice be given of the time and place of sale, by advertising, in some paper printed in the city of Washington, at least six months, where the property belongs to persons residing out of the United States; three months, where the property belongs to persons residing within the United States, and without the limits of the District of Columbia; and six weeks, where the property belongs to persons residing within the District of Columbia, or city of Washington; in which notice shall be stated the number of the lot or lots, the number of the square or squares, the name of the person or persons to whom the same may have been assessed, and also the amount of taxes due thereon." And then follows another proviso, securing to the proprietor the right to redeem within two years after such sale.

In legislating upon this subject, the corporation has sanctioned an assessment to the owners, or supposed owners; and the real state of the question is, whether this is not going beyond the power of sale, as delegated to them by the act of Congress. This, again, depends upon the question, whether the person "to whom," in the language of the clause cited, "the lots may have been assessed," can mean any other than the actual owner of such lot.

We think it cannot. It was undoubtedly in the power of Congress to have left what latitude they pleased to the assessor in designating the owner; but if they have confined him to the necessity of determining the true owner, it is not in our power to enlarge his discretion. It may be a hardship upon the corporation, but the legislature only can decide whether that hardship shall be perpetuated or not. It must be observed that the alternative is one which would put it in the power of the assessor to designate a mere nominal owner, a kind of casual ejector, in every case. Had Congress intended to lighten the labors of the corporation, or their assessor, in this respect, there were very simple means of doing it; they might have sanctioned a designation with reference to the first or last vendee of record. But it is obvious that Congress were very jealous of the exercise of this power over the lots of absentees; and in the previous provisions of this eighth section, they make the right of selling, with reference to the time of advertising, to depend expressly upon ownership; not reputed ownership or assessment; "to whom the property belongs," are the words of the law. When, therefore, they afterwards speak of publishing the name of the person to whom the lot was assessed, they must be held to mean the name of him who was owner at the time of the assessment. This removes many of the inconveniences apprehended from subsequent or fraudulent transfers; and the inquiries remaining to be made by the assessor, will be greatly simplified by the operation of the registering law of the district. It will seldom happen that the legal estate does not, in fact, exist in the last vendee of record, or his heirs or devisees. The name of the real party in interest must have been, in the eyes of Congress, the most awakening circumstance of the advertisement required to warn him of his danger.

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2. The second question is, whether, where several lots belonged and were assessed to one person, and two years' taxes were due on every one of them, it would be lawful to sell one of the lots to pay the taxes due upon all, or each lot would be liable only to be sold to pay the tax due on itself.

This question, thus stated, does not admit of a general answer.

That each lot stands encumbered with no more than its own taxes, and the lien upon each is several and distinct, results, not less from the provisions of this eighth section, which gives the right of redeeming severally, than from the consideration that in case of a partial sale by the proprietor of many lots, the purchaser from him would not, by the act of transfer, hold his purchase disencumbered of its own particular taxes, either absolutely, or upon the contingency of the remaining lots of his vendor being adequate to the satisfaction of the taxes due on the whole. Nor would a purchaser of a single lot hold his purchase encumbered with the taxes due on the whole mass of lots held by the vendor; each would have the right to redeem, upon paying the taxes assessed on his own particular purchase, and would hold his purchase subject to such taxes.

The provisions of the act are clearly intended **687\*** to raise the tax of each lot from itself. The words are, *so much* thereof, not *so many*; as they must have been, after speaking of "unimproved lots," had it been intended to authorize the sale of some for the taxes of others; and not the sale of each one, or "so much" as is necessary of each one, for the payment of its own taxes. Apply the enacting words to the case of an owner of a single lot, and the effect of the word "much" can only be to authorize a sale of part of a lot, whenever circumstances will admit of such a sale, and the sum due will not require more. But if taxes be due by one and the same individual, in small sums, upon many lots, and one lot being set up for sale, produces a sum adequate to the payment of all, the whole arrears become paid off, and no excuse can then exist for making further sales.

This exposition disposes of the second question.

3. The third question is, whether it be necessary that the advertisement should contain a particular statement of the amount of taxes due on each lot separately; or where several lots belong to the same person, whether it would be sufficient to state in the advertisement the aggregate amount of taxes due on all the lots so belonging to the same person.

This may be a very immaterial question practically, and it may not be very easy to assign a sufficient reason of policy for the one or other alternative. But what have we to do with such inquiries in cases of positive enactment? The law must be pursued, whatever be the previous **688\*** steps required. The difficulty here presented is grounded on the use of the words in this eighth section, "amount of taxes." This, in its ordinary import, expresses an aggregate of taxes. But it is obvious that we cannot here apply that aggregate idea to a sum made up from the taxes of many lots; since this would also support the sufficiency of a publication exhibiting nothing more than the amount of taxes

upon the whole list of lots advertised, whoever be the proprietors. Some more appropriate signification must therefore be sought for it; and this is easily found; for when it is considered that the taxes of each lot are made several liens upon each, it follows that this aggregate idea can have reference only to the amount made up from the arrears of the two years, which must be due to authorize a sale.

We therefore think that the taxes of each lot ought to be severally exhibited. The operation of such a provision must be the test of its own policy. The duty is easily complied with, and the performance of it may not be destitute of practical utility.

4. The fourth point has not been pressed by the appellants' counsel, nor can there be a doubt entertained that it is altogether against the appellants. The publication of the sum due was as necessary under the eighth section as any other act required by it; the circumstance of time in the advertisement, therefore, could not have been dispensed with as to that particular. An increase of the sum demanded necessarily required the extension of the time of advertising. *Non constat* \*but that the **689** smaller sum may have been provided and ready on the day of sale; or that the larger would not have been provided within the legal time, had the advertisement been continued.

5. The fifth question is, whether, if unimproved lots, on which two years' taxes be due, be advertised for sale, and the amount stated be greater than that actually due, the sale of such lots will be void; and if void, whether for the whole, or only for the amount of excess, when the amount is divisible, as it may be in the sale of several lots.

This question may be disposed of thus: As it supposes that two years' taxes are actually due, there can be no doubt that the lots may be severally sold; for the greater sum includes the less, and the owner had his remedy to prevent a sale by tendering the amount actually due on any particular lot set up for sale. But if the corporation are suffered to go on to sell, and the sale of any one or more lots shall produce the amount actually due on the whole, by the same individual, it is clearly at their peril to proceed further. They must, in law, be held cognizant of the amount justly demandable, and have no power to sell, but for taxes actually due.

The sixth question we understand to be withdrawn; and the seventh, at least in one view of it, we consider as disposed of in the answers to the first and fifth. If two years' taxes be actually due by the party whose property is advertised, and it be not tendered, the sale must be valid, \*and the owner **690** must be left to his remedy against the corporation for adjusting the correct amount. But if it be intended to obtain the decision of this court, whether one man's lots can be legally sold for another man's debts, we cannot perceive that it will admit of a question; nor can it ever occur, if the course be pursued which is marked out by this decision.

The tenth point made in the cause, is one which goes to contest the correctness of the decision below, on a general principle of equity; but, understanding this question, as well as that which arises upon the ground of the com-

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plainant's supposed remedy at law, to be withdrawn, we shall decline noticing them.

*Decree affirmed with costs.*

Cited—9 How. 257, 260; 16 How. 619; 4 McLean, 26.

[PLEADING. LOCAL LAW.]

SNEED ET AL., *Plaintiffs in Error*,  
v.

WISTER ET AL., *Defendants in Error*.

The act of assembly of Kentucky, of the 7th of February, 1812, "giving interest on judgments for damages, in certain cases," applies as well to cases depending in the circuit courts of the Union, as to proceedings in similar cases in the state courts.

The party is as well entitled to interest in an action on an appeal bond, as if he were to proceed on the judgment, if the judgment be on a contract for the payment of money. He is entitled to interest from the rendition of the original judgment.

691\*] \*Oyer is not demandable of a record; nor, in an action upon a bond for performance of covenants in another deed, can oyer of such deed be craved; for the defendant, and not the plaintiff, must show it, with a profert of it, or an excuse for the omission.

If oyer be improperly demanded, the defect is aided on a general demurrer; but it is fatal to the plea, where it is set down as a cause of demurrer.

*Nil debet* is an improper plea to an action of debt upon a specialty or deed, where it is the foundation of the action.

## ERROR to the Circuit Court of Kentucky.

This was an action of debt, brought in the Circuit Court for the District of Kentucky, by the defendants in error, against the plaintiffs, upon a bond in the penalty of \$4,000, with condition that the said A. Sneed should prosecute with effect his appeal from a judgment of the Franklin Circuit Court, pronounced in a suit wherein the said Wister and others were plaintiffs, and the said A. Sneed was defendant, and should well and truly pay to the said obligees all such damages and costs as should be awarded against him, in case the said judg-

ment should be affirmed in whole or in part, or the appeal should be dismissed or discontinued.

The averments in the declaration are, that the said A. Sneed did not prosecute his said appeal with effect, but that afterwards, at a certain term of the Court of Appeals, the said judgment was affirmed, and judgment rendered in favor of the said plaintiffs against the said defendant, A. Sneed, for damages at the rate of ten per cent. on the amount of the said judgment, to wit, on the sum of \$1,895.13½, as by the records of the said Court of Appeals would appear. And further, that [692 the said judgment, rendered by the said Franklin Circuit Court, was for \$1,895.13½ damages, and \$ costs, as would appear by the records of the said court. The declaration then avers that the said A. Sneed hath not paid to the said plaintiffs the said damages and costs aforesaid, or either of them, whereby action accrued.

To this declaration, the defendants, after demanding oyer of the bond, and condition thereof, in the declaration mentioned, and also of the judgment of the Court of Appeals, therein proffered, pleads in bar of the action: 1. That by the judgment and mandate of the said Court of Appeals, the said cause was remanded to the Circuit Court of Franklin, where the judgment of the said Court of Appeals, according to the mandate, was entered up as the judgment of the said court of Franklin; and that after the said judgment was so entered, viz., on the 19th of August, 1820, in the clerk's office of the said court, the said A. Sneed, according to the laws of Kentucky, did replevy the said sum in the declaration mentioned, by acknowledging recognizances, called replevin bonds, before the said clerk, together with Landon Sneed, his surty in said recognizances for the said sums of money, damages and costs, in the declaration mentioned, to be paid in one year from the date thereof; the said clerk having lawful authority to take said replevin bonds, having by law the force of judgments, and then remaining in the said court in full force, not quashed, &c. 2. The second plea is

NOTE.—As to appellate jurisdiction from judgments of state courts, see note to *Martin v. Hunter's lessee*, 1 Wheat. 304, and note to *Houston v. Moore*, 3 Wheat. 433; and note to *Cohen v. Virginia*, 6 Wheat. 264, and note to *Gibbons v. Ogden*, 6 Wheat. 448.

*Interest when recoverable.*

All contracts to pay give a right to interest from the time when the principal ought to be paid. *Boddam v. Riley*, 2 Bro. C. C. 3; *Williams v. Sherman*, 7 Wend. 109.

In these cases the interest computed at the legal rate becomes the fixed measure of damages, to which the plaintiff is entitled as of right. *Robinson v. Bland*, 2 Burr. 1077, 1086; *Gibbs v. Fremont*, 9 Exch. 25; S. C. 20 Eng. L. & E. 555; *Purdy v. Phillips*, 1 Kern. N. Y. 406; *Higgins v. Sargent*, 2 Barn. & C. 348.

There must be an agreement, express or implied. *Crookford v. Winter*, 1 Camp. 122; *DeHaviland v. Bowerbank*, 1 Camp. 150; *Bernal v. Fuller*, 2 Camp. 426; *Knight v. Mitchell*, 2 Tread. 668; *Goodard v. Burlow*, 1 Nott. & McC. 44; *Firrand v. Bouehall*, Harp. 83.

An agreement to pay interest may be inferred from usage. *Meech v. Smith*, 7 Wend. 415; *Reub v. McAllister*, 8 Wend. 109; *Holmes v. Rankin*, 17 Barb. 544; *Fitch v. Livingston*, 4 Sandf. N. Y. 492; *The Isaac Newton*, 1 Abb. Adm. 588; *Hunt v. Nev-ers*, 15 Pick. 500; *Goff v. Inhab. of Rehoboth*, 2 Cush. 475.

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Interest denied on an open account. *Cloud v. Smith*, 1 Texas, 102; *Gammage v. Alexander*, 14 Texas, 414; unless payment be unreasonably delayed. *Aldrich v. Dunham*, 16 Ill. 403; *McCormick v. Elston*, 16 Ill. 204.

Recoverable on all liquidated demands, as on accounts stated, or rendered and not disented from; also from time fixed for payment, and where no time is fixed for payment, then from the time of demand of payment. *Bainbridge v. Wilcocks*, Baldw. 536; *Nelson v. Felder*, 7 Rich. (S. C.) Eq. 395; *Walden v. Sherburne*, 15 John. 405; *Williams v. Storrs*, 6 John. Ch. 353; *Nat. Lancers v. Lovering*, 10 Fost. N. H. 511; *Devereaux v. Burgwin*, 11 Fed. 491; *Hunt v. Nev-ers*, 15 Pick. 500; *Brewer v. Tyrringham*, 12 Pick. 547.

Recoverable on money improperly or wrongfully withheld, or converted, or misapplied. *People v. Gasherie*, 9 John. 71; *Lynch v. DeViar*, 3 John. Cas. 303; *Slingerland v. Sweet*, 13 John. 255; *Crane v. Dygert*, 4 Wend. 675; *Greenly v. Hopkins*, 10 Wend. 96; *Crane v. Thayer*, 18 Verm. 162; *Commonwealth v. Crevor*, 3 Binn. 121, 123; *Wood v. Robbins*, 11 Mass. 504; *Goff v. Inhab. of R. 2 Cush. 475*; *Hubbard v. R. R. Co.*, 11 Met. 124; *Dodge v. Perkins*, 9 Pick. 368; *Bassett v. Kinney*, 24 Conn. 267; *Close v. Fitch*, 13 Tex. 623; *Grey v. Franklin*, 5 Cal. 410; *Wood v. Robins*, 11 Mass. 504; *Pope v. Baron*, 1 Mason. 117.

Interest is allowed—First, on a special agreement. Second, on an implied promise, which



**693\*]** *nil debet*. \*To these pleas the plaintiffs demurred, and assigned for cause of demurrer, to the first, that it contains a prayer of oyer of records, of which profert was not made, and of which the defendants had no right to oyer; and further, that the said plea is defective, in not setting forth where the replevin bond pleaded was executed, that the court might judge whether there was any authority to take it.

The demurrers being joined, the court below gave judgment in favor of the plaintiffs, and awarded a writ of inquiry to assess the damages to which they were entitled. On this inquiry, the defendants' counsel moved the court to instruct the jury, 1. That the damages of ten per cent. on affirmance cannot be given, because not within the breaches assigned; and 2. That they ought not to allow interest on the damages in the original judgment, for any period before affirmance.

These instructions the court refused to give; but did, upon the motion of the counsel for the plaintiffs, instruct the jury that the act of assembly of Kentucky, of the 7th of February, 1812, "giving interest on judgments for damages in certain cases," applies to cases depending in this court, in actions on appeal bonds, as much as to proceedings in similar cases in the state courts. That the party is as well entitled to interest in an action on the appeal bond, as if he were to proceed on the judgment at law; and that, by law, the plaintiff is entitled to interest on the amount of his judgment, from the time it was rendered in the Franklin Circuit Court.

**694\*]** \*Judgment being rendered in favor of the plaintiffs below, for the damages assessed by the jury, a writ of error was sued out by the defendants, and the cause brought before this court for revision.

The cause was argued by *Mr. Talbot* for the plaintiffs in error, and by *Mr. M. B. Hardin* for the defendants in error.<sup>1</sup>

*Mr. Justice WASHINGTON* delivered the opinion of the court, and after stating the case, proceeded as follows:

1.—The latter cited 1 Chitty's Plead. 302.

may arise from usage. *Third*, on money or property withheld after demand, or after due, or against the will of the owner. *Fourth*, for illegal conversion or use of another's property. *Fifth*, upon advances in cash. *Williams v. Baxter*, 3 McLean, 471; *Reid v. Rens, Glass Fact.*, 3 Cow. 393; 5 Cow. 587; *Burnhisel v. Furman*, 22 Wall. 170; *Van Rensselaer v. Jones*, 2 Barb. 643; *Van Rensselaer v. Jewett*, 5 Denio, 136; 2 Comst. 135; *Dox v. Dey*, 3 Wend. 356; *Leotard v. Graves*, 3 Caines. 226; *Doyle's Adm'rs v. St. James' Ch.*, 7 Wend. 178; *Cromwell v. Sac Co.*, 6 Otto, 51; *Tucker v. Ives*, 6 Cow. 193; *Kane v. Smith*, 12 John. 156; *Watkinson v. Loughton*, 8 John. 213; *Amory v. McGregor*, 15 John. 24; *Van Beuren v. Van Gaasbeek*, 4 Cow. 496; *Feeter v. Heath*, 11 Wend. 478; *Still v. Hall*, 20 Wend. 51; *Clark v. Barlow*, 4 John. 183; *Livingston v. Miller*, 1 Kern. 80; *Gammell v. Skinner*, 2 Gall. 45; *Burnham v. Best*, 10 B. Mon. 227; *Barclay v. Kennedy*, 3 Wash. C. C. 350.

Also, on money obtained by fraud, on liquidated accounts and settlements, on money unreasonably detained, and from commencement of suit. *The Isaac Newton, Abb. Adm.* 588; *Whitaker v. Pope*, 2 Woods, 463; *Selleck v. French*, 1 Conn. 32; *Dexter v. Arnold*, 3 Mas. 284; *McIlvaine v. Williams*, 12 N. H. 474; *Livermore v. Rand*, 6 Fost. N. H. 85; *Killing v. Taylor*, 1 Cranch, C. C. 99; *U. S. v. Ormsby*, 3 Wash. C. C. 195.

Whether the replevin bond entered into by *A. Sneed*, in the clerk's office of the Franklin Circuit Court, could be pleaded in bar of the action on the appeal bond, is a question which this court would feel no hesitation in deciding, could we have succeeded in our efforts to obtain the act or acts of the Kentucky legislature which authorized the giving such bonds. The same reason prevents this court from giving an opinion as to the alleged insufficiency of the first plea, in not setting forth where the replevin bond, so pleaded, was executed, that the court might judge whether there was any authority for taking the same. If the cause turned exclusively upon those points, we should deem a continuance of it proper, until the counsel could have an opportunity of furnishing the court with those laws. This, we think, is not the case, being all of opinion, that, for the other cause of demurrer \*assigned to the first [**\*695** plea, the judgment of the court below, upon that plea, was correct. In this case no profert was made, in the declaration, of the records therein mentioned, nor would it have been proper to do so. And even if a profert be unnecessarily, or improperly made, still the defendant is not entitled to demand oyer of the instrument, but is bound to plead without it. We take the law to be that oyer is not demandable of a record; nor in an action upon a bond, for performance of covenants in another deed, can oyer of such deed be craved, but the defendant, and not the plaintiff, must show it, or the counterpart, with a profert of it, or an excuse for the omission. If oyer be improperly demanded, and the instrument be stated upon it, although the defect in the plea would be aided on a general demurrer, it is nevertheless fatal to the plea, where it is set forth as a cause of demurrer. The whole of this doctrine is laid down in 1 Chitty's Plead., 302, third Am. ed.

As to the plea of *nil debet*, to which there is a demurrer, it is clearly bad, no principle of law being better settled than that this is an improper plea to an action of debt upon a specialty or deed, where it is the foundation of the action.

This brings the court to the consideration of the instructions given to the jury upon the ap-

Allowable as damages, in actions of tort, or for negligence. *Andrews v. Durant*, 18 N. Y. 496; *Parrott v. Knickerbocker*, 46 N. Y. 361; *Schwarin v. McKee*, 51 N. Y. 180; *Beals v. Guernsey*, 8 John. 446; *Hyde v. Stone*, 7 Wend. 354; *Bissel v. Hopkins*, 4 Cow. 53; *Kennedy v. Strong*, 14 John. 128; *Hallett v. Novion*, 14 John. 273; 16 John. 327; *Rowley v. Gibbs*, 14 John. 385; *Thomas v. Weed*, 14 John. 255; *Handley v. Chambers*, 1 Litt. Ky. 358; *Devereaux v. Burgwin*, 11 Ired. 490; *Daggett v. Emerson*, 1 Wood. & M. 195; *Green v. Garcia*, 3 La. Ann. 702; *Willings v. Consequa*, Pet. C. C. 172; *Gilpins v. Consequa*, Pet. C. C. 85; 3 Wash. C. C. 184; *Matthews v. Menedager*, 2 McLean, 145.

On judgments, whether the original demand carried interest or not. *Klock v. Robinson*, 22 Wend. 157; *Nelson v. Felder*, 7 Rich. S. C. Eq. 395; *Gatewood v. Moses*, 5 Rich. S. C. Law, 244; *Rogers v. Burns*, 27 Penn. St. 525; *Lord v. Mayor*, 3 Hill, 426; *Sayre v. Austin*, 3 Wend. 496; *Byrd v. Gasquet*, Hempst. 261; *Evans v. White*, Hempst. 296; *Hemenway v. Fisher*, 20 How. 255; *Perkins v. Fourinquet*, 14 How. 328.

Where interest is allowed, not under contract, but by way of damages, the rate must be according to the *lex fori*. *Goddard v. Foster*, 17 Wall. 123; *Consequa v. Willings*, Pet. C. C. 225; *Beers v. U. S.*, Dev. 27; *Geipeke v. City of Dubuque*, 1 Wall. 175, 206.

plication of the plaintiffs' counsel; and we are of opinion that the act referred to was strictly applicable to this case, in like manner as it would have been had this action been brought in a state court; and that, according to the clear **696\*** expressions of that act, the plaintiffs were entitled to legal interest on the damages recovered in the Franklin Circuit Court, from the time of the rendition of that judgment, since it fully appeared, by the record of the Court of Appeals, that the judgment of the Franklin Circuit Court was rendered on a contract to pay money. The act declares, in substance, that every judgment rendered after the passage of the act, founded upon contract sealed or unsealed, expressed or implied, for the payment of money, &c., which should be delayed in the execution, by proceedings on the part of the defendant, by injunction, writ of error, &c., with a supersedeas, or an appeal to the Court of Appeals, should, in the event of the judgment being affirmed, bear legal interest from the rendition of the judgment, &c. The last part of the section, which declares it to be the duty of the clerk of the court in which the judgment was rendered, to indorse on the execution that the same is to bear legal interest until paid, is strictly applicable to the remedy, and not to the right. The latter is given by the preceding parts of the act; but it can only be enforced where the plaintiff proceeds by execution, by virtue of the indorsement on that process, which it is the duty of the clerk to make.

The court is also of opinion that the court below was right in refusing to give the first instruction asked for by the defendants' counsel, inasmuch as the breaches assigned do, in our apprehension, manifestly embrace the ten per **697\*** cent. \*damages given upon affirmance by the Court of Appeals. And if the above opinion, in respect to the interest to which the plaintiff was entitled, be correct, it follows that the court below was right in refusing to give the second instruction asked for by the defendants' counsel.

*Judgment affirmed with costs.*

Cited—5 Otto, 618; 1 Wood. & M. 384.

[PRACTICE.]

HUGH, *Plaintiff in Error*,

*v.*

HIGGS AND WIFE, *Defendants in Error*.

No action at law will lie on the decretal order of a court of equity.

**E**RROR to the Circuit Court for the District of Columbia.

This cause was argued by *Mr. Key* for the plaintiff in error,<sup>1</sup> and by *Mr. Jones* for the defendants in error.

*Mr. Chief Justice MARSHALL* delivered the opinion of the court:

This is an action on the case brought to re-

1.—He cited *Carpenter v. Thornton*, 3 Barnw. & Ald. 52.

Wheat. 8.

cover the money which the plaintiff in error had been decreed by a Court of Chancery to pay to the defendants in error. The defendant in the court below contended, that an \*action [**698** at common law did not lie on a decree in chancery, and excepted to the opinion of that court overruling this objection. It is admitted by the opposite counsel, that, in general, the action does not lie to recover money claimed under the decree of a court in equity, but he supposed that, in this case, the money had been received by the defendant below, upon transactions which took place after the decree. Upon examining the record, we perceive that the money was in his hands, as trustee, at the time the order to pay it over was made.

An objection was also made to an opinion of the Circuit Court upon another part of the case. There was an agreement between the parties, under seal, and having some relation to the money to which part of the claim relates, and the defendant below objected to the form of the action on that account. But we cannot discover, from the bill of exceptions, whether the money in contest was, or was not, received under that instrument. On that point, therefore, the Court gives no opinion. The judgment is to be reversed for error in the opinion of the court below, which declares the action to be sustainable on the decretal order of the Court of Chancery, and the cause is remanded to the Circuit Court for further proceedings.

*Judgment reversed.*

Cited—16 How. 79.

[\*PRACTICE.]

[\*699]

GRACIE ET AL., *Plaintiffs in Error*,

*v.*

PALMER ET AL., *Defendants in Error*.

It is not necessary to aver on the record that the defendant in the Circuit Court was an inhabitant of the district, or was found therein at the time of serving the writ. Where the defendant appears, without taking the exception, it is an admission of the regularity of the service.

**MR. WEBSTER** moved to dismiss the writ of error in this case, for want of jurisdiction. He stated that the plaintiffs below, Palmer and others, were described to be aliens, and subjects of the King of Great Britain, and the defendants, Gracie and others, to be citizens of the state of New York; and the suit was brought in the Circuit Court of Pennsylvania. It did not appear that the defendants were inhabitants of, or found in the district of Pennsylvania, at the time of serving the writ; and he therefore contended, under the eleventh section of the judiciary act of 1789, c. 20, that no civil suit could be brought against them by original process in that district.

*Mr. Chief Justice MARSHALL* stated that the uniform construction, under the clause of the act referred to, had been that it was not necessary to aver, on the record, that the defendant was an inhabitant of the district, or found therein. That \*it was sufficient if the [**700** Court appeared to have jurisdiction by the



citizenship or alienage of the parties. The exemption from arrest in a district in which the defendant was not an inhabitant, or in which he was not found at the time of serving the process, was the privilege of the defendant, which he might waive by a voluntary appearance. That if process was returned by the

marshal as served upon him within the district, it was sufficient; and that where the defendant voluntarily appeared in the court below, without taking the exception, it was an admission of the service, and a waiver of any further inquiry into the matter.

*Motion denied.*

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# APPENDIX.

3\*]

[\*NOTE I.]

ON THE CASE OF GREEN ET AL. *v.* BIDDLE, *ante*, p. 1-108.

The editor has supposed that the learned reader would not be dissatisfied to see collected together the authorities from the civilians, and also from the common law, and the decisions of the courts of equity, bearing upon the principal question in the above case. The leading principals of the civil law on the subject, are stated by Justinian as follows:

“*De edificatione ex sua materia in solo alieno.*

“Lib. II., tit. 1, sec. xxx. Ex diverso, si quis in alieno solo ex sua materia domum ædificaverit, illius fit domus cujus solum est. Sed hoc casu materiæ dominus proprietatem ejus amittit, quia voluntate ejus intelligitur esse alienata; utique si non ignorabat, se in alieno solo ædificare: et ideo, licet diruta sit domus, materiam tamen vindicare non potest. Certe illud constat, si, in possessione constituto ædificatore, soli dominus petat, domum suam esse, nec solvat pretium materiæ et mercedes fabrorum, posse eum per exceptionem dolli mali repelli; utique si bonæ fidei possessor fuerit, qui ædificavit. Nam scienti, solum alienum esse, potest objici culpa, quod ædificaverit temere in eo solo, quod intelligebat alienum esse.”

“*De fructibus bona fide perceptis.*

“Sec. xxxv. Si quis a non domino, quem dominum esse crediderit, bona fide fundum emerit, vel ex donatione, aliave qualibet justa causa, æque bona fide acceperit, naturali ratione placuit, fructus, quos percepit, ejus esse pro cultura et cura: et ideo, si postea dominus supervenerit, et fundum vindicet, de fructibus ab eo [\*4\*] consumptis agere non potest: ei vero \*qui\* alienum fundum sciens possederit, non idem concessum est; itaque cum fundo etiam fructus, licet consumpti sint, cogitur restituere.”

“Lib. IV., tit. 17, sec. ii. Et si iu rem actum sit coram iudice, sive contra petito rem judicaverit, absolvere debet possessorem; sive contra possessorem, jubere ei debet, ut rem ipsam restituat cum fructibus. Sed, si possessor neget, in præsentem se restituere posse, et siue frustratione videbitur tempus, restituendi causa petere, indulgendum est ei; ut tamen de litis æstimatione caveat cum fidejussore, si intra tempus quod ei datum est, non restituerit. Et si hæreditas petita sit, eadem circa fructus interveniunt, quæ diximus intervenire de singularum rerum petitione. Illorum autem fructuum, quos culpa sua possessor non perceperit, sive illorum quos perceperit, in utraque actione eadem ratio pene habetur, si prædò fuerit. Si vero bonæ fidei possessor fuerit, non habetur

ratio neque consumptorum, neque non perceptorum. Post inchoatam autem petitionem etiam illorum fructuum ratio habetur, qui culpa possessoris percepti non sunt, vel percepti consumpti sunt.”

So also, the Napoleon Code, which is in a great measure copied from the civil law, declares (liv. 2, tit. 2, art. 546) that “the property of a thing, whether movable or immovable, gives a right to all which it produces, and to everything which is inseparably united with it, whether naturally or artificially.

“This right is termed the *right of accession*.

“547. The natural or artificial fruits of the earth, the civil fruits, and the increase of animals, belong to the owner by right of accession.

“548. The fruits thus produced belong to the owner of the thing producing them, provided he re-imburse the expense of the labor bestowed upon it by third persons.

“549. A mere occupant does not make these fruits his own, unless he is a *bonæ fidei* possessor; in the contrary case, he is bound to restore the products with the thing, to the owner who claims it.

“550. He is considered as a *bonæ fidei* possessor, when he possesses, as proprietor, in virtue of a title to the property, of the defects of which he is ignorant. He ceases to be such the moment these defects are known to him.

“551. Every object which unites and incorporates itself with the thing, belongs to the owner, according to the rules hereinafter established.”

“555. Where plantations, buildings, and other works have been made or erected by a third person, with materials belonging to him, the owner of the land has a right either to retain them, or to compel such third person to remove them.

“If the owner insists upon the suppression of the plantations and \*buildings, it must be [\*5\*] done at the expense of the person who has made or erected them, without any indemnity to him; he may even be adjudged in damages, if there be ground for it, for the injury done to the owner of the land.

“If the owner chooses to preserve the plantations and buildings as his own, he must reimburse the value of the materials and labor bestowed on them, without regard to the more or less augmentation in value of the land. But if the plantations, buildings, and other works, have been made or erected by a party who has been evicted from the possession, but who was



not adjudged to restore the fruits, by reason of his being a *bonæ fidei* possessor, the owner cannot insist upon the suppression of the said works, plantations, and buildings, but shall have the election either to re-imburse the value of the materials and labor, or to pay a sum equal to the augmented value of the land."

So, also, in the law of Scotland, which is mainly founded upon the Roman law—"A *bonæ fidei* possessor is he who, though he is not really proprietor of the subject, yet believes himself proprietor, on probable grounds. A *malæ fidei* possessor knows, or is presumed to know, that what he possessed is the property of another. A possessor *bona fide*, acquired right, by the Roman law, to the fruits of the subject possessed, that had been reaped and consumed by himself, while he believed the subject his own. (Sec. 35, Inst. de rer. div.) By our customs, perception alone, without consumption, secures the possessor. Nay, if he has sown the ground while his *bona fides* continued, he is entitled to reap the crop, *propter curam et culturam*. But this doctrine does not, according to Bankt. I., 214, sec. 19, reach to civil fruits, *e. g.*, the interest of money, which the *bonæ fidei* receiver must restore, together with the principal, to the owner.

"*Bona fides* necessarily ceases by the *conscientia rei alienæ* in the possessor, whether such consciousness should proceed from legal interpellation, or private knowledge; for the essence of *bona fides* consists in the possessor's opinion that the subject is his own. (Lib. 20, sec. 11, de her. pet., 20 Nov., 1662, Children of Woolmet.) The decision, 14 March, 1626, brought by Viscount Stair, in support of the contrary opinion, proves no more than that an assignation, without intimation, is an incomplete deed. *Malæ fides* is sometimes induced by the true owner's bringing his action against the possessor, by which the lameness of his title may appear to him; sometimes not till litiscontestation, which was the general rule of the Roman law; and, in cases uncommonly favorable, it is not induced until sentence be pronounced against the possessor." (Erskine's Princ. of the law of Scotland, B. 2, tit. 1, s. 13, 14.)

6\*] \*Pothier has discussed this subject with his usual precision; and the following translation of a few passages from his treatise "*Du Droit de Propriété*" may not be unacceptable to the learned reader.

"335. A *malæ fidei* possessor is bound to account for all the fruits of the thing recovered which he has received, not only those which he received after the judicial demand, but those which have come to his hands subsequent to his unlawful possession: *Certum est malæ fidei possessorem omnes fructus solere præstare cum ipsa re*. (L. 22, Cod. de rei vind.)

"He is held accountable, even for those proceeding from the crops which he has sown, and the labor he has bestowed on the land; but from these must be deducted the value of the seed and labor expended by him.

"The reason is, that all the fruits which the land produces are accessaries to the land, which, as soon as they are gathered, *jure accessionis*, become the property of the owner of the land, as we have seen *supra*, n. 151, instead of belonging to him whose labor has produced them; from whence this maxim: *Omnis fructus non*

*jure seminis, sed jure soli percipitur*. (L. 25, D. de usur.)

"He is held accountable, not only for the fruits which are the products of the thing itself, and which are termed *natural fruits*; he ought, also, to account for the *civil fruits*, as we have seen in the preceding paragraph.

"336. A *malæ fidei* possessor is not only held accountable for the fruits which he has received, but even for those which he has not received, but which the owner might have received, if the land had been restored to him: *Generaliter*, says Papinian, *quum de fructibus æstimandis queritur, constat adverti debere, non an malæ fidei possessor fructus sit, sed an petitor frui poterit, si ei possidere licuerit*. (L. 62, s. 1, D. de rei vind.)

"The reason is, that a *malæ fidei* possessor contracts, by the knowledge which he has that the property does not belong to him, the implied obligation to restore it to the owner; on failure of which he is responsible for the damages and interest resulting from this obligation, in which are included the fruits which the owner has failed to receive.

"The heir, or other representative of the *malæ fidei* possessor; even if he supposes in good faith that the property belongs to him, is held accountable for all the fruits received subsequent to the unlawful possession of the deceased to whom he succeeds, in the same manner as the deceased would be held accountable, if he were still living; because in his character of heir he has succeeded to all his obligations, and his possession \*is merely a continuation of [\*7 that of the ancestor, and is infected with all its vices, as we have observed in the preceding article.

"337. According to the principles of the Roman law, a *bonæ fidei* possessor is not liable to restore the fruits received by him before the litiscontestation, except those which at that period specifically remain; but he is responsible for all the fruits subsequently received, in the same manner as a *malæ fidei* possessor; *Certum est malæ fidei possessores omnes fructus præstare; bonæ fidei vero, extantes post litiscontestationem, universos*. (L. 22, Cod. de rei vind.)

"340. That which we have laid down, as to a *bonæ fidei* possessor not being responsible for the fruits received and consumed by him before the suit, only applies in those cases where he has received and consumed them whilst his *bona fides* continued; but where he has had notice, although long before the judicial demand, that the property of which he is in possession belongs to another, he can no longer receive for his own profit the fruits proceeding from it, nor discharge himself from the obligation of restoring those which specifically remain, by afterwards consuming them."

"341. The principles of our French law, in respect to the restitution of the fruits, in an action *in rem*, in the case of a *malæ fidei* possessor, are the same with those of the Roman law, as they have already been explained.

"As to a *bonæ fidei* possessor, he is not bound to restore any fruits received by him before the judicial demand. I do not find that in our practice (different in that respect from the Roman law)—that the demandant can claim the fruits which specifically remain in the hands of

the occupant at that period, where they have been previously received.

"But by the notice which is given to a *bonæ fidei* possessor, in which the demandant exhibits to him a copy of his title deeds, and which has consequently, in this respect, in our law, the same effect as the *litiscontestation* in the Roman law, he ceases to be any longer a *bonæ fidei* possessor, being considered as informed of the demandant's right by this notice; he cannot, therefore, be any longer considered as entitled to receive the fruits, and must be adjudged to restore all those which he has received subsequent to the notice."

"343. Where, in the action *rei vindicationis*, the demandant has established his right, the possessor is adjudged to restore him the thing recovered; but in certain cases, where the possessor has disbursed a certain sum, or contracted an obligation for the removing an incumbrance, for the preservation or amelioration of the thing which he is adjudged to restore, the judgment is rendered upon condition that the demandant shall re-imburse the possessor for the sums he has expended, and indemnify him in other respects."

"344. The second case is that to which Papius refers in the latter part of the law *sumptuum in prædium factorum exemplo*: Where the possessor has incurred any necessary expenses for the preservation of the thing (other than ordinary repairs) which the proprietor would have been obliged to incur, if the possessor had not, the owner cannot compel the possessor to restore the thing, unless he first re-imburses to this possessor the amount thus expended by him, with the interest thereon, if it exceeds the fruits which the possessor has received, which are to be set-off against it.

"We have excepted from the operation of our principle the expenses of ordinary repairs, because these are a charge upon the fruits, and for this reason, a *bonæ fidei* possessor, who receives for his own account the fruits before the judicial demand, without being subject in this respect to make restitution to the owner, ought not to claim against the latter the expenses of ordinary repairs incurred by him during the same period, these expenses being a charge upon the usufruct which he has enjoyed.

"345. There is a distinction between a *bonæ fidei* and a *mali fidei* possessor, in respect to the expenses which they have laid out, which were not indispensably necessary, but only useful, and which have merely contributed to ameliorate the property.

"In respect to a *bonæ fidei* possessor, the owner cannot compel him to restore the property, without first re-imbursing the expenses, although they were not indispensably necessary to the preservation of the property, and have merely augmented its value.

"Justinian gives an example of this principle in the case of a *bonæ fidei* possessor, who has erected a building upon the land; and he decides that the owner cannot recover the land unless he first offers to re-imburse this expense to the occupant: *Si quis in alieno solo ex sua materia domum edificaverit. . . . illud constat, si in possessione constituto edificatore soli dominus petat domum suam esse, nec solvat pretium materiæ et mercedes fabrorum, posse eum exceptionem doli mali repelli, utique si bonæ fidei possessor fuerit qui edificavit.* (*Instit. tit. de rer. div. s. 30.*)

"346. This principle, that a *bonæ fidei* possessor ought to be re-imbursed the expenses of utility which he has laid out upon the property, is subject to several exceptions, which must be considered as implied in the text we have just cited from the Institutes, as Vinnius has remarked in his commentary.

"The first is, that the possessor ought not to be re-imbursed precisely \*and absolutely [\*9] for the amount of the said expenses, but only for the amount which they have augmented the property in value.

"This is what Paulus teaches us in the case of a *bonæ fidei* purchaser who has erected a building upon land which had been previously mortgaged. Paulus says: *Ius soli superficiem secutam videri. . . . sed bonæ fidei possessores non aliter cogendos ædificium restituere, quàm sumptus in extructione erogatos, quatenus res pretiosior facta est, reciperent.* (*Lib. 59, s. 2, D. d. pign.*)

"This results from the principle on which is founded the obligation of the proprietor to re-imburse the expenses of the *bonæ fidei* possessor.

"This obligation arises only from that rule of equity which forbids one person from enriching himself at the expense of another, without the fault of the latter. According to this rule, the owner ought not to profit, at the cost of the possessor, of the expenses which the latter has incurred; but he thus profits by it only so far as his property is augmented in value by these expenses; he ought not, therefore, to repay more than to that amount, even though the possessor has paid more.

"On the other hand, even if the value of the property is augmented to a greater amount than the expenditure laid out upon it, the owner is not obliged to repay more than the expenditures; because, although he has profited to a greater amount, he has only profited, at the expense of the possessor, to the amount of the sums actually laid out by him.

"The second exception to the principle, that a *bonæ fidei* possessor is entitled to be re-imbursed his expenditures of utility, at least to the extent of the increased value of the property is, that the rule is not so inflexible but that the judge may sometimes depart from it, according to circumstances. This is what Celsus teaches:

*In fundo alieno quem imprudens edificasti aut conseruisti, deinde evincitur, bonus iudex varie in personis causisque constituet: finge et dominum eadem facturum fuisse;¹ reddat impensam et fundum recipiat, usque² cò duntaxat quò pretiosior factus est; et si plus pretio fundi accessit, solum quod impensum est. Finge pauperem qui si id reddere cogatur, laribus, sepulchris arvis carendum habeat: sufficit tibi permitti tollere ex his rebus quæ possis; dum ita ne deterior sit fundus quàm si initio non fuerit edificatum.* (*Lib. 38. D. de rei vind.*)

"In the case put by Celsus, if there be this equitable consideration in favor of the occupant, that the owner ought not to profit, at his expense, \*by the augmentation in value [\*10] which the land has received from the expenditures laid out on it, on the other hand, there

1.—Id est, maximè hoc casu debet reddere impensam, sed etsi facturum non fuisset regulariter debet reddere.

2.—This refers to *impensam reddat*.



is another equitable consideration, still more strong, in favor of the owner, to which the other must yield, which is, that equity still less permits the owner to be deprived of his inheritance, for which he may be supposed to have a just affection, because he is unable to re-imburse expenditures which he did not wish to have laid out upon the property which he has no desire to sell, and which would answer all his purposes in its original condition.

"Where the expenditures of utility, laid out by the *bonæ fidei* possessor, are so considerable that the owner is unable to repay them, before taking possession of his land, and these expenditures have, at the same time, produced a considerable augmentation in its rent, it seems to me that the interests of the respective parties may be conciliated by allowing the owner to take possession, upon condition that he should charge the land with the repayment of the amount of these expenditures by installments. By these means, the just rights of both parties will be preserved; the owner is not deprived of his land, for want of the means of payment, and at the same time he does not profit, at the expense of the occupant, by its increased value."

Our author then proceeds (No. 348) to state that there are expenditures which may augment the value of the thing, supposing the owner to wish to sell it without increasing the rent or profit derived from it, supposing him to wish to retain it for his own use; in which case, the owner is not obliged to re-imburse the *bonæ fidei* possessor, unless the owner be himself a dealer in such articles, and has, therefore, derived a pecuniary benefit from the increased value of the thing. And he quotes, as an example of the application of this rule, a case put in the Digest, of a slave in the hands of a *bonæ fidei* possessor, who has instructed him in painting, or some other elegant art, and the slave being reclaimed by his master, the latter is not responsible to the possessor for his increased value, unless the master be himself a dealer in slaves.

He then states (No. 349) a third exception to the rule, which obliges the owner to re-imburse the *bonæ fidei* possessor the expenses of utility laid out on the property, which is, that the rents and profits received by the occupant are to be first deducted.

"350. As to a *malæ fidei* possessor, the Roman law seems to have denied him the re-imbursement of the expenses not absolutely necessary for the preservation of the property, although they may have augmented its value, and only to have allowed him the privilege of carrying off such articles as could be severed without injury to the property, and leaving it in its original state. *Malæ fidei possessores*, says 11\*] the Emperor Gordian, *\*ejus quod in alienam rem impendunt, non eorum negotiam gerentes quorum est, nullam habent repetitionem, nisi necessarios sumptus fecerint; sin autem utiles, licentia eis permittitur, sine læsione prioris status rei, eos auferre.* (Lib. 5, Cod., h. t.)

"The same also says elsewhere: *Vincas in alieno agro institutas solo cedere, et si à malæ fidei possessore id factum sit, sumptus eo nomine erogatos per retentionem servari non posse incognitum non est.* (Lib. 1, tit. de rei vind. in fragm. Cod. Gregor.)

"Lastly, Justinian, in the institutes (*de rer. div. s. 30*), after having stated that he who has built upon the land of another is entitled to a re-imbursement of his expenditures by the owner, adds, *utique si bonæ fidei possessor sit; nam si scienti solum alienum esse, potest objici culpa, quod edificaverit temerè in eo solo quod intelligebat alienum esse.*"

Pothier then states, that notwithstanding these positive texts, Cujas (Obs. X., cap. I.) supposes that the *malæ fidei* possessor is to be put on the same footing, in this respect, with the *bonæ fidei* possessor, and is equally entitled to be re-imbursed his expenditures, by which the land has been increased in value. Our author, after having refuted this notion, proceeds to observe, that in practice it is left to the discretion of the judge to decide whether the owner ought to indemnify a *malæ fidei* possessor for the expenses of utility, to the amount of the increased value of the land, according to the nature and extent of the *malæ fides* of the possessor, whether it is characterized by circumstances more or less criminal. (See, also, Huber. Prælect., lib. 5, tit. 3., de Hered. Petit., s. 12-19; Pothier, Pandect. Just. in Nov. Ord. Digest., Tom. 1, p. 186-191; Ib., p. 201-204; Argou, Instit. au Droit Français, Tom. 2, liv. 4, ch. 17; Domat, Loix Civiles, liv. 3, tit 5, sec. 3.)

The subject under consideration has been treated somewhat at large by Lord Kaimes, in his Principles of Equity. The following citations will show that the author's notions of abstract justice, and his legal principles deduced from them, are in general accordance with the law of England, as well as with the doctrines of the civilians:

In his third book (the first chapter of which is entitled, "What equity rules with respect to Rents levied upon an erroneous title of Property,") he says: "With respect to land possessed upon an erroneous title of property, it is a rule established by the Roman law, and among modern nations, that the true proprietor, asserting his title to the land, has not a claim for the rents levied by the *bonæ fidei* possessor, and consumed. But though this subject is handled at large, both by the Roman lawyers, and by their commentators, we are left in the dark as to the reason of the rule and of the principle upon which it is founded." \* \* \* \*

\*If the common law afford to the proprietor a claim for the value of his rents consumed, it must be equity correcting the rigor of the common law, that protects the possessor from this claim; but if the proprietor have not a claim at common law, the possessor has no occasion for equity. The matter, then, is resolvable into the following question: Whether there be or be not a claim at common law. And to this question, which is subtle, we must lend attention." \* \* \* (p. 270, 271, 2d ed.)

Lord Kaimes then proceeds to an investigation of this point, and, at the close of the inquiry, observes: "And thus it comes out clear that there is no action at common law against the *bonæ fidei* possessor for the value of the fruits he consumes; such an action must resolve itself into a claim of damages, to which the innocent cannot be subjected." \* \* \* (p. 273.)

"But suppose the *bonæ fidei* possessor to be *loquutor* by the rents he has levied;" \* \* \*

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common law "there is no remedy, for the reason before given, that there is nothing upon which to found an action of reparation of damages in this case, more than where the rents are consumed upon living. But that equity affords an action, is clear; for the maxim, '*quod nemo debet locupletari alienâ jacturâ*,' is applicable to this case in the strictest sense." (p. 274.)

By common law, Lord Kaimes evidently must mean the unwritten law of Scotland; since the common law of England has doubtless always afforded some remedy for the recovery of rents and profits, both where the fruits have been consumed, and where the tenant is *locupletior*. It would indeed strike one that the famous maxim of the Roman law, of which Lord Kaimes has made so judicious a use, viz., "that no one ought to profit by another's loss," is applicable to the case of fruits consumed, not less than to the supposition that the tenant is *locupletior*. The fruits consumed are certainly gain to the tenant, and loss to the proprietor, quite as much as fruits hoarded up are. But in ordinary cases, it is to be supposed that the tenant is a gainer and *locupletior* (in Lord Kaimes' sense of the word), and hence the distinction may not be very important; since he allows that equity will grant relief even against a *bonæ fidei* possessor, in case he be *locupletior*.

In another place (Book 1, part 1, art. 1), Lord Kaimes considers the case of a *bonæ fidei* possessor, and the melioration of real property in his possession.

"The title of land-property being intricate, and often uncertain, instances are frequent where a man, in possession of land the property of another, is led, by unavoidable error, to consider it as belonging to himself; his money is bestowed without hesitation in repairing and meliorating the subject." (p. 99.) "Everyone, **13\*** in that case, must be sensible of \*a hardship that requires a remedy; and it must be the wish of every disinterested person, that the *bonæ fidei* possessor be relieved from this hardship. That the common law affords no relief will be evident at first sight." (p. 98.) But "a court of equity interposes, to oblige the owner to make up the loss, as far as he is *locupletior*." (p. 99.)

The maxim of the law of England, on this subject, seems to have always been *quod caveat emptor*. This is the general spirit of the common law doctrine as to the transfer both of personal chattels and of real property. Where there is an outstanding judgment or mortgage, concerning which the purchaser is ignorant, the maxim is applied, so far as the land itself, and the title to it, claimed by persons other than the vendor and vendee. If there be a remedy, then, for the *bonæ fidei* possessor, it is, as Lord Kaimes observes, only to be found in a resort to a court of equity; and there, as we shall presently see (in the case of *Dormer v. Fortescue*), the relief will depend upon the evidence of *bona fides*.

The authorities in the common law of England are numerous and uniform, from the earliest times, in support of the doctrine laid down by the court in the case in the text, concerning rents and profits. "Est autem ista recognitio (says Bracton) sive assisa triplex et pœna multiplex ut infra de restitutione damno-  
Wheat. 8.

rum: Est enim personalis quia persequitur enim, qui fecit disseisinam propter factum quia ipse fecit; persequitur etiam cum ad pœnam propter injuriam; persequitur etiam rem quoad restitutionem et in hoc est rei persecutoria." . . . "Acquiritur vero per assisam istam non solum ipsa res spoliata corporalis verum etiam omnes fructus medio tempore percepti cui competit querela. Item non solum ipsa res sed in ipsa pax et quies. Item non solum pax et quies in proprio, sed libertas et perturbationis evacuatio, de quibus mentio facta est in principio." (Lib. IV. De assisa novæ disseisinæ, Cap. VI.)

Nearly the same thing is to be found in Fleta; take the following citations: "Et quo easu, si talis intrusor teneat se in possessione ejeci poterit impunè vel donator per assisam novæ disseisinæ seisinam suam recuperabit." (Fleta, Lib. III. Cap. 15.)

"Domino vero proprietatis competit remedium versus ejectorem per assisam novæ disseisinæ et perinde recuperabit tenementum dampnâ vero minimè." (Id. L. IV., C. 31.)

And Brooke also, in his abridgement, is equally explicit. "Nota (says he) per asenm justices et sergeants, si disseysor fait feoffment, le disseysie reenter il recouvera son damages per severals briefes de trespass tam vers les feoffees come vers le disseysor et in assyse derent le playntife recouvera tout son damages vers le tenaunt pour xx. ans coment \*que il nad [**\*14** estre tenaunt mes per un moys. (33 Hen. VI., 46.)" (Bro. Abridg. part I, fol. 202, s. 13, tit. Damages.)

The extent to which the principle is carried in this place, is warranted by the statute 6 Edw. I., commonly called the Statute of Gloucester, which enacts (among other things) "that the disseisee shall recover damages in a writ of entry upon novel disseisin, against him that is found tenant after the disseisin." (*Vide* Plowden, 204.) The statute of Marlbridge (52 Hen. III., c. 16), had before given damages in a writ of mort auncester against the chief lord.

It is also laid down in Brooke's Abridgment, "that if a man disseise me and enfeoff persons unknown, and then retake an estate to himself and ten others, and only two of these ten take the profits, the disseisee shall have an assize against the disseisor, and not against the ten feoffees, for the profits; and it shall be no good plea for the disseisor in this case to say that he received nothing of the rents with the ten others." (See, also, folio 121, b. s. 22, Part II. tit. *Pernor de profits et rents*; and titles Assize. Disseisor and Disseisin. Trespass.)

Lord Coke says, that "in actions where damages are to be recovered, and the land is the principal" (some hold the opinion), that "the demandant never counteth to damages, and yet shall recover them." "Others doe hold the contrarie." (Co. Litt., 356 a.) And in Mr. Butler's note upon this passage, he says that "Sir Edward Coke, in his commentary upon the statute of Gloucester (2 Inst., 286), observes, that regularly, in personal and mixed actions, damages were to be recovered at common law; but that in real actions no damages were to be recovered at the common law, because the court could not give the demandant that which he demanded not; and the demandant in real actions demands no damages, either by writ or count. The assize was a mixed action, and,



therefore, if upon the trial the demandant made out his title, his seisin, and his disseisin, by the tenant, he had judgment to recover his seisin, and his damages for the injury sustained." (Co. Litt., 355 b. Note 1).

It thus appears that, by the old law, damages were formerly recovered by the demandant in a writ of assize. But by the modern law, "the action for mesne profits is consequential to the recovery in ejectment." (Per Lord Mansfield, 2 Burrow, 668.) Undoubtedly, the substitution of the modern action of ejectment, for the assize and the ancient action of ejectment, has produced this change.

In the case of *Goodtitle v. Tombs* (3 Wils. Rep., 120), Lord Chief Justice Wilmot says: "Before the time of Henry VII., plaintiffs in ejectment did not recover the term, but, until about that time, the mesne profits were the measure of damages. I brnsh out of my mind all 15\*] fiction \*in an ejectment, the nominal plaintiff, and nominal defendant, the casual ejector—the *dramatis personee*, or *actores fabulae*, and consider the recovery by default, or after verdict, as the same thing, viz., a recovery by the lessor of the plaintiff of his term against the tenant in the actual wrongful possession of the land. By the old law of practice, in an action of ejectment (as I said before) you recovered nothing bnt damages—the measure whereof was the mesne profits; no term was recovered. But when it became established that the term should be recovered, the ejectment was lieked into the form of a real action; the proceeding was *in rem*, and the thing itself—the term only, was recovered, and nominal damages, but not the mesne profits; whereupon, this other mode of recovering the mesne profits, in an action of trespass, was introduced and granted upon the present fiction of ejectment; and I take it that the present action is put in the place of the ejectment at common law, which was, indeed, a true and not a fictitious action, in which the mesne profits only, and not the term, were recovered; for it was no other than a mere action of trespass. You have turned me out of possession, and kept me out ever since the demise laid in the declaration; therefore I desire to be paid the damages to the value of the mesne profits, which I lost thereby; this is just and reasonable." (3 Wilson's Rep., 120. See, also, 2 Dunlap's Practice, 973, 974, 1068, 1069.)

Both in the English practice, and that of the United States, the plaintiff who recovers judgment in ejectment, is entitled to his action for the rents and profits received by the defendant anterior to the time of the demise laid in the ejectment. (3 Bl. Com., 205; Adams' Eject., 329; 2 Dunlap's Prae., 1070.) And the statute of limitations is a bar to a recovery of the rents and profits received beyond six years before the bringing of the action. (Bull. N. P., 88; *Hare v. Furey*, 3 Yeates' Rep., 13.)

In *Van Alen v. Rogers* (1 Johns. Cas., 281) it was determined by the Supreme Court of New York that if the tenant has made buildings and other improvements, antecedent to the time when the plaintiff's title accrued, under a contract with the then owner, he will not be allowed for them in an action for the mesne profits, brought by a devisee, bnt must seek his compensation from the personal representatives of the deviser. In the case of *Murray v. Gouver-*

*neur* (2 Johns. Cas., 441), it is said, by Mr. Justice Kent, that the action for mesne profits is an equitable action, and will allow of every kind of equitable defense; and that a *bonae fidei* purchaser, without notice, may set-off the value of repairs made upon a house, against the amount of the rents and profits.

It is observed by Mr. Adams, in his valuable treatise on the action of \*ejectment, [\*16 that it has been said by some, that the plaintiff is entitled to recover the mesne profits only from the time he can prove himself to have been in possession; and that, therefore, if a man make his will and die, the devisee will not be entitled to the profits until he has made an actual entry, or in other words, until the day of the demise in ejectment; for that none can have an action for mesne profits, unless in ease of actual entry and possession. Others have held, that when once an entry has been made, it will have relation to the time the title accrued, so as to entitle the claimant to recover the mesne profits from that time; and they say, that if the law were not so, the courts would never have suffered plaintiffs in ejectments to lay their demises back in the manner they now do, and by that means entitle themselves to recover profits, to which they would not otherwise be entitled. The latter seems the better opiuiou; but these antecedent profits are now seldom the subject of litigation, from the practice of laying the demise and ouster immediately after the time when the lessor's title accrues." (Adams' Eject., 334, 335.)

Where a fine, with proclamations, has been levied, an entry to avoid it will not, in the action for mesne profits, entitle the plaintiff to the profits between the time of the fine levied and the time of the entry, although they probably may be recovered in a court of equity. (*Compere v. Hicks*, 7 Term Rep., 723; *Dormer v. Fortescue*, 3 Atk., 124.)

And this conducts us from the decisions of the courts of law to those of equity. In the case of *Dormer v. Fortescue*, referred to in the text, it was decreed that "the defendants should account with the lessor of the plaintiff, Dormer, for all the rents and profits of the estates, from the time when his title first accrued." "I am well satisfied," says Lord Chancellor Hardwicke, "in my opinion upon this case, and that the plaintiff is entitled to the rents from the accrual of his title, and that in this court he has a right to demand them."

\* \* \* "There are several cases where this court will do it" (*i. e.*, decree an account of rents and profits), "and several where they will not; but I can by no means admit the latitude in the anonymous case in 1 Veruon, 105, or, rather, in that note of a case."<sup>1</sup> "For if a man brings an ejectment bill for possession, and an account of rents and profits, where there is no mixture of equity, the court will oblige the plaintiff to make his election to proceed here or at law, and if at law, he must proceed for the whole there." \* \* "But, \*as I said [\*17

1—"Where a man is put to his election, whether to proceed at law or in this Court, if the bill be for the land, and to have an account of the mesne profits, he may elect to proceed in an ejectment at law for the possession, and in equity upon the account, because at law he can recover damages for mesne profits from the time only of the entry laid in the declaration." 1 Vern. 105.

before, there are several cases where this court does decree an account of rents and profits, and that from the time the title accrued." \* \* \* In this case, it appears that the settlement under which the plaintiff's title arose was in the hands of the defendants, and detained by them, though I do not say it was fraudulently obtained, but still the plaintiffs could not come at it, without the assistance of this court. The plaintiff, it is true, brought his ejectment before he brought his bill here, and from hence the defendant's counsel have inferred that he knew his title; but how did he know it? Why, only by guess; for it is plain the plaintiff did not so much as know there was this two hundred years' term standing out; for the deed, by which it was created, is not so much as mentioned in the bill, and he only knew it by its being read in the cause." (3 Atk., 124.)

This case affords us also some assistance upon

the nature of a *bona fide* possession, which has been already discussed in the former part of this note.

"It is objected," said Lord Hardwicke, "that where a man is *bonæ fidei* possessor, he shall not account according to the rule of the civil law; and the rule of this court, and the civil law, is stronger in this respect than the law of England."

"But where a man shall be said to be *bonæ fidei* possessor, is where the person possessing is ignorant of all the facts and circumstances relating to his adversary's title."

This last interpretation confines the case of *bonæ fidei* possessor within very narrow limits; and wherever there be color of dispute as to one's title to land, even from the time the title accrues, the tenant must be considered, according to Lord Hardwicke, as a *malæ fidei* possessor.

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[NOTE II.]

TO THE CASE OF HUGHES v. MARYLAND INSURANCE COMPANY, *ante*, p. 311.

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WASHINGTON, J. The question, in this case, is, whether the action is maintainable. The objection to the action of debt, where the penalty is uncertain, is, that this action can only be brought to recover a specific sum of money, the amount of which is ascertained. It is said, that the very sum demanded must be proved; and on a demand for thirty pounds, you can no more recover twenty pounds than you can a **18\*** horse on a demand <sup>for</sup> a cow. Blackstone says,<sup>1</sup> that debt, in its legal acceptation, is a sum of money due, by certain and express agreement, where the quantity is fixed, and does not depend on any subsequent valuation to settle it; and for non-payment, the proper remedy is the action of debt, to recover the specific sum due. So, if I verbally agree to pay a certain price for certain goods, and fail in the performance, this action lies; for this is a determinate contract. But if I agree for no settled price, debt will not lie, but only a special action on the case; and this action is now generally brought, except in cases of contracts under seal, in preference to the action of debt; because, in this latter action, the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single cause of action, fixed and determined, and which, if the proof varies from the claim, cannot be looked upon as the same contract of which performance is demanded. If I sue for thirty pounds, I am not at liberty to prove a debt of twenty pounds, and recover a verdict thereon; for I fail in the proof of that contract which

my action has alleged to be specific and determinate. But *indebitatus assumpsit* is not brought to compel a specific performance of the contract, but is to recover damages for its non-performance; and the damages being indeterminate, will adapt themselves to the truth of the case, as it may be proved; for if any debt be proved, it is sufficient.

The doctrine laid down by this writer appears to be much too general and unqualified, although, to a certain extent, it is unquestionably correct. Debt is certainly a sum of money due by contract, and it most frequently is due by a certain and express agreement, which also fixes the sum, independent of any extrinsic circumstances. But it is not essential that the contract should be express, or that it should fix the precise amount of the sum to be paid. Debt may arise on an implied contract, as for the balance of an account stated, to recover back money which a bailiff has paid more than he had received, and in a variety of other cases, where the law, by implication, raises a contract to pay.<sup>2</sup> The sum may not be fixed by the contract, but may depend upon something extrinsic, which may be averred, as a promise to pay so much money as plaintiff shall expend in repairing a ship, may be sued in this form of action, the plaintiff averring that he did expend a certain sum.<sup>3</sup> So on promise by defendant to pay his proportion of the expenses of defending a suit, in which defendant was interested, with an averment that plaintiff had

2.—3 Com. Dig. 365.

3.—2 Bac. 20.

1.—3 Black. Com. 154.

Wheat. 8.



expended so much, and that defendant's pro-  
19\*] portion amounted to so much.<sup>1</sup> \*So, an action of debt may be brought for goods sold to defendant, for so much as they were worth.<sup>2</sup> So, debt will lie for use and occupation, where there is only an implied contract, and no precise sum agreed upon.<sup>3</sup>

Wooddson (3d vol., 95), states that debt will lie for an indeterminate demand, which may readily be reduced to a certainty. In *Emery v. Fell* (2 Term Rep., 28), in which there was a declaration in debt, containing a number of counts for goods sold and delivered, work and labor, money laid out and expended, and money had and received, the court, on a special demurrer, sustained the action, although it was objected that it did not appear that the demand was certain, and because no contract of sale was stated in the declaration. But the court took no notice of the first objection, and avoided the second, by implying a contract of sale, from the words which stated the sale. These cases prove that debt may be maintained upon an implied as well as upon an express contract, although no precise sum is agreed upon. But the doctrine stated by Lord Mansfield, in the case of *Walker v. Witter* (Douglass, 6), is conclusive upon this point. He lays it down that debt may be brought for a sum capable of being ascertained, though not ascertained at the time the action was brought. Ashurst and Buller say that whenever *indebitatus assumpsit* is maintainable, debt is also. In this case two points were also made by the defendant's counsel; first, that on the plea of *nil debet* the plaintiff could not have judgment, because debt could not be maintained on a foreign judgment; and second, that the one plea of *nil tiel record*, judgment could not be entered for the plaintiff, because the judgment in Jamaica was not on record. The court were in favor of the defendant on the second point, and against him in the first, by deciding that debt could not be maintained on a foreign judgment, because *indebitatus assumpsit* might; and that the uncertainty of the debt demanded in the declaration was no objection to the bringing of an action of debt. The decision, therefore, given upon that point, was upon the very point on which the cause turned. But, independent of the opinion given in this case, is it not true, to use the words of Buller, "that all the old cases show, that whenever *indebitatus assumpsit* is maintainable, debt also lies." The subject is very satisfactorily explained by Lord Loughborough, in the case of *Rudder v. Price*,<sup>4</sup> which was an action of debt, brought on a promissory note, payable by installments, before the last day of payment was past, in which the court, yielding to the weight of authority, rather than to the reason which governed it, decided that the action could not be supported, because the 20\*] contract, being entire, would \*admit of but one action, which could not be brought until the last payment had become due, although *indebitatus assumpsit* might have been brought. But his lordship was led to inquire into the ancient forms of action on contracts, and he

states that in ancient times debt was the common action for goods sold, and for work and labor done. Where *assumpsit* was brought, it was not a general *indebitatus assumpsit*; for it was not brought merely on a promise, but a special damage for a non-feasance, by which a special action arose to the plaintiff. The action of *assumpsit*, to recover general damages for the non-performance of a contract, was first introduced by *Slade's case*, which course was afterwards followed. In the case of *Walker v. Witter*, Buller also stated, that till *Slade's case*, a notion prevailed, that on a simple contract for a certain sum, the action must be debt; but it was held in that case that the plaintiff might bring *assumpsit* or debt, at his election.

Thus it appears, that in all cases of contracts, unless a special damage was stated, the primitive action was debt, and that the action of *indebitatus assumpsit* succeeded, principally, I presume, to avoid the wager of law, which, in *Slade's case*, was one of the main arguments urged by the defendant's counsel against allowing the introduction of the action of *assumpsit*, as it thereby deprived the defendant of his privilege of wagering his law. Buller seems, therefore, to have been well warranted, in the case of *Walker v. Witter*, in saying that all the old cases show, that where *indebitatus assumpsit* will lie, debt will lie. The same doctrine is supported by the case of *Emery v. Fell*,<sup>6</sup> which was an action of debt, in which all the counts of *indebitatus assumpsit* are stated, where the objection to the doctrine was made and overruled. So, in the case of *Harris v. Jameson*,<sup>7</sup> Ashurst refers, with approbation, to the opinion delivered in the case of *Walker v. Witter*. That debt may be brought for foreign money, the value of which the jury are to find, had been decided before the case of *Walker v. Witter*, as appears in the case of *Rands v. Peck*,<sup>8</sup> and in *Draper v. Rastal*, the same action was brought, though in different ways, for current money, being the value of the foreign.

Comyns, in his Digest, tit. Debt, p. 366, where he enumerates the cases in which debt will not lie, states no exception to the rule, that where *indebitatus assumpsit* will lie, debt will lie, but one, for the interest of money due upon a loan. But the reason of that is explained by Lord Loughborough, in the case of *Rudder v. Price*, who states that until the case of *Cook v. Whorwood*, upon a covenant to pay a stipulated sum by installments, \*if [\*21 the plaintiff brought *assumpsit*, after the first failure, he was entitled to recover the whole sum in damages, because he could not, in that form of action, any more than in the action of debt, support two actions on an entire contract. Until that decision, the only difference between debt and *assumpsit*, in such a case, was, that the former could not be brought until after the last installment was due; and in the latter, though it might be brought after the first failure, yet the plaintiff might recover the whole, because he could not maintain a second action on the same contract.

1.—3 Levy, 429.

2.—2 Com. Dig. 365.

3.—6 Term Rep. 63.

4.—1 H. Black. 550.

5.—T. 44 Eliz.; 4 Co. 92 b.

6.—2 Term Rep. 30.

7.—5 Term Rep. 557.

8.—Cro. Jac. 618.

I proceed with the doctrine of Judge Blackstone, before stated. After stating what constitutes debt, he observes "that the remedy is an action of debt, to recover the special sum due." It is observable, that he does not say that the plaintiff is to recover the sum demanded by his declaration, and no person will deny but that he is to recover the special sum due.

After stating what constitutes a debt, and prescribing the remedy, Judge Blackstone proceeds to the evidence and recovery, and says "the plaintiff must prove the whole debt he claims, or he can recover nothing." On this account he adds, "the action of *assumpsit* is most commonly brought; because, in that, it is sufficient if the plaintiff prove any debt to be due, to enable him to recover the sum, so proved, in damages." If this writer merely means to say that where a special contract is laid in the declaration, it must be proved as laid, the doctrine will not be controverted. If debt be brought on a written agreement, the contract produced in evidence must correspond, in all respects, with that stated in the declaration, and any variance will be fatal to the plaintiff's recovery. Such, too, is the law in all special actions in the case; but if Judge Blackstone meant to say that in every case where debt is brought on a simple contract, the plaintiff must prove the whole debt as claimed by the declaration, or that he can recover nothing, he is opposed by every decision, ancient and modern. The old cases, before mentioned, in which debt was brought and sustained, are all cases where it is impossible to suppose that the sum stated in the declaration was or could in every instance be proved, any more than it is or can be proved in actions of *indebitatus assumpsit*. They are, in fact, actions substantially like to actions of *indebitatus assumpsit* in the form of action for debt. The action of debt for foreign money, is and can be for no determinate sum; because the value must be found by the jury, either upon the trial of the issue, or upon a writ of inquiry, where there is judgment by default.<sup>1</sup>

22\*] \*The case of *Sanders v. Mark* is debt for an uncertain sum, in which the debt claimed was for fifteen pounds eighteen shillings and sixpence, and the defendant's proportion of the whole sum was averred to be fifteen pounds eighteen shillings and eight pence; yet the action was supported. This is plainly a case where the sum due could not be certainly averred; because the yearly value of the defendant's property might not be known to the plaintiff, and could only be ascertained, with certainty, by the jury. In the case of *Walker v. Witter*, Lord Mansfield is express upon this point. He says that debt may be brought for a sum capable of being ascertained, though not ascertained at the time of bringing the action; and he adds, that it is not necessary that the plaintiff should recover the exact sum demanded. In the case of *Rudder v. Price*, Lord Loughborough, who has shed more light upon this subject than any other judge, says, "that long before *Slade's* case, the demand in an action of debt must have been for a thing certain in its nature; yet it was by no means necessary that the amount should be set out so precisely that less could not be recovered."

In short, if, before *Slade's* case, debt was the common action for goods sold, and work done, it is more obvious that it was not thought necessary to state the amount due, with such precision, as that less could not be recovered; for, in those cases, as the same judge observes, "the sum due was to be ascertained by a jury, and was given in the form of damages." But yet the demand was for a thing certain in its nature; that is, it was capable of being ascertained, though not ascertained, or perhaps capable of being so, when the action was brought. Whence the opinion arose, that in an action of debt on a simple contract, the whole sum must be proved, I cannot ascertain. It certainly was not, and could not be the doctrine prior to *Slade's* case; and it is clear that it was not countenanced by that case. However, let the opinion have originated how it might, Lord Loughborough, in the above case, denominates it an erroneous opinion, and says that it has been some time since corrected.

In the case of *M'Quillen v. Coxe*, the sum demanded was five thousand pounds; which was fifty more than appeared to be due by the different sums. The objection was made on a special demurrer, that the declaration demanded more than appeared by the plaintiff's own showing to be due. The court did not notice the alleged variance between the writ and declaration, or the misrecital of the writ; but overruled the demurrer, because the plaintiff might, in an action of debt on a simple contract, prove and recover a less sum than he demanded in the writ.

From this last expression it might be supposed that the court meant \*to distinguish [23] between the sum demanded by the writ, and that demanded by the declaration; but this could not have been the case, because the sum demanded by the writ, and that demanded by the declaration, was the same viz., five thousand pounds. There was, in fact, no variance; for, though the declaration recites the writ, yet the sum demanded, and which the declaration declared to be the sum which the defendant owed and detained, was the same sum as that mentioned in the writ; and the objection stated in the special demurrer, was made to the variance between the sum demanded by the declaration, and the sum alleged to be due.

The distinction taken in the case of *Ingleton v. Cripps*,<sup>2</sup> runs through all the above cases, and appears to be perfectly rational—viz., that where debt is brought on a covenant, to pay a sum certain, any variance of the sum in the deed will vitiate. But where the deed relates to matter of fact extrinsic, there, though the plaintiff demanded more than is due, he may enter a remitter for the balance. This shows that debt may be brought for more than is due, and that the jury may give less; or, if they give more than is due, the error may be corrected by a remitter.

Thus stands the doctrine in relation to the action of debt on contracts; and if debt will lie on a contract, where the sum demanded is uncertain, it would seem to follow that it would lie for a penalty given by statute, which is uncertain, and dependent upon the amount to be

1.—Randall's Peake.  
Wheat. 8.

2.—2 Lord Raym. 815; Salk. 659.



assessed by a jury; for, when they have assessed it, the sum so fixed becomes the amount of the penalty given. This, however, stands upon stronger ground than mere analogy. The point is expressly decided in the case of *Pemberton v. Shelton*.<sup>1</sup> That was an action of debt, brought upon the first section of the statute, 2 Ed. VI., ch. 13, which gives the treble value of the tithes due, for not setting them out. The declaration claimed thirty-three pounds, as the treble value; and, in setting forth the value of the tithes, the whole amount appeared to be more than one-third of the sum demanded; so that the plaintiff claimed less than the penalty given by the statute. Upon *nil debet* pleaded, the jury found for the plaintiff twenty pounds, and a motion was made in arrest of judgment, for the reason above mentioned. The court overruled the motion, upon the ground afterwards laid down in the case of *Ingledon v. Cripps*. They held that there was a difference when the action of debt is grounded on a specialty, or contract, which is a sum uncertain; or upon a statute, which gives a certain sum for the penalty; and where it is grounded on a demand, when the 24\*] sum is uncertain, being such \*as shall be given by the jury. In the former, it was agreed that the plaintiff cannot demand less than the sum agreed to be paid or given by the statute;

but in the latter, it is said that if the declaration varies from the real sum, it is not material; for he shall not recover according to his demand in the declaration, but according to the verdict and judgment which may be given for the plaintiff. It cannot be said that this doctrine was laid down in consequence of the court considering this as a statutory action, to which it was necessary to accommodate the recovery, by changing general principles of law applicable to other cases; for it will appear, by a reference to the statute, that it prescribes no remedy for enforcing the penalty; and that debt was brought upon the common law principle that where a statute gives a penalty, debt may be brought to recover it. In this case, the statute gives the action of debt, and I cannot perceive in what other form, than this one which has been adopted, the declaration could have been drawn. Had it claimed the smallest sum, it might have been less than the jury might have thought the United States entitled to recover; and yet, judgment could not have been given for more. I know of no precedent for a declaration in debt, claiming no precise sum to be due and detained, nor any principle of law, which would sanction such a form. On the other hand, I find abundant authority for saying that the demand of one sum does not prevent the recovery of a smaller sum, where it is diminished by extrinsic circumstances.

1.—Crooke James, 498.

## VIII WHEATON.

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8 Wheat. 1-108, 5 L. 547, GREEN v. BIDDLE.

**Rents and profits.**—At common law disseizor is liable to owner for all rents and profits which he has received, pp. 75, 80.

Cited and principle applied in *Cunningham v. Ashley*, 16 Ark. 182, 63 Am. Dec. 63, holding right to rents and profits of land necessarily follows the recovery as a consequence resulting therefrom; *Trubee v. Miller*, 48 Conn. 357, 40 Am. Rep. 180, where tenant of disseizor was compelled to account to disseizee; *Alliance Co. v. Hardwood Co.*, 74 Miss. 589, 60 Am. St. Rep. 533, 21 So. 398, 36 L. R. A. 156, disseizee, after re-entry, may maintain trover or trespass de bonis, for trees cut while out of possession; dissenting opinion, *Sanderson v. Price*, 21 N. J. L. 647, holding tenant of mortgagor holding by lease made subsequent to mortgage, is liable for mesne profits from time of service of declaration in ejectment. Cited, without special application of the rule, in *City of Apalachicola v. Apalachicola Company*, 9 Fla. 349, 79 Am. Dec. 287; *Mundy v. Monroe*, 1 Mich. 72; *Bacon v. Sheppard*, 11 N. J. L. 199, 200, 20 Am. Dec. 585, 586; *Peter v. Hargrave*, 5 Gratt. 18, where slave, having recovered freedom, brought action for mesne profits; *Cain v. Cox*, 29 W. Va. 261, 1 S. E. 307; note, 85 Am. Dec. 326.

**Wills.**—Devise of profits of land, or even grant of them, will pass a right to the land itself, p. 76.

Principle affirmed without special application in *Mason v. Kellogg*, 38 Mich. 137.

**Estoppel.**—Equitable owner, cognizant of his rights, who stands by and sees another occupy and improve his property, is estopped to claim value of these improvements as well as the land, p. 77.

Cited in *Willie v. Brooks*, 45 Miss. 548, as ground for equitable estoppel.

**Rents and profits.**—In equity, one in possession is liable to account to true owner for rents and profits, from time title accrued, with certain exceptions, p. 78.

Cited and applying exception in *Russell v. Southard*, 12 How. 156, 13 L. 934, where there was laches in asserting rights under a mortgage; *Martin v. Evans*, 1 Strob. Eq. 355, where possession was bona fide under purchase at sheriff's sale. Cited generally to this point in *Tyler v. Maguire*, 17 Wall. 292, 21 L. 586; *Payne v. Atterbury*, Harr. Ch. (Mich.) 419.

U. S. Notes 8 Wheat. 5 L. Ed. 730—60 p.



**Bona fide possessor of land** is one who not only supposes himself to be the true proprietor, but who is ignorant that his title is contested by another claiming a better right, p. 79.

Cited and affirmed in *Canal Bank v. Hudson*, 111 U. S. 80, 28 L. 359, 4 S. Ct. 311, involving right of possessor to compensation for improvements; *Gordon v. Twcedy*, 74 Ala. 235; *Fee v. Cowdry*, 45 Ark. 419, 55 Am. Rep. 566; *McLaughlin v. Barnum*, 31 Md. 454; *Cole v. Johnson*, 53 Miss. 101; *Dorn v. Dunham*, 24 Tex. 379; *Broumel v. White*, 87 Md. 527, 39 Atl. 1049, holding one building by mistake partly on unopened street entitled to be paid for same on removal.

**Improvements.**—At common law bona fide occupant may recoup the value of, against claim for mesne profits, pp. 81, 82.

Cited and principle applied in analogous case, *Williams v. Gibbs*, 20 How. 538, 15 L. 1014, where assignee, being compelled to defend title of assignor, was held entitled to reimbursement for costs; *Bright v. Boyd*, 1 Story, 493, 494, 496, F. C. 1,875, where bona fide purchaser made improvements; *Stark v. Starr*, 1 Sawy. 26, F. C. 13,307, bona fide possessor under color of title; *Lamar v. Minter*, 13 Ala. 43, where improvements were made under parol contract to purchase; *Porter v. Hanley*, 10 Ark. 194, affirming the rule, although case is decided on statutory grounds; *Byers v. Fowler*, 12 Ark. 292, 54 Am. Dec. 293, and *Jackson v. Loomis*, 4 Cow. 172, 15 Am. Dec. 348, cases of bona fide purchasers; *McCloy v. Arnett*, 47 Ark. 458, 2 S. W. 76, but only to extent they have enhanced rent; *Griswold v. Bragg*, 48 Conn. 582, 18 Blatchf. 208, 48 Fed. 522, holding statute valid which permits bona fide possessor in action of ejectment to set off value of improvements against claim for use and occupation. Cited with approval in *Pugh v. Bell*, 1 J. J. Marsh. 405, holding further, rule that occupant may recover for improvements only to extent of claim for rents, should be restricted to cases mala fide; *McLaughlin v. Barnum*, 31 Md. 456, holding further, occupant is not entitled to compensation for improvements made after notice of adverse claim; *Pickering v. Pickering*, 63 N. H. 471, where tenant in common was allowed to set off expense of repairs on common property against claim for accounting for rents brought by cotenant; *Preston v. Brown*, 35 Ohio St. 28, where improvements were made by one in possession under agreement to purchase, holding his claim is a lien on property; *Dellet v. Whitner*, Chev. Eq. 228, but chancery will not sustain a claim for improvements beyond rents and profits; *Wilson v. Scruggs*, 7 Lea, 641, applying principle in construction of statute on subject. Cited with approval in *Carver v. Jackson*, 4 Pet. 101, 7 L. 796. Cited generally in *Litchfield v. Johnson*, 4 Dill. 556, F. C. 8,387, case is decided on statutory grounds; *Tufts v. Tufts*, 3 Wood. & M. 482, 512, F. C. 14,233, collecting authorities. Cited, arguendo, in *Jones v. Great Southern Hotel*, 86 Fed. 385; *Summers v. Howard*, 33 Ark. 496, holding improvements should be estimated

at their value at the time of the recovery. Commented on in *Billings v. Hall*, 7 Cal. 7, 8. Cited generally, without application of the rule, in *Davis v. Smith*, 5 Ga. 289, 48 Am. Dec. 288. Approved in *Parson v. Moses*, 16 Iowa, 445, and *Putnam v. Ritchie*, 6 Paige, 403, although decided on statutory grounds. Cited without comment, *Bell's Heirs v. Barnet*, 2 J. J. Marsh. 528. Cited, *arguendo*, in *Stark v. Coffin*, 105 Mass. 332; *McCoy v. Grandy*, 3 Ohio St. 466, holding further as to the constitutionality of an act which gives occupying claimant option of taking land at its value less improvements, or compelling successful claimant to pay for improvements; *Martin's Appeal*, 23 Pa. St. 438. Cited in *Scott v. Mather*, 14 Tex. 236, 237, and *Saunders v. Wilson*, 19 Tex. 196, where the court hold it is not unconstitutional to allow bona fide occupant full value for improvements regardless of value of use and occupation; *Hearn v. Camp*, 18 Tex. 549, 550. See also extended note, 15 Am. Dec. 350-352; note, 6 Am. St. Rep. 495.

Distinguished in *Dermott v. Jones*, 23 How. 235, 6 L. 448, where claimant did not follow proper procedure; *Doe v. Roe*, 31 Fed. 99, where plea, being equitable, was set up to action at law; *Leighton v. Young*, 52 Fed. 444, 10 U. S. App. 298, 18 L. R. A. 271, by statute; *N. O. & S. R. Ry. v. Jones*, 68 Ala. 55, where improvements were made by trespasser and in mala fide; *Hawke v. Deffebach*, 4 Dak. 40, 22 N. W. 490; also, *Woodhull v. Rosenthal*, 61 N. Y. 397, where improvements were not made in good faith; *Ross v. Irving*, 14 Ill. 177; *Armstrong v. Jackson*, 1 Blackf. 375, and *Webster v. Stewart*, 6 Iowa, 403, on statutory grounds; *Strike v. McDonald*, 2 Harr. & G. 225, 227, 1 Bland Ch. 76, 78, where improvements were made by one conscious of defect in title. Distinguished in *Laible v. Ferry*, 32 N. J. Eq. 801, where claimants extended credit to party whom they knew had no authority to bind trust property; *Worthington v. Young*, 8 Ohio, 404, where attempt was made to set off value of improvements against claim for rents, under lease providing tenant might remove improvements at expiration of term; *Effinger v. Hall*, 81 Va. 102, and *Dawson v. Grow*, 29 W. Va. 337, 1 S. E. 567, improvements made with notice of defect in title. Modified, *Ewing's Heirs v. Handley*, 4 Litt. 371, and *Pugh v. Bell*, 2 T. B. Mon. 129, 15 Am. Dec. 147, holding value of improvements is not always restricted to amount of rents charged.

**Constitutional law.**—Any law which enlarges, abridges, or in any manner changes the intention of parties, resulting from stipulations in the contract, necessarily impairs it, and to that extent is void, p. 84.

The following citing cases affirm and apply this principle: *Schuster v. Weiss*, 114 Mo. 174, 21 S. W. 443, 19 L. R. A. 187, liability of surety changed by enlarging contract of principal; *Berdan v. Van Riper*, 16 N. J. L. 11, holding an act respecting estates of joint tenancy does



not affect estates created before its adoption; dissenting opinion, *State v. Mathews*, 3 Jones (N. C.), 464, holding an act making it an indictable offense to pass bank bills of certain denominations impairs contract authorizing bank to issue bills of that denomination; *Goodale v. Fennell*, 27 Ohio St. 432, 22 Am. Rep. 326, where, after municipality under general statute had contracted for improvements, its power of taxation was restricted; *Knighton v. Burns*, 10 Or. 551, App., holding a law permitting debts to be cancelled in currency known as "scrip," is void as to debts contracted before its enactment; *Western Fund Society v. Philadelphia*, 31 Pa. St. 182, 72 Am. Dec. 734, where principle was applied to acts of municipality which impaired its contracts; *Goggans v. Turnipseed*, 1 S. C. 82, 98 Am. Dec. 398, holding statute providing creditor might charge specified interest on open accounts, is invalid as to contracts made before its passage; *Taylor v. Stearns*, 18 Gratt. 274, where statute stayed collection of debts for a limited period; *Bank v. McVeigh*, 20 Gratt. 465, where place of payment was changed by law; *Homestead Cases*. 22 Gratt. 288, 292, 12 Am. Rep. 515, 518, where statute increased amount of property exempt as a homestead; *State v. Commissioners*, 4 Wis. 418, where conditions under which purchases of school lands might be made were changed. Cited in *In re Kennedy*, 2 S. C. 222, but holding a homestead exemption law is not void as to contracts made before its adoption. See also note on general subject, 10 Am. Dec. 135, 136.

**Constitutional law.**— A statute which so changes the nature and extent of remedies on a contract as to impair the right, is to that extent void, and it is immaterial that the extent of the change in the contract is slight, pp. 75, 84.

This principle is applied in *Bronson v. Kinzie*, 1 How. 316, 317, 11 L. 145, 149, case of a statute affecting mortgagee's foreclosure rights; *Planters' Bank v. Sharp*, 6 How. 327, 330, 332, 12 L. 458, 459, 460, where right of bank to collect notes was impaired; *Curran v. State*, 15 How. 319, 14 L. 712, where State was made preferred creditor of bank, leaving, in effect, no remedy to other creditors; *Von Hoffman v. City of Quincy*, 4 Wall. 550, 552, 18 L. 408, 409, and *United States v. New Orleans*, 17 Fed. 488, where statute restricted municipality's powers of taxation, thereby rendering it unable to pay its outstanding bonds; *Edwards v. Kearzey*, 96 U. S. 601, 604, 24 L. 796, 797, where statute increasing amount of property exempt from execution was enacted subsequent to contraction of debt; *Barnitz v. Beverly*, 163 U. S. 123, 41 L. 98, 16 S. Ct. 1044, holding a statute authorizing redemption after foreclosure, when no such right existed at time contract was made, is void as to such contracts; *Nelson v. McCrary*, 60 Ala. 310, where statute enlarged homestead exemptions; *Edwards v. Williamson*, 70 Ala. 152, holding statute relating to collection of taxes, which operated to impair a State's contracts with its creditors, to be inoperative; *Jacoway v. Denton*, 25 Ark.

641, where State Constitution cut off all remedy on contracts for sale of slaves; Cohn v. Hoffman, 45 Ark. 385, holding exemption in Constitution as to homestead has no application to debts contracted before its adoption; McCauley v. Brooks, 16 Cal. 30, holding statute requiring claims against State to be approved by board of examiners has no application to claims matured before its enactment; dissenting opinion, Cutts v. Hardee, 38 Ga. 385, where statute permitted evidence to be introduced to attack consideration as to certain contracts made before passage of act; Lott v. Dysart, 45 Ga. 361, where statute imposed certain conditions as to payment of taxes which must be complied with before courts would render assistance to enforce contract; Fisher v. Green, 142 Ill. 94, 31 N. E. 176, where statute operated to deprive mortgagee of right to have property sold under power of sale, and without redemption; Martindale v. Moore, 3 Blackf. 281, holding statute providing misleading should not render executor personally liable, does not have retroactive effect; Berry v. Ransdall, 4 Met. (Ky.) 294, where legislature sought to limit time for bringing actions, regardless of time when right of action accrued; Collins v. Collins, 79 Ky. 90, 92, applying rule to statute affecting redemptions of real estate sold under order of court; Sabatier v. Creditors, 6 Mart. (La.) (N. S.) 591; also, Lessley v. Phipps, 49 Miss. 799, where amount of exempt property was increased; Rowlett v. Shepherd, 4 La. 94, where statute compelled debtor to pay interest on certain contingency; dissenting opinion, Doughty v. Sheriff, 27 La. Ann. 360, holding statute exempting property from execution has no application to cases where debt was contracted before its passage; Phinney v. Phinney, 81 Me. 461, 10 Am. St. Rep. 269, 17 Atl. 407, 4 L. R. A. 350, and n., time for redemption extended; Cargill v. Power, 1 Mich. 371, where time for redemption was shortened; Coffman v. Bank of Kentucky, 40 Miss. 33, 90 Am. Dec. 314, where "stay laws" operated to take away all remedies for period of two years; Leavitt v. Lovering, 64 N. H. 609, 1 L. R. A. 59, statute providing all payments made within three months before assignment for benefit of creditors shall be void, does not apply to payments of existing contracts; Moore v. State, 43 N. J. L. 206, 39 Am. Rep. 561, where statute operated to create liability which had been barred by statute of limitations; State v. Carew, 13 Rich. 511, 91 Am. Dec. 250, where statute operated to stay execution; State v. Bank, 1 S. C. 78, where act withdrew property of debtor from operation of legal process of creditor; State v. Cardozo, 8 S. C. 81, 28 Am. Rep. 284, where statute diverted money from a fund which State had pledged for payment of its bonds; Nelson v. Allen, 1 Yerg. 383, holding statute allowing defendant in ejectment the value of improvements made upon land, void; Grasmeyer v. Beeson, 13 Tex. 530, where statute took away all remedy; Swinburne v. Mills, 17 Wash. 618, 61 Am. St. Rep. 936, 50 Pac. 491, case of statute requiring a year's stay of sale under foreclosure decree, and requiring sale to bring within 80 per cent. of appraised valuation, there



having been no such law at time mortgage was given; *Peninsular, etc. v. Union Oil Co.*, 100 Wis. 492, 76 N. W. 361, 42 L. R. A. 332, and *Sec., etc., Bk. v. Schranck*, 97 Wis. 262, 73 N. W. 35, 39 L. R. A. 575, act enabling debtor by assignment of his property to defeat a levy thereon made within ten days, is invalid as to pre-existing contracts.

Other citing cases affirm the syllabus principle without being called upon especially to apply it: *Lavin v. Emigrant Bank*, 18 Blatchf. 16, 1 Fed. 655, as bearing on question of what constitutes "due process of law;" *Limestone County v. Rather*, 48 Ala. 447, affirming rule; *Thorne v. San Francisco*, 4 Cal. 142, *quære*, whether suspension of remedies, or any part thereof, existing when contract was made, does not impair obligation of contract; *Billings v. Hall*, 7 Cal. 10, holding a remedial statute which operates to take away a right is void. Cited generally in dissenting opinion, *Aycock v. Martin*, 37 Ga. 179, involving constitutionality of "stay laws." Affirming rule generally, without specially applying it, *Bruce v. Schuyler*, 4 Gilm. 277, 46 Am. Dec. 459; dissenting opinion, *Scobey v. Gibson*, 17 Ind. 578; dissenting opinion, *Kennebec Ry. Co. v. Portland Ry. Co.*, 59 Me. 73. Approved in *Grimes v. Bryne*, 2 Minn. 96, although the case holds an exemption law intended to operate on debts contracted before its passage, operates only on remedy and is constitutional; also, *King v. Hopkins*, 57 N. H. 353, 354. Cited generally, without special application of the principle, in *McLaren v. Pennington*, 1 Paige Ch. 108; in dissenting opinion, *People v. Draper*, 15 N. Y. 563; *Eakin v. Raub*, 12 S. & R. 366; dissenting opinion, *Satterlee v. Matthewson*, 16 S. & R. 185. Cited generally in *Smith v. Elliott*, 39 Tex. 211. See note on constitutionality of stay laws, 6 Am. Dec. 540.

Distinguished in *New Orleans v. Morris*, 105 U. S. 603, 26 L. 1185, holding, under facts, there was no impairment of obligations; *Connecticut Ins. Co. v. Cushman*, 108 U. S. 65, 27 L. 653, 2 S. Ct. 245, statute did not affect agreement; *Ex parte Pollard*, 40 Ala. 88, holding statute complained of does not affect obligation; also cited in dissenting opinion, same case, pp. 102, 105; *Colorado Springs Co. v. Cowell*, 6 Colo. 79, holding remedy is not affected; *Watkins v. Glenn*, 55 Kan. 431, 40 Pac. 319, objectionable statute did not have retroactive effect; *Tompkins v. Forrestal*, 54 Minn. 125, 55 N. W. 814, which deals with method of procedure only; *State v. Gilliam*, 18 Mont. 107, 44 Pac. 399, 31 L. R. A. 726, statute enlarging redemption time if mortgagee becomes purchaser; *State v. Griffin*, 66 N. H. 328, 29 Atl. 415, where right to trial by jury was held not to be affected by statute relating to; also, *Chadwick v. Moore*, 8 Watts & S. 50, 51, 42 Am. Dec. 268, 269, holding statute which suspends remedy for reasonable time does not impair contract to such a degree as to be objectionable; *Longbine v. Piper*, 70 Pa. St. 380, where construction which would impair right was denied. Distinguished also in *Ex parte Penniman*, 11 R. I. 346, holding repeal of statute providing stockholders are liable to arrest on execution issued on judgment

against corporation, does not impair contract, but affects remedy merely; *Fleming v. Holt*, 12 W. Va. 167, holding statute providing that interest shall be allowed on judgments from date rendered, does not affect the contract; *Von Baumbach v. Bade*, 9 Wis. 591, holding a "mortgage stay law" affects the remedy only.

**Principal and surety.**—Agreement between creditor and debtor to alter terms of contract releases surety, p. 85.

Cited and followed in *Dey v. Martin*, 78 Va. 4.

**Compacts between States.**—Consent of congress to, is sufficiently indicated, when not necessary to be made in advance, by adoption or approval of proceedings taken under it, p. 87.

Approved in *Wharton v. Wise*, 153 U. S. 173, 38 L. 676, 14 S. Ct. 788, where congress adopted award of commissioners which had previously been ratified by States interested in.

**Constitutional law.**—Compact of 1789 between Virginia and Kentucky is not invalid on ground of surrendering inalienable rights of sovereignty, pp. 87, 88.

**Constitutional law.**—Powers of legislation granted to government of the United States, as well as to State governments, are limited. p. 88.

Cited in *Campbell v. State*, 11 Ga. 370, holding amendments to Constitution of United States are restrictions on State legislation as well as Federal. Cited, *arguendo*, in dissenting opinion, *Luther v. Borden*, 7 How. 66, 12 L. 609.

**Constitutional law.**—Taking property acquired under contract for public use does not impair contract, p. 89.

Cited to this effect, without application, in *Piscataqua Bridge v. Bridge*, 7 N. H. 68.

**Contract** is the agreement of two or more persons to do, or not to do, certain acts, p. 92.

Cited to this point in *State v. Mayor of New Orleans*, 32 La. Ann. 716; *Fisk v. Police Jury*, 34 La. Ann. 45.

Supreme Court has jurisdiction to declare a State law impairing obligation of contract void, p. 92.

Cited to this point in *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 566, 14 L. 269.

Distinguished in *Charles River Bridge v. Warren Bridge*, 11 Pet. 582, 9 L. 838, where action of State was not directly on contract.

**Constitutional law.**—Prohibition against State laws impairing obligation of contract, embraces all contracts, p. 92.

Cited and rule applied in *Pollard's Heirs v. Kibbe*, 14 Pet. 413, 414, 10 L. 519, 520, where claims under Spanish grants and treaties were



determined; dissenting opinion, in *Louisiana v. Jumel*, 107 U. S. 750, 27 L. 462, 2 S. Ct. 160, and opinion of majority in *Poindexter v. Greenhow*, 114 U. S. 286, 29 L. 191, 5 S. Ct. 912, where State impaired her own contracts with creditors; *New Orleans Gas Co. v. Louisiana Co.*, 115 U. S. 673, 29 L. 524, 6 S. Ct. 264, where State, having granted exclusive franchise, enacted law under which companies could be organized which would impair value of franchise; dissenting opinion, *In re Ayers*, 123 U. S. 515, 31 L. 233, 8 S. Ct. 188, the majority distinguishing the case and deciding it on other grounds; *Hancock v. Walsh*, 3 Woods, 363, F. C. 6,012, where State of Texas attempted to annul one of the conditions contained in resolution of annexation; *Mutual Life Ins. Co. v. Richardson*, 77 Fed. 398, where statute changed place of payment of contract; *Willis v. Cadenhead*, 28 Ala. 474, holding statute of succession and distribution cannot effect separate estate of married woman, created by deed before enactment of statute; *McElvain v. Mudd*, 44 Ala. 63, 4 Am. Rep. 117; also, *Calhoun v. Calhoun*, 2 S. C. 301, where State ordinance provided all contracts should be void, where consideration was slaves or Confederate bonds; *Micou v. Tallassee Bridge Co.*, 47 Ala. 656, holding act incorporating persons to build toll-bridge creates a contract which cannot be impaired by another grant; *State v. County Court of Crittenden County*, 19 Ark. 364, 373, where purchase of land from State under State law was held to be a contract and within constitutional inhibition; *Leach v. Smith*, 25 Ark. 252, where statute provided contracts to be paid in Confederate money should be paid in United States currency; *Enfield Bridge Co. v. Connecticut Co.*, 7 Conn. 48, where State granted franchise to company which infringed rights granted to another company; *Bailey v. Philadelphia Ry. Co.*, 4 Harr. (Del.) 401, 44 Am. Dec. 603, where right of action was given for authorized acts already performed; *Young v. Harrison*, 6 Ga. 154, 156, where legislature passed act annulling charter granted; *Winter v. Jones*, 10 Ga. 196, 54 Am. Dec. 382, holding an act, providing for resale of lands which had been sold under prior act, void; *Aycock v. Martin*, 37 Ga. 135, 150, 92 Am. Dec. 64, where statute provided for staying execution on certain contracts; *Bruce v. Schuyler*, 4 Gilm. 276, 46 Am. Dec. 458, where legislature repealed that portion of statute providing for execution of conveyance by officer making sale for taxes; *Edwards v. Jagers et al.*, 19 Ind. 413, where State Constitution impaired grant of corporate powers; *Canal Co. v. Railroad Co.*, 4 Gill. & J. 129, 146, where State sought to impair compact entered into with corporation and another State; dissenting opinion, *Common Council v. Assessors*, 91 Mich. 116, 51 N. W. 799, 16 L. R. A. 79, inhibition covers act permitting, as to prior mortgages, mortgagor's property to be seized to pay tax of mortgagee; *State v. Young*, 29 Minn. 525, 9 N. W. 739, applying principle to constitutional amendment impairing obligation of State's executory contracts; *State v. Fry*, 4 Mo. 132, applying principle to marriage con-

tract; *State v. Branin*, 23 N. J. L. 500, to charter of a corporation; *United Ry. Co. v. Commissioner*, 37 N. J. L. 251, to government land grant. Cited in *Hawkins v. Barney*, 5 Pet. 465, 8 L. 193, holding further as to what legislation will be construed as carrying out the compact of 1789 between Virginia and Kentucky; *Camblos v. Philadelphia*, 4 Fed. Cas. 1106, further as to what legislative grants will be considered contracts. Cited generally, *Silliman v. Hudson Bridge Co.*, 4 Blatchf. 411, F. C. 12,852, where power of State to restrict privileges granted in license is discussed; dissenting opinion, *Dale v. Governor*, 3 Stew. 418, 424, the majority holding it within power of legislature to repeal a private act confirming military title, and settling annuity; *Craig v. Flanagan*, 21 Ark. 323. Cited generally as to power of constitutional convention, *Lawson v. Jeffries*, 47 Miss. 707, 12 Am. Rep. 355. Approved in *Chenango Bridge Co. v. Binghamton Co.*, 27 N. Y. 92, but under facts no impairment of contract. Cited generally in *Mexican Ry. Co. v. Mussette*, 86 Tex. 715, 26 S. W. 1077, 24 L. R. A. 644. Approved, *arguendo*, dissenting opinion, *Antoni v. Greenhow*, 107 U. S. 803, 27 L. 481, 2 S. Ct. 119.

Distinguished in *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 432, 433, 15 L. 438, where compact was avoided by act of congress; *In re Owens*, 6 Biss. 434, F. C. 10,632, where perfected lien was avoided by national bankruptcy law; dissenting opinion, *McElvain v. Mudd*, 44 Ala. 76, obligation was avoided by act of national government; *Stone v. Gazzam*, 46 Ala. 275, where act complained of affected status of married women, although transaction attacked was effected after passage of act; *Trustees v. Rider*, 13 Conn. 96, holding legislative act, importing a contract executory, depending on further action of legislature for its execution, could not impose obligation capable of being impaired; *In re Lee & Co.*, 21 N. Y. 14, holding statute did not impair obligation of charter contract, because of reserve right to alter and amend.

**Constitutional law.**—The act of State of Kentucky of January 31, 1812, concerning occupying claimants of land, is in violation of compact between Kentucky and Virginia, and is void, p. 108.

Cited, *arguendo*, *McKinney v. Carroll*, 12 Pet. 69, 9 L. 1003. Cited in *Beard v. Smith*, 6 T. B. Mon. 517, and *Clark's Heirs v. Gates*, 5 J. J. Marsh. 315, in both of which the court seems to take a contrary view. Cited generally in *Gaines v. Buford*, 1 Dana (Ky.), 495, 512.

Distinguished in *Fisher v. Cockerill*, 5 T. B. Mon. 133, where question of compact between two States was not involved. Denied in *Bodley v. Gaither*, 3 T. B. Mon. 58, 59.

**Miscellaneous.**—Cited in *Noble v. Cullom*, 44 Ala. 583, as to right of Federal government to determine as to effect to be given laws and judgments of States not organized under the Constitution; *Howard v. Jones*, 50 Ala. 69, and *Watson v. Rose*, 51 Ala. 300, to effect that laws in force at time of making contract enter into it



and form part thereof; dissenting opinion, *Bellamy v. Bellamy*, 6 Fla. 121; *Farves' Heirs v. Graves*, 4 S. & M. 711, not in point; *State v. Central Pacific Ry. Co.*, 21 Nev. 103, 25 Pac. 444, not clear to what point cited; as also in *Phaelon v. Perman*, 2 McCord Ch. 431, and *Oakley v. Hibbard*, 2 Pinn. 22, 52 Am. Dec. 140; *Cherokee Nation v. Georgia*, 5 Pet. 47, 8 L. 41, to point that sovereignty devolved upon the States by the Revolution.

8 Wheat. 108-174, 5 L. 574, *LA NESEYDA*.

**Admiralty.**—One claiming under sentence of condemnation must show jurisdiction of condemning court, p. 168.

**Prize.**—Failure to produce further proof, after leave granted, is fatal to party's claims, p. 171.

No citations.

8 Wheat. 174-217, 5 L. 589, *HUNT v. ROUSMANIER*.

Power of attorney may, in general, be revoked by party giving it, at any time, and is revoked by his death, p. 201.

Principle applied in *Eagleton Co. v. Bradley Co.*, 18 Blatchf. 223, 2 Fed. 779, where attorney acted for grantor after grantor's death; *Lockett v. Hill*, 1 Woods, 563, F. C. 8,443, where rule was applied where grantor became bankrupt; *Young Co. v. Young Co.*, 72 Fed. 64, and *Patton v. Coen, etc.*, 3 Colo. 270, where grantor revoked power; *Saltmarsh v. Smith*, 32 Ala. 408, and *Travers v. Crane*, 15 Cal. 18, holding deed given by attorney after death of grantor of power, is void; dissenting opinion, *Janin v. Browne*, 59 Cal. 47; *Cully v. Bloomingdale*, 68 Ga. 759, where power granted in mortgage to mortgagee to sell equity of redemption was held revoked by death of mortgagor; *Lewis v. Kerr*, 17 Iowa, 76, 77, and *Vance v. Anderson*, 39 Iowa, 430, where power to sell real estate in name of principal was held to be without interest therein, and revoked by death of principal; *Smith v. Minnesota Ry. Co.*, 30 Iowa, 249, where power to procure donations and right of way, agent to receive a share of donations, was held to be without interest and revocable at will of principal; *Alworth v. Seymour*, 42 Minn. 528, 44 N. W. 1030, holding power revocable where agent was to receive share of results of execution of agency; *Temple v. Hammock*, 52 Miss. 359, holding acts of agency performed by agent after death of principal are void; *Burke v. Priest*, 50 Mo. App. 313, holding agreement to turn over books to agent for collection of claims at a given per cent. does not give agent such an interest in claims as to prevent revocation; *Berry v. Potter*, 52 N. J. Eq. 668, 29 Atl. 325, where license was held revoked on licensor becoming insane; *Weber v. Bridgman*, 113 N. Y. 605, 21 N. E. 987, holding payments made to agent after death of principal, do not bind estate of principal; *Blackstone v. Buttermore*, 53 Pa. St. 268, holding principal may revoke power of agent to sell real estate, even though he had agreed the authority was

Irrevocable; *Huston v. Cantril*, 11 Leigh, 173, where agents' special power to sell principal's property and apply proceeds arising therefrom to liquidation of principal's debts, was held revoked by death of principal; *Herring v. Lee*, 22 W. Va. 667, holding, where principal cannot act, the disqualification extends to his deputy or agent. Cited generally, without particular application of the rule, in *United States v. Cutts*, 1 Sumn. 140, F. C. 14,912; *Lockart v. Forsythe*, 49 Mo. App. 657; *Cleveland v. Williams*, 29 Tex. 215, 94 Am. Dec. 280; *Michigan Bank v. Leavenworth*, 28 Vt. 217. And see note, 10 Am. Dec. 41.

Distinguished in *Parke v. Frank*, 75 Cal. 368, 17 Pac. 428, where, for consideration, principal agreed not to revoke for reasonable time; *White v. Stephens*, 77 Mo. 454, where power of sale was conferred on trustee by terms of deed; *Morgan v. Gibson*, 42 Mo. App. 242, where death of principal was held not to annul contract to pay agent for services on recovery in pending suit, which was maintained by agent; *McIntire v. Morris*, 14 Wend. 95, where power had been fully executed before death of principal, the only matter undetermined being the amount of agent's compensation. Modified in *Cassiday v. McKenzie*, 4 Watts & S. 285, 39 Am. Dec. 79, holding acts of agent are binding until he has knowledge of principal's death. And see note, 39 Am. Dec. 89.

**Power of attorney.**—When it forms part of contract and is security for performance of any act, it is deemed irrevocable in law, p. 202.

Principle approved and applied in *Day v. Candee*, 7 Fed. Cas. 236, where grantor bound himself for consideration not to change his will; *Ray v. Hemphill*, 97 Ga. 565, 566, 25 S. E. 486, where mortgagor conferred on mortgagee power of sale; *Mutual Loan Co. v. Haas*, 100 Ga. 115, 62 Am. St. Rep. 318, 27 S. E. 980, holding further, power is not affected by judgment rendered against mortgagor in favor of another creditor; *McGheehen v. Duffield*, 5 Pa. St. 499, holding submission to a final reference in consideration of discontinuance of proceedings in chancery for an account is irrevocable; *Smith Co. v. McGuinness*, 14 R. I. 61, holding an irrevocable power of attorney to collect rents, given as security for money loaned, is between the parties an equitable mortgage of the rents; *Montague v. McCarroll*, 15 Utah, 325, 49 Pac. 420, power to enter land on soldier's scrip, and to sell same after entry, given for valuable consideration, is irrevocable.

Cited generally in *Heath v. Griswold*, 18 Blatchf. 560, 5 Fed. 577; *American Trust Co. v. Billings*, 58 Minn. 190, 59 N. W. 998; *Terwilliger v. Ontario, etc., R. Co.*, 149 N. Y. 94, 95, 43 N. E. 435; *Fraser v. Charleston*, 11 S. C. 520.

Distinguished, *Oregon & W. Bank v. Mortgage Co.*, 13 Sawy. 265, 35 Fed. 25, where there was stipulation providing authority might be revoked.



**Power of attorney.**—Mere naked power confers on attorney power only to act for and in name of party who grants it, p. 203.

Cited and rule applied in *The Perseverance*, Blatchf. & H. 388, 389, F. C. 11,017, where attorney sought to maintain suit in character of owner; note, 81 Am. Dec. 778.

**Power coupled with an interest** survives the person giving it and may be executed after his death, p. 203.

Cited and principle applied in *Taylor v. Benham*, 5 How. 272, 13 L. 149, where executors under will were empowered to sell lands of testator, held by him in trust; *Jacquet v. Creditors*, 38 La. Ann. 867, like rule applies in case of bankruptcy of principal; *Renshaw v. Creditors*, 40 La. Ann. 40, 3 So. 404, holding power of sale given to pledgee gives an interest which causes power to survive principal's bankruptcy; *Berry v. Skinner*, 30 Md. 573, and *Reilly v. Phillips*, 4 S. Dak. 611, 57 N. W. 782, where power of sale given mortgagee was held to create in him an interest in mortgaged premises; *Dickinson v. Bank*, 129 Mass. 283, 37 Am. Rep. 353, where power of sale of shares of stock given as security for debt was held to create interest therein so that power was not affected by bankruptcy of principal; *Knapp v. Alvord*, 10 Paige, 209, 40 Am. Dec. 243, holding possession of property connected with power for protection and indemnity of agent gives agent an interest so that power survives death of principal; *Hess v. Rau*, 95 N. Y. 363, where power of broker to manage stock for customers was held, under facts, not to be revoked by death of principal; *Sulphur Co. v. Thompson*, 93 Va. 312, 313, 315, 25 S. E. 235, 236, power granted to trustee to convey in his own name, gives interest, so that power survives death of grantor; *McNeill v. McNeill*, 43 W. Va. 768, 28 S. E. 718, holding deed executed and delivered to grantee, although intended as power to sell, gives grantee interest, so that power survives death of grantor; *Metcalf v. Hart*, 3 Wyo. 532, 31 Am. St. Rep. 140, 27 Pac. 907, as authority for holding license coupled with interest is not revoked by conveyance of realty to which it relates. Cited generally in *Bonney v. Smith*, 17 Ill. 533; *Powers v. Harlow*, 53 Mich. 514, 51 Am. Rep. 159, 19 N. W. 259, as bearing on question of right of principal to revoke power coupled with interest; *Michigan Bank v. Leavenworth*, 28 Vt. 217; *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 24, and *Huston v. Cantrill*, 11 Leigh, 167, as bearing on doctrine of law in relation to the determination of authority by death of person from whom it emanates. See also note, 39 Am. Dec. 82, 83.

Distinguished in *Jeffersonville Association v. Fisher*, 7 Ind. 702, on ground that agent had no interest.

**Power coupled with interest.**—To constitute, there must be an interest in the thing itself and not merely in the execution of the power, p. 204.

The citations collect a large number of authorities affirming and applying this doctrine, as follows: Walker v. Walker, 125 U. S. 342, 31 L. 772, 8 S. Ct. 931, affirming S. C., 88 Mo. 284, holding statute conferring authority to prosecute claims of State against United States and receive a percentage of amount collected for services does not create power coupled with interest so that power is irrevocable; Lockett v. Hill, 1 Woods, 558, 9 Bank. Reg. 178, F. C. 8,443; Lathrop v. Brown, 60 Ga. 315, holding under laws of Georgia a power of sale in a mortgage is not a power coupled with an interest; Or. & Wash. Bank v. Mortgage Co., 13 Sawy. 265, 35 Fed. 25, where power to loan principal's money and to collect the interest thereon and to retain commission for services was held not coupled with an interest; Kahn v. Weill, 14 Sawy. 514, 42 Fed. 712, where power was given to manage and sell lands; Stier v. Insurance Co., 58 Fed. 845, and Insurance Co. v. Williams, 91 N. C. 72, 49 Am. Rep. 638, holding right of insurance agent to commissions on renewal policies does not make his agency an agency coupled with an interest; Johnson Signal Co. v. Union Switch Co., 59 Fed. 22, where appointment making claimant sole agent with power to develop business and negotiate sale thereof was held to create no interest; China Ins. Co. v. Ward, 59 Fed. 714, 20 U. S. App. 292, holding ship's general agent has, presumptively, no maritime or equitable lien or insurable interest in the vessel; Hall v. Gambrell, 88 Fed. 711, holding power to sell land, authorizing agent to retain part of purchase money as compensation for his services, not coupled with an interest.

State court citing cases rely upon this definition as follows: Chambers v. Leay, 73 Ala. 378, holding, under power to sell land, agreement to give agent share of proceeds as commission does not give him an interest in land; Yeates v. Pryor, 11 Ark. 77, 78, power to locate floating timber claims and to sell and give title thereto cannot be executed after death of principal; Frink v. Roe, 70 Cal. 309, 310, 11 Pac. 825, 826, holding power to sell real estate gives no interest therein unless agent may execute power in his own name; Norton v. Whitehead, 84 Cal. 268, 271, 18 Am. St. Rep. 176, 177, 24 Pac. 155, 156, holding assignment of accruing moneys, with power to collect, gives assignee power coupled with interest; Darrow v. St. George, 8 Colo. 598, 9 Pac. 792, where agreement to share profits as compensation for services was held to create no interest; Mansfield v. Mansfield, 6 Conn. 562, 565, 16 Am. Dec. 78, 81, holding power to prosecute claims to sell interest recovered and to deduct therefrom compensation for services, gives no interest in thing itself; McGriff v. Porter, 5 Fla. 380, 381, holding authorization to enter on borrower's premises and sell slaves in case of default in payment of loan, gives no interest in slaves; Coney v. Sanders, 28 Ga. 513, fact that agent paid valuable consideration for power does not give him interest in that to which



power relates; *Wilkins v. McGehee*, 86 Ga. 767, 768, 13 S. E. 84, 85, holding power given by mortgage to sell lands was revoked by mortgagor's death before note fell due; *Walker v. Denison*, 86 Ill. 146, holding power authorizing agent to dispose of principal's patent right gives agent no interest therein; *Rowe v. Beckett*, 30 Ind. 158, 95 Am. Dec. 680, trust deed giving trustee power to convey in his own name, gives him an interest in the land; *Hawley v. Smith*, 45 Ind. 203, and *F. L. & T. Co. v. Wilson*, 139 N. Y. 287, 36 Am. St. Rep. 698, 34 N. E. 784, "interest in the proceeds of the thing is not an interest in the thing itself;" *Reed v. Welch*, 11 Bush, 460; *Attrill v. Patterson*, 58 Md. 250; *Brown v. Massey*, 138 Mo. 531, 38 S. W. 942, and *Simpson v. Carson*, 11 Or. 363, 8 Pac. 326, contingent interest in proceeds arising from sale of lands gives no interest in lands; *Lockart v. Forsythe*, 49 Mo. App. 658, 660; *Gardner v. Bank*, 10 Mont. 153, 25 Pac. 30, 10 L. R. A. 149, bank's power to apply future deposits on notes for money borrowed, is naked power not coupled with interest; *Campbell v. Roddy*, 44 N. J. Eq. 247, 6 Am. St. Rep. 892, 14 Atl. 280, holding right of vendor to take possession and sell on failure of vendee to make payments does not give him an interest; *Ballard v. Insurance Co.*, 119 N. C. 191, 25 S. E. 957; *Carter v. Slocomb*, 122 N. C. 477, 65 Am. St. Rep. 715, 29 S. E. 720, holding power of sale in mortgage is coupled with an interest and survives; *White's Appeal*, 36 Pa. St. 139, where wife gave mortgage to creditor of husband and instrument came back fairly into her hands without such purpose being accomplished, creditor was held to have acquired no interest in wife's property; *Minors' Appeal*, 53 Pa. St. 214, 91 Am. Dec. 208, where power to collect moneys for principal and retain percentage for services was held to give no interest therein; *Lightner's Appeal*, 82 Pa. St. 305; *Yerkes' Appeal*, 99 Pa. St. 408, holding instrument empowering agents to examine into a document purporting to be a will and to take such action thereon as they might deem expedient, did not give them an interest in estate of decedent; *Johnson v. Johnson*, 27 S. C. 316, 13 Am. St. Rep. 642, 3 S. E. 610, power of sale conferred on mortgagee does not grant an interest; *Fisher v. Fair*, 34 S. C. 210, 13 S. E. 472, 14 L. R. A. 336, easement in gross gives no interest in land; *Reilly v. Phillips*, 4 S. Dak. 611, 57 N. W. 782, and *Armstrong v. Moore*, 59 Tex. 648, power of sale conferred on mortgagee does give an interest in mortgaged premises; *Mervin v. Murphy*, 35 Tex. 795, holding power to appoint a trustee, who shall have power to sell and convey title to property given in consideration of debt owed agent does not give agent an interest in property; *Daugherty v. Moon*, 59 Tex. 399, attorney who is to receive a share of judgment for collecting same, has no interest in the judgment; *Wells v. Littlefield*, 59 Tex. 562, holding where debtor pledges chattels to creditor pledgee has an interest in the thing itself which cannot be revoked; *Tinsley v. Dowell*, 87 Tex. 29, 26 S. W. 948,

real estate broker who is to receive a certain commission and all he gets above a certain price for making a sale has not such an interest in the thing itself as entitles him to maintain action for breach of contract to purchase.

Cited generally in *Taylor v. Benham*, 5 How. 269, 12 L. 147, discussing distinction between power coupled with trust and power coupled with interest; *Hammond v. Allen*, 2 Sumn. 393, F. C. 6,000; *Wicks' Heirs v. Rector*, 4 Ark. 280; *Barr v. Schroeder*, 32 Cal. 617; *Schauber v. Jackson*, 2 Wend. 54; *Terwilliger v. Ontario*, 149 N. Y. 92, 93, 43 N. E. 434; *Frederick's Appeal*, 52 Pa. St. 342, 91 Am. Dec. 162, as to meaning of phrase, "power coupled with interest;" *Flagstaff Co. v. Patrick*, 2 Utah, 313.

**Evidence.**—Both at law and in equity the general rule is parol testimony is not admissible to vary a written instrument, p. 211.

Rule approved in *Sprigg v. Bank*, 14 Pet. 206, 10 L. 421, where signer of note as principal sought to show that he signed as surety; *Warner v. Brinton*, 29 Fed. Cas. 240, as to declaration of testator before or after making his will; *In re Dunham*, 8 Fed. Cas. 38, holding parol evidence of agreement in contradiction of receipt of payment of mortgage inadmissible; *Tilghman v. Tilghman*, Bald. 489. 492, F. C. 14,045, where attempt was made to vary terms of marriage settlement; *Gayle v. Hudson*, 10 Ala. 127, refusing parol evidence in action at law to show that a party different from one signing as obligee on bond was intended to be the obligee; *Freed v. Brown*, 41 Ark. 500, holding, in absence of fraud, equity will not permit parol evidence to show interest of parties for purpose of enforcement of instrument; *Rogers v. Atkinson*, 1 Ga. 20; *Smith v. Gibbs*, 44 N. H. 349, refusing parol testimony to vary terms of bill of sale. Cited generally in *Chestnut Co. v. Chase*, 14 Conn. 133.

Distinguished in *Phillips v. Preston*, 5 How. 291, 12 L. 158, where evidence was offered to prove collateral contract and not to vary written instrument.

**Evidence.**—Equity will allow parol, to vary written agreement in cases of fraud or mistake in order to show and carry out intent of parties when this is not shown by written instrument, p. 211.

Cited and rule approved in *Ivinson v. Hutton*, 98 U. S. 82, 83, 25 L. 67, 68, where parol testimony was admitted to explain agreement which written instrument was intended to put in execution; *Fire Ins. Co. v. Wickham*, 141 U. S. 576, 35 L. 866, 12 S. Ct. 87, holding parol testimony may be admitted to show contract was without consideration; *English v. Lane*, 1 Port. 349, where parol proof was admitted to show that a deed absolute in form was intended as a mortgage; *Pelangué v. Guesnon*, 15 La. 313, admitting parol proof to show description of a lot in deed was erroneous. Cited generally in *Gibson v. Cook*, 2 Blatchf. 147, F. C. 5,393, not applied, case going upon another point.



**Equity.**— Courts of, will afford relief in cases of fraud or mistake in facts, p. 211.

Principle approved and followed in *Walden v. Skinner*, 101 U. S. 584, 25 L. 966, where irregularities in conveyance executed by trustee were corrected in order to carry out purpose of trust; *Rogers v. Atkinson*, 1 Ga. 25, holding, where instrument is drawn to carry into effect oral agreement and which, by mistake of draughtsman, in fact or in law, does not fulfill intention of parties, equity will correct mistake; *Stafford v. Fetters*, 55 Iowa, 487, 8 N. W. 324, where blank indorsement intended to be without recourse was so construed; *Miller v. Aldrich*, 31 Mich. 420, where stipulation in mortgage, that mortgagor would keep premises insured for mortgagee's benefit, was held binding on all others who stood in mortgagor's place with notice; *Massie v. Heiskell*, 80 Va. 801, where, by mistake, vendor granted more than vendee bargained for. Cited generally in *Bledsoe v. Nixon*, 68 N. C. 523, as containing general discussion of subject; *Oliver v. Pray*, 4 Ohio, 192, 19 Am. Dec. 600. See valuable note in 65 Am. St. Rep. 481, 482, 487, 492, on reformation of contracts.

Distinguished in *Tilghman v. Tilghman*, Bald. 492, F. C. 14,045, where there was neither fraud nor mistake of facts, but owing to circumstances not provided for, contract would not carry out intent of parties; *Burke v. Anderson*, 40 Ga. 538, limiting rule to original parties and their privies in estate or in law.

**Mistake of law.**— Although it seems not to be decided by any case that mistake of law may be relieved against, on the other hand, there is no case holding it may not, p. 215.

The following cases cite this case as authority for holding equity may relieve from such mistake: *Wyche v. Greene*, 16 Ga. 59, where instrument intended as a deed of gift was corrected so as to conform to intent of parties; *Nowlin v. Pyne*, 47 Iowa, 295, where writing failed to express in apt and proper terms real intention of parties; *Underwood v. Brockman*, 4 Dana, 316, 29 Am. Dec. 413, where party, under misapprehension of law, compromised fraudulent claim; *Lammot v. Bowly*, 6 Harr. & J. 525; *Griffith v. Townley*, 69 Mo. 19, 33 Am. Rep. 481, and *Lowndes v. Chisholm*, 2 McCord Eq. 463, 16 Am. Dec. 670, all holding where purchaser and vendor both supposed fee was being sold, when in fact equity of redemption only passed, equity will afford purchaser relief; *Mellon v. Webster*, 5 Mo. App. 454, where a layman in dealing with a lawyer manifestly did just contrary to what was intended; *Green v. Morris*, 12 N. J. Eq. 170, where mistake was made by agent of party who afterwards sought to take advantage of it; *Moreland v. Atchison*, 19 Tex. 309, where one party, having superior knowledge of law, took advantage of another, who was confessedly ignorant thereof; *Shear*

v. Robinson, 18 Fla. 468; *Oliver v. Pray*, 4 Ohio, 194, 19 Am. Dec. 602, making no application of this principle; *Evants v. Administrator*, 11 Ohio, 487, 38 Am. Dec. 745, where an instrument, through mutual mistake of parties as to legal effect of terms used, failed to carry out their intention; *Wilson v. Ott*, 173 Pa. St. 260, 51 Am. St. Rep. 769, 34 Atl. 26, affirming rule that equity will relieve against mistake of law; also *Lawrence v. Beaubien*, 2 Bail, 652, 23 Am. Dec. 162, holding it immaterial that parties were correctly informed as to the facts; *Stone v. Brown*, 16 Tex. 430, holding where party through ignorance of the law, failed to present will for probate within statutory time, right to letters was not forfeited; *Green Bay Co. v. Hewitt*, 62 Wis. 334, 21 N. W. 221, and *Kyle v. Fehley*, 81 Wis. 71, 29 Am. St. Rep. 868, 51 N. W. 259, where error in deed, arising from mistake in law, was corrected; *Kearney v. Sascer*, 37 Md. 280, proof of mistake must be as conclusive as the existence of legal right which is sought to be restrained; *Gwinn v. Rooker*, 24 Mo. 292; *Crislip v. Cain*, 19 W. Va. 477, able discussion of general subject.

The principal case is cited also in the following as bearing upon this subject: *Snell v. Insurance Co.*, 98 U. S. 90, 25 L. 55, holding mere mistake of law constitutes no ground for reformation of contract; *Culbreath v. Culbreath*, 7 Ga. 69, 74, 50 Am. Dec. 379, 383, holding money paid under mistake of law may be recovered, but not so if paid under ignorance of law; *Freeman v. Curtis*, 51 Me. 143, 81 Am. Dec. 567, where equity decreed a reconveyance of realty, conveyance having been made under mistake of fact arising from ignorance of law; *Sparks v. Pittman*, 51 Miss. 521, equity will afford relief from mistake of law where, through misapprehension of, deed fails to effectuate agreement; *Champlin v. Laytin*, 18 Wend. 414, 423, 31 Am. Dec. 386, 394; *McNaughten v. Partridge*, 11 Ohio. 234, 38 Am. Dec. 734, and *Ellis v. Bibb*, 2 Stew. 72, where it is noted that case is cited as both for and against doctrine that equity will afford relief from mistake of law. Cited generally, *Pulliam v. Pulliam*, 10 Fed. 73, F. C. 11,463a, case goes off on other points; *Ex parte Dixon*, 1 Del. Ch. 271; *Broadwell v. Broadwell*, 1 Gill, 606; *Tyson v. Passmore*, 2 Pa. St. 125, 44 Am. Dec. 184, 185; *McDow v. Brown*, 2 S. C. 112, where authorities are collected and reviewed.

Cited as being argument in favor of interference by courts of equity where contract does not carry out intent of parties owing to mutual mistake. Note, 10 Am. Dec. 324, 326, 327, 68 Am. Dec. 763, 15 Am. Rep. 177, 178, 55 Am. St. Rep. 499, 504, 65 Am. St. Rep. 481, 482, 487, 492, note on reformation of contracts. Cited in connection with later decisions of same case in 1 Pet. 1, 7 L. 27; *Root v. Stuyvesant*, 18 Wend. 299; *Whitaker v. Gavit*, 18 Conn. 526; *Champlin v. Laytin*, 6 Paige, 196; S. C., 1 Ed. Ch. 473; *Leavitt v. Palmer*, 3 N. Y. 39, 51 Am. Dec. 339; *Brock v. O'Dell*, 44 S. C. 33,



21 S. E. 980; *Zollman v. Moore*, 21 Gratt. 323; *Curtis v. Leavitt*, 15 N. Y. 163.

On the other hand the following cases cite *Hunt v. Rousmanier* as authority for holding no relief will be afforded from mere mistake of law; *Upton v. Tribilcock*, 91 U. S. 50, 23 L. 206, 13 Bank. Reg. 177, where there was contract limiting liability of stockholders, which contract was void; *In re Dunham*, 8 Fed. Cas. 38, where contract was entered into under mutual understanding that the law affecting the subject was in accordance with a decision rendered by Supreme Court, the court afterwards reversing itself on the point; *Washington v. Barber*, 5 Cr. C. C. 161, F. C. 17,224, where action was brought to recover license fee paid under ignorance of law; *Pierson v. Armstrong*, 1 Iowa, 290, 63 Am. Dec. 446, and *Holmes v. Hall*, 8 Mich. 69, 77 Am. Dec. 445, where parties intended to give a chattel mortgage, but instead a naked power to sell, in case of condition broken, was given. And see *Wheaton v. Wheaton*, 9 Conn. 100, where parol evidence to show mistake was rejected; *Butler v. Livingston*, 15 Ga. 568, holding every man is presumed to know the law.

Distinguished in *Pickersgill v. Lahens*, 15 Wall. 144, 21 L. 121, and *United States v. Cushman*, 2 Sumn. 435, F. C. 14,908, holding there is no presumption surety intended his obligation to be joint and several with principal and that his failure to make it so was a mistake of law; *Arnold v. Georgia Co.*, 50 Ga. 310, and *White v. Rowland*, 67 Ga. 557, 44 Am. Rep. 734, on ground that injury arose from ignorance and not mistake. Distinguished generally in *Harney v. Charles*, 45 Mo. 158. Apparently not approved, *Clarke v. Dutcher*, 9 Cow. 686, holding no relief will be granted where rent is paid in English currency under mistake as to its equivalent in currency of the United States; *Moser v. Libenguth*, 2 Rawle, 430, although direct point was not decided. Cited and discussed in *Harner v. Price*, 17 W. Va. 540, 542, the court holding no relief will be afforded from a plain mistake of law; *Morgan v. Bell*, 3 Wash. 573, 574, 28 Pac. 930, 931, 16 L. R. A. 621, and n., holding case not an authority against *maxim ignorantia legis non excusat*. Denied in *Good v. Herr*, 7 Watts & S. 256, 42 Am. Dec. 237, where mistake was made as to who were heirs-at-law of one who died intestate.

Miscellaneous.—Cited in *Hunt v. Rousmanier*, 3 Mason, 301, 304, F. C. 6,897, same case on rehearing in Circuit Court, as to points decided without making application thereof; *Wallace v. Collins*, 5 Ark. 48, 39 Am. Dec. 363; *Nicodemus v. Potter*, 12 S. & R. 158, as bearing on question of liability of surety on bond who signs as joint obligor; *Brownlee's Adm.*, 2 Spears L. 526, as to kinds of powers of attorney; *Battle v. Mack*, 33 Tex. 798; *Cato v. Easley*, 2 Stew. 221, not in point.

8 Wheat. 217-228, 5 L. 600, GOLDSBOROUGH v. ORR.

**Divisible contracts.**—Where the acts stipulated to be done are to be done at different times, the covenants are to be construed as independent of each other, p. 224.

Cited and principle applied in *Loud v. Pomona Water Co.*, 153 U. S. 578, 38 L. 828, 14 S. Ct. 932, where payment or tender of payment of purchase-price of land was held a condition precedent to the right to compel conveyance; *Railroad Co. v. Parks*, 86 Tenn. 562, 8 S. W. 845, agreement to pay subscription to stock when road reached county line held independent of agreement to build depot at particular point in county, although building depot was condition precedent to payment of final installment. Cited generally in *McSherry v. Brooks*, 46 Md. 122. See note, 59 Am. St. Rep. 279.

Qualified in *Green v. Town of Dyersburg*, 2 Flipp. 499, F. C. 5,756, holding the rule yields to manifest contrary intent and that building of railroad and payment of municipal bonds in aid therefor were dependent covenants.

**Contracts.**—Where party to contract agrees to pay a specified amount in some particular article, if, upon demand, he refuses to deliver the article, he loses the benefit of that part of contract, p. 227.

Cited and applied in *Cook v. Stevenson*, 30 Mich. 248, where vendee agreed to give security for part of purchase price, on failure to do so it was held he lost the right.

**Contracts.**—Acts to be done by both parties at the same time are deemed mutual and concurrent covenants, p. 224.

Cited to this point in *Tilghman v. Tilghman*, 1 Bald. 494, F. C. 14,045, holding party who claims remedy for nonperformance must aver and prove performance, or offer and readiness to perform; to same effect, *Neir v. Yocum*, 9 Sawy. 25, 16 Fed. 170, where one party had agreed to sell and deliver hops to another on demand and upon payment of certain price.

**Attachment.**—Under Maryland law an attachment will not lie in a case *ex contractu* for unliquidated damages for the nondelivery of goods, p. 227.

Principle applied in *State v. Steibel*, 31 Md. 37, in construction of statute permitting action against surety on guardian's bond.

**Attachment.**—Under Maryland practice, if defendant appears in attachment proceedings for purpose of dissolving attachment, plaintiff cannot be required to file a new declaration, p. 226.

This practice is approved and followed in *Spear v. Griffin*, 23 Md. 429.



8 Wheat. 229-252, 5 L. 603, *SEXTON v. WHEATON*.

**Fraudulent conveyance.**—Acts of grantee will not be considered fraudulent unless one complaining thereof knew of the acts and has been actually defrauded thereby, p. 238.

Principle applied with approval in *Magniac v. Thompson*, 1 Bald. 357, 359, 364, F. C. 8,956, holding both parties to alleged act of fraud must concur in illegal design and that time intervening between conveyance and contraction of debt is not a matter which makes conveyance per se a fraud; to same effect, *Ashby v. Steere*, 2 Wood. & M. 357, F. C. 576, and *Stockley v. Horsey*, 4 Houst. 614; S. C., 4 Del. Ch. 550, where case is cited in quotation from *Magniac v. Thompson*, supra; *Lyman v. Cessford*, 15 Iowa, 233, where grantee failed to have deeds recorded, but it was not shown creditors were aware of this fact; *Marston v. Dresen*, 85 Wis. 542, 55 N. W. 900, where husband, being indebted, conveyed legal title to wife who had equitable, it not appearing credit was given husband on such title, held, conveyance was valid as to them.

**Fraudulent conveyances.**—Owner of property may make any disposition of it which does not interfere with existing rights of others, p. 242.

This principle is applied in *Harkins v. Bailey*, 48 Ala. 378, holding bona fide sale of property by insolvent to a relation will not be set aside; *Marsh v. Richardson*, 49 Ala. 433, and *Lawson v. Warehouse Co.*, 73 Ala. 292, only limitation on this power is that prescribed by statute; *Lyles v. Cements*, 49 Ala. 449, applying principle to married woman in management of her separate estate; *Rowland v. Plummer*, 50 Ala. 196, in determining legality of loan made by wife to husband; *Braune v. McGee*, 50 Ala. 362, where property of intended wife was conveyed by antenuptial settlement to trustee to hold for her separate use during coverture; *Crawford v. Kirksey*, 50 Ala. 595, affirming right of insolvent debtor to make conveyance of property to one creditor in satisfaction of debts owed him; *Holleman v. De Nyse*, 51 Ala. 99, conveyance by husband to wife and children; *Sims v. Rickets*, 35 Ind. 187, 9 Am. Rep. 683, where husband, free from debt and without children, conveyed to wife; *Wilder v. Brooks*, 10 Minn. 54, 57, 88 Am. Dec. 50, 53, voluntary settlement on wife. Approved in *Cosby v. Ross*, 3 J. J. Marsh. 290, 20 Am. Dec. 140, conveyance without consideration, but there was no allegation of fraud; *Miller v. Miller*, 17 Or. 434, 21 Pac. 942, holding further as to interest husband retains in property voluntarily settled on wife.

**Fraudulent conveyances.**—Statute 13 Eliz. c. 5., avoids all conveyances not made on a consideration deemed valuable in law, as against previous creditors, p. 242.

Cited and statute followed in *McLaughlin v. Bank*, 7 How. 228, 12 L. 679, holding a note not yet due is sufficient to constitute

holder a creditor within rule; *Parish v. Murphree*, 13 How. 100, 14 L. 68, where debtor made voluntary settlement on his wife; *Clements v. Moore*, 6 Wall. 313, 18 L. 789, where conveyance was made to wife indirectly through third person; *Kehr v. Smith*, 20 Wall. 35, 36, 22 L. 315, affirming decision, same case, 2 Dill. 59, 60, F. C. 13,071, where settlement was made while debts existed and was held to be out of all proportion to means of husband; *Bean v. Patterson*, 122 U. S. 499, 30 L. 1127, 7 S. Ct. 1299, holding where wife is one of husband's creditors, a conveyance made to her will be deemed to have been made for valuable consideration; *Miller v. Thompson*, 3 Port. 207, and whether void as to subsequent creditors depends on intent with which conveyance was made; *Hoot v. Sorrell*, 11 Ala. 398, and *Wright v. Campbell*, 27 Ark. 645, where voluntary trust deed was held void as to creditors; *Arnett v. Coffey*, 1 Colo. App. 37, 27 Pac. 615, but it must be shown by allegation and proof that debt to which property is said to be subject existed at time of conveyance; *Chapin v. Pease*, 10 Conn. 73, 25 Am. Dec. 58, where grantee without consideration sought to reconvey to grantor without consideration, in order to defraud creditors; *O'Brien v. Coulter*, 2 Blackf. 424, where property was conveyed to children at time parent was in insolvent circumstances; *Iseminger v. Criswell*, 98 Iowa, 389, 67 N. W. 291, where wife was estopped from claiming title to land which her husband had purchased with her money, but had retained title in himself, on the strength of which credit had been procured; *Hurdt v. Courtenay*, 4 Met. (Ky.) 146, voluntary conveyance of slave held void, husband being indebted at time; *Smith v. Parker*, 41 Me. 455, as to conveyance in trust made by one largely in debt; *Brinton v. Hook*, 3 Md. Ch. 480, where deed of trust was made in favor of grantor; *Wood v. Savage*, 2 Doug. (Mich.) 326, and parol antenuptial promise to hold money belonging to wife in trust and to invest same in real estate in her name cannot sustain postnuptial settlement as against creditors; *Allen v. Antisdale*, 38 Mich. 232, but a conveyance to wife, she being a creditor, is deemed to have been made on valuable consideration; *Eddy v. Baldwin*, 23 Mo. 596, holding land conveyed by husband to trustee, to hold for separate use of wife with intent to defraud creditors, is subject to sale under execution by husband's creditors; *Carlisle v. Rich*, 8 N. H. 48, holding a surety on an administration bond is a creditor so as to render voluntary conveyance void; *Carter v. Grimshaw*, 49 N. H. 105, where father made settlement of all his property on minor children, at the time being largely in debt; *Mohawk Bank v. Atwater*, 2 Paige Ch. 58, and fact that grantee was not privy to fraud is of no effect; *Young v. Heermans*, 66 N. Y. 381, where debtor transferred all his property in trust for his own benefit; *Thompson v. Dougherty*, 12 S. & R. 453, 456, and where conveyance is set aside on account of debts outstanding at time it is made, subsequent creditors will be let in on property settled; *Har-*



lan v. Maglaughlin, 90 Pa. St. 297, stating further that what is said in Thompson v. Dougherty, *supra*, as to rights of subsequent creditors, is obiter dicta. Cited generally, Sumner v. Hicks, 2 Black, 534, 535, 17 L. 357; Hickox v. Elliott, 11 Sawy. 645, 27 Fed. 845, without application; Benton v. Jones, 8 Conn. 190, as containing general discussion of subject. Cited, *arguendo*, Howe v. Ward, 4 Me. 205. Cited generally as to when sale is fraud on subsequent creditors, Kendall v. Fitts, 22 N. H. 6. Cited generally, without application, Farr v. Sims, Rich. Eq. Cas. 137, 24 Am. Dec. 405; Clement v. Cozart, 112 N. C. 418, 17 S. E. 488; Chambers v. Spencer, 5 Watts, 408, 409, as to meaning of phrase "indebted at time of making conveyance." Cited generally as construction of statute, Churchill v. Wells, 7 Cold. 370. Cited generally, Lockhart v. Beckley, 10 W. Va. 98; Bank v. Swan, 3 Wyo. 375, 23 Pac. 751, as to presumption of fraud arising from voluntary conveyance; note, 14 Am. Dec. 703, 709.

Modified in Hopkirk v. Randolph, 2 Brock. 144, F. C. 6,698, holding where gift made is comparatively small, though donor afterwards becomes insolvent, court will refuse to set it aside as fraudulent; Davidson v. Lanier, 51 Ala. 320, holding, if gift is not made with fraudulent intent, it is valid even as to existing creditors; Bertrand v. Elder, 23 Ark. 501, 502, voluntary conveyance by debtor is not conclusive evidence of fraud, holding further as to what indebtedness will be sufficient grounds for setting aside conveyance; Clayton v. Brown, 17 Ga. 220, holding statute does avoid voluntary conveyances merely as being voluntary, but such as are fraudulent; Carson v. Foley, 1 Iowa, 527, voluntary conveyance is not per se fraudulent as to existing creditors; Stewart v. Rogers, 25 Iowa, 398, 95 Am. Dec. 795, whether voluntary conveyance will be void in absence of fraud depends on reasonableness of, and condition of grantor as respects his ability to pay creditors. Cited in Seward v. Jackson, 8 Cow. 452, where court questions whether it was necessary for Supreme Court to decide the point raised by the English statute. Modified in Pell v. Treadwell, 5 Wend. 696, where father made settlement on children on the advice and consent of a creditor who at time had security for money due him; Rose v. Brown, 11 W. Va. 137, holding debts of prior creditors are a charge on premises.

Distinguished, United States v. Bank, 8 Rob. (La.) 403, where conveyance was made for benefit of certain creditors.

**Voluntary conveyance** made with intent to defraud subsequent creditors will be set aside, p. 247.

Rule approved and adopted in Caller v. McNabb, 4 Fed. Cas. 1075, where conveyance was made without consideration on eve of contracting debt; Burdick v. Gill, 2 McCrary, 488, 7 Fed. 670, fraud will be presumed when voluntary conveyance to wife is followed within

short time by fraudulent disposition of remaining property; *Driggs v. Norwood*, 50 Ark. 46, 7 Am. St. Rep. 81, 6 S. W. 324, but voluntary conveyance is not per se fraudulent as to subsequent creditors; *Rudy v. Austin*, 56 Ark. 81, 35 Am. St. Rep. 88, 19 S. W. 113, where means of subsequent creditors were used to pay off debts of prior creditors; *Plunkett v. Plunkett*, 114 Ind. 488, 16 N. E. 614, where property was conveyed by deed of trust in order to defeat wife's claim for alimony; *Laughton v. Harden*, 68 Me. 213, and *Andrew v. Jones*, 10 Ala. 422, holding intent of grantor alone determines validity of conveyance; *Henry v. Fullerton*, 13 S. & M. 635, indirect conveyance to wife; *Payne v. Stanton*, 59 Mo. 160, and *Mittleburg v. Harrison*, 11 Mo. App. 142, but fraud must be proved even if grantor was indebted at time of making conveyance; *Garr v. Hill*, 9 N. J. Eq. 215, holding further, deed executed for purpose of defeating creditors, in which purpose grantee participates, is void, even though full consideration is paid; *Beeckman v. Montgomery*, 14 N. J. Eq. 111, 113, 80 Am. Dec. 232, 234, where conveyance was made with a view to future indebtedness; *Carpenter v. Carpenter*, 27 N. J. Eq. 503, but fraud must be alleged and proved; *Mills v. Morris*, 1 Hoff. Ch. 420, where future debts were contracted to pay off those existing at time settlement was made; *Hutchinson v. Kelly*, 1 Rob. (Va.) 134, 39 Am. Dec. 257, conveyance made to avoid prospective liability as a surety; *Johnston v. Zane*, 11 Gratt. 561, holding further, to let in subsequent creditor, it is immaterial whether fraudulent intent be directed against subsequent or existing creditors, so long as there was fraud in fact; *McLane v. Johnson*, 43 Vt. 57, where subsequent creditors were permitted to maintain suit to set aside conveyance when fraud complained of was on existing creditors; *Lockhard v. Beckley*, 10 W. Va. 103, 110, fact that conveyance was made while debts were in existence is evidence fraud was intended on subsequent creditors. Cited generally in *Smith v. McDonald*, 25 Ga. 380, holding the continuing of occupation by vendor is a badge of fraud as against after creditors. Cited without application, *Hook v. Mowre*, 17 Iowa, 201. Cited approvingly, arguendo, in *Parkman v. Welch*, 19 Pick. 237; also, dissenting opinion, *Bullitt v. Taylor*, 34 Miss. 745; *Loehr v. Murphy*, 45 Mo. App. 524, 526. Cited generally, *Botts v. Cozine*, 1 Hoff. Ch. 86, case holding voluntary assignment is prima facie valid as to subsequent creditors, but this may be overcome by proof of actual fraud; *Bank v. Merrill*, 81 Wis. 150, 29 Am. St. Rep. 875, 50 N. W. 505, as to necessity of subsequent creditors showing fraudulent intent. Cited, arguendo, *Sioux City Terminal Co. v. Trust Co.*, 82 Fed. 136, 49 U. S. App. 545, as to right of subsequent creditors when debtor has mortgaged his property, there being no intent to defraud.

Distinguished, *Emery v. Yount*, 7 Colo. 109, 1 Pac. 688, where pleading contained no allegation that conveyance was made with intent to defraud; *May v. May*, 19 Fla. 387, payments of premiums



on life insurance policy by insolvent is not fraudulent as to subsequent creditors; *Pepper v. Carter*, 11 Mo. 544, holding voluntary conveyance, even if grantor be embarrassed by debts, is not void as to subsequent creditors unless actual fraud be shown; *Grimes v. Sherman*, 25 Neb. 846, 847, 41 N. W. 815, holding, under facts, no intent to defraud was shown; *Martin v. Oliver*, 9 Humph. 566, 49 Am. Dec. 718, holding facts that husband conveyed nearly all his property to his wife and subsequently became indebted without means to pay, does not show fraudulent intent.

**Fraudulent conveyance.**—A voluntary settlement in favor of a wife and children is not to be impeached by subsequent creditors, on the ground of its being voluntary, p. 250.

Principle applied in *Mattingly v. Nye*, 8 Wall. 372, 19 L. 381, where settlement was made three years previous to contraction of debt; *Jackson v. Jackson*, 91 U. S. 125, 23 L. 259, where husband attempted to have settlement set aside; *Smith v. Vodges*, 92 U. S. 183, 23 L. 481, debt contracted subsequent to settlement; *Jones v. Clifton*, 101 U. S. 227, 25 L. 909, where it was held small debts owed at time of settlement, such debts being subsequently paid, would not avoid settlement; *Schreyer v. Scott*, 134 U. S. 410, 33 L. 958, 10 S. Ct. 581, settlement made prior to contraction of debts and not in contemplation of defrauding subsequent creditors; *Garner v. Bank*, 151 U. S. 434, 38 L. 224, 14 S. Ct. 395, holding further, where husband while managing wife's separate estate, without her knowledge invests a part in real estate, taking title in his name, and she, on discovering this fact, compels a conveyance of title to herself, her equity in the property will be considered superior to that of his creditors; *Dick v. Hamilton*, Deady, 329, 330, 331, F. C. 3,890, it will not be presumed that husband's creditor trusted him on faith of property which appeared on records as property of his wife; *Sedgwick v. Place*, 5 Ben. 185, 5 Bank. Reg. 168, F. C. 12,620, holding conveyance to wife through third party will not be set aside if husband was solvent at time of making, there being no intention of defrauding creditors; *Barker v. Barker's Assignee*, 2 Woods, 90, 12 Bank. Reg. 477, F. C. 986, holding further, such conveyance may be impeached because of concealment of the fact; *Picquet v. Swan*, 4 Mason, 452, F. C. 11,133; *Anonymous*, 1 Wall. Jr. 112, 116, 118, 121, F. C. 474, where settlement was made on illegitimate child before debts were contracted; *United States v. Griswold*, 7 Sawy. 320, 8 Fed. 562, but where conveyance is mere device to put property beyond reach of creditors, it will be set aside; *Herring v. Richards*, 1 McCrary, 575, 3 Fed. 443, settlement made on child while father was free of debt; *Adams v. Broughton*, 13 Ala. 744, holding voluntary conveyance of slaves operative against subsequent creditors of grantor; *Horn v. Volcano Co.*, 13 Cal. 72, 73 Am. Dec. 573, but may be impeached if fraudulent in fact; *Benton v. Jones*, 8 Conn.

191, where subsequent creditor sought to set aside conveyance made to previous creditors; *Alston v. Rowles*, 13 Fla. 136, where the main question involved was as to time when relationship of debtor and creditor arose; *Sheppard v. Thomas*, 24 Kan. 782, subsequent creditors had knowledge of conveyance when credit was given; *National Bank v. Jaffray*, 41 Kan. 713, 21 Pac. 249, where credit was given subsequent to conveyance, and without knowledge debtor ever had title to property in question; *Thacher v. Phinney*, 7 Allen, 150, but whether such conveyance was intended as fraudulent on subsequent creditors is a question for jury; *Wilder v. Brooks*, 10 Minn. 54, 57, 88 Am. Dec. 50, 53; *Wells v. Treadwell*, 28 Miss. 725, holding such conveyance not void as to subsequent purchasers; *Phillips v. Wooster*, 36 N. Y. 414, where husband having procured a conveyance to be made to his wife, grantor sought to impeach it by reason of becoming a creditor of husband for debt simultaneously contracted; *Crumbaugh v. Kugler*, 2 Ohio St. 379, where subsequent creditors were not allowed to come in where conveyance was set aside as being fraudulent as to prior creditors; *Vance v. Smith*, 2 Heisk. 351, where grantor made ample provision for satisfaction of existing debts; *Bank v. Patton*, 1 Rob. (Va.) 538, subsequent creditors, who became such with knowledge conveyance had been made, cannot complain thereof, even though grantor was indebted to others at time of making; *Sayers v. Wall*, 26 Gratt. 366, 372, 21 Am. Rep. 307, 310; *Lockhard v. Beckley*, 10 W. Va. 96, 97, where husband made improvements on wife's property; *Bank v. Wilson*, 25 W. Va. 256; *Pike v. Miles*, 23 Wis. 169, 99 Am. Dec. 150, holding conveyance cannot be impeached when, at time of making, husband's assets greatly exceeded his debts.

Cited generally in *Clarke v. White*, 12 Pet. 198, 9 L. 1055, as bearing on subject; *Graham v. Railroad Co.*, 102 U. S. 153, 26 L. 108, referring to extensive note on general subject; *Robinson v. Cathcart*, 2 Cr. C. C. 598, F. C. 11,946, and *Jones v. Clifton*, 2 Flipp. 194, F. C. 7,457, application not clear; *Scogin v. Stacy*, 20 Ark. 271, where inability of husband to have voluntary conveyance set aside was affirmed; *Going v. Orns*, 8 Kan. 88, as to right of wife to purchase personal property from husband. Cited without application, *Simmons v. Thomas*, 43 Miss. 38, 5 Am. Rep. 472; *Pawley v. Vogel*, 42 Mo. 303; *National Bank v. Hamilton*, 34 N. J. Eq. 162. Cited generally in *Hunters v. Waite*, 3 Gratt. 64, 65, containing an exhaustive discussion of principles applicable to voluntary conveyances. Cited, *arguendo*, *Dayton Co. v. Sloan*, 49 Neb. 630, 68 N. W. 1042, in determining validity of mortgage given by husband to wife.

Distinguished in *Hinde's Lessee v. Longworth*, 11 Wheat. 211, 6 L. 457, where conveyance was attacked by antecedent creditors; *In re Jones*, 6 Biss. 72, 9 Bank. Reg. 559, F. C. 7,444, where intended settlement was not such in law; *Taylor C. Co. v. Bell*, 62 Ark. 33,



34 S. W. 82, where wife permitted husband to represent her property as his own; also, to same effect, *Bceson v. Eveland*, 26 N. J. Eq. 471; *Bank of U. S. v. Housman*, 6 Paige, 534, where grantee, son of grantor, did not record conveyance; *Bank v. Wilson*, 25 W. Va. 259, and *Bailey v. Gardner*, 31 W. Va. 106, 13 Am. St. Rep. 858, 5 S. E. 642, where improvements were made on conveyed property in default of creditors; *Cato v. Easley*, 2 Stew, 221, facts showing that settlement in favor of children was fraudulent as to creditors.

The rule of this case is greatly modified in *McCanless v. Smith*, 51 N. J. Eq. 527, 25 Atl. 222, where subsequent creditors were permitted to subject lands of wife to payment of judgments against husband, although the lands had stood in wife's name on public records at time husband's debts were contracted.

Miscellaneous.—Cited in *Cowles v. Marks*, 47 Ala. 623, as to confidential relations existing between husband and wife; *Wise v. Norton*, 48 Ala. 217, and *Jones v. Wilson*, 69 Ala. 402, application not apparent; *Cunningham v. Williams*, 42 Ark. 173; *Smith v. Railroad Co.*, 99 U. S. 401, 25 L. 438; *Vasser v. Henderson*, 40 Miss. 521, 90 Am. Dec. 353; *Hershy v. Latham*, 46 Ark. 551, and *Campbell v. Whitson*, 68 Ill. 243, 18 Am. Rep. 556, as to note on fraudulent conveyances; 1 Am. Lect. Cases (5th ed.), 51. Cited generally in *Willard v. Magoon*, 30 Mich. 281, as to contract relations between husband and wife; *Steele v. Coon*, 27 Neb. 597, 20 Am. St. Rep. 712, 43 N. W. 414, as to deed not fraudulent at first becoming so by laches of grantee; *Coolidge v. Melvin*, 42 N. H. 526, as to secret trust reserved to vendor; *Monroe v. Hussey*, 1 Or. 190, 75 Am. Dec. 553, as to when sale of personalty unaccompanied by delivery will be considered void as to creditors of vendor.

8 Wheat. 253-257, 5 L. 610, UNITED STATES v. WILSON.

Constitutional law.—Discharge of insolvent debtor under State insolvency law does not bind the United States with reference to debts due from insolvent, p. 255.

Cited to this point in *Trustees v. Trenton*, 30 N. J. Eq. 684, as an example of application of rule, that general words in statute do not bind the sovereign; also, in *Skelly v. School District*, 103 Cal. 656, 37 Pac. 644; and in note to *People v. Herkimer*, 15 Am. Dec. 382. Cited in *Ex parte Holman*, 28 Iowa, 105, 4 Am. Rep. 169, to the effect, that a State court cannot in any manner interfere with or control the process of the Federal courts; and in *Strozier v. Howes et al.*, 30 Ga. 580, as an authority for holding. "Federal courts have no authority, in cases not within appellate jurisdiction, to in any manner interfere with jurisdiction of proceedings of State courts." Cited also in *United States v. Hewes, Crabbe*, 317, F. C. 15,359; *Glenn v. Humphreys*, 4 Wash. (Cirt.) 425, F. C. 5,480.

8 Wheat. 257-261, 5 L. 611, *GREELY v. UNITED STATES*.

**Construction of statute.**—Collusive captures and violation of the revenue laws, committed by a private armed vessel, are a breach of the condition of the bond given by the owners, under prize act of June 26, 1812, chap. 430, p. 261.

**Construction of statute.**—Where breach in condition of bond, given under prize act of June 26, 1812, chap. 430, appears upon demurrer, the defendants are not entitled to a hearing in equity under judiciary act of 1789, chap. 20, § 26, p. 261.

Cited in *Marble v. Fulton*, 1 Hask. 470, F. C. 9,059, an action for breach of condition in bond, as an instance where penalty for breach was established by law.

8 Wheat. 261-268, 5 L. 612, *THE EXPERIMENT*.

**Prizes.**—In cases of collusive capture, papers found on board one captured vessel may be invoked into the case of another captured on the same cruise, p. 264.

Approved in *The Springbok*, Blatchf. Pr. Cas. 443, F. C. 13,264. Cited in *The Springbok*, Blatchf. Pr. Cas. 449, F. C. 13,264, and *The Diana*, 7 Wall. 360, 19 L. 166, as instances of invoking testimony from other sources.

**Admiralty rules.**—Commission obtained by fraudulent misrepresentations will not vest the interests of prize, p. 264.

**Admiralty rules.**—Collusive capture made under a commission, is not, per se, evidence that commission was fraudulently obtained, p. 265.

**Admiralty rules.**—Collusive capture vests no title in captors, because captors thereby forfeit all title to prize property, p. 265.

8 Wheat. 268-293, 5 L. 614, *SPRING v. S. C. INSURANCE CO.*

**Assignment.**—An insolvent debtor has a right to prefer one creditor to another in payment by an assignment bona fide made, and subsequently-acquired liens will not affect the assignment, p. 283.

Cited in *Thornton v. Davenport*, 1 Scam. 298, 29 Am. Dec. 360, where rule is applied in case of securing certain creditors by mortgage in preference to others; also, *Ashby v. Steere*, 2 Wood. & M. 357, F. C. 576, where assignment was made in contemplation of bankruptcy; *Lord v. Devendorf*, 54 Wis. 496, 11 N. W. 905, where individual creditors were preferred to those of firm. Cited to this point in *McCall v. Hinkley*, 4 Gill, 157. Cited generally, *Dufphey v. Frenaye*, 5 Stew. & P. 256.

Distinguished on statutory grounds in *Landauer v. Vietor*, 69 Wis. 440, 34 N. W. 231.



**Equity pleading.**—Bill of interpleader may be maintained where there are several parties claiming the same fund, and under it the rights of respective parties will be determined, p. 282.

Approved, and applying rule to case of several defendants claiming an interest in a lottery drawing in *Roselle v. Farmers' Bank*, 119 Mo. 93, 24 S. W. 746; also in *School District v. Weston*, 31 Mich. 97, holding further, "an absolute identity in the conflicting claims is not requisite." Cited, *arguendo*, in *Chase v. Manhardt*, Bland Ch. 345, and *Widaman v. Hubbard*, 88 Fed. 813. Cited in extended note on "Interpleader in Equity," 35 Am. Dec. 706.

**Equity practice.**—The complainant in a bill of interpleader will be required to pay interest on the fund pending proceedings, in case he has not paid fund into court, p. 293.

Cited in *Groves v. Sentell*, 66 Fed. 181, 30 U. S. App. 119, as an instance.

**Equity practice—Costs.**—Complainants in bill of interpleader may deduct their costs out of the fund awarded, p. 293.

Cited in note, 35 Am. Dec. 709.

**Liens.**—An insurance broker is entitled to a lien on the policy for premiums paid by him on account of his principal, which is not lost by parting with possession, unless there be an intent to abandon lien, p. 285.

Cited in *Johnson v. The Schooner M'Donough*, 1 Gilp. 104, 105, F. C. 7,395, applying the rule to wharfinger's lien, where vessel had been removed from wharf secretly and wrongfully, and afterwards brought back without fraud or force. Cited generally, in *Packard v. Sloop Louisa*, 2 Wood. & M. 58, F. C. 10,652.

**Evidence.**—Proof that subscribing witness has gone to sea, and has been absent for four years without having been heard from, diligent inquiry having been made, is sufficient to admit secondary evidence of his handwriting, p. 282.

Cited and rule applied in *Hartford Ins. Co. v. Gray*, 80 Ill. 30, where secondary evidence of application for insurance policy was admitted. Cited in *Disnukes v. Musgrove*, 7 Mart. (La.) (N. S.) 62, as an instance where secondary evidence was admitted to prove handwriting. Cited in *Bennett v. Robinson*, 3 Stew. & P. 239, as to view of Supreme Court on evidence to prove handwriting of subscribing witness; note, 1 Blackf. 49.

Distinguished, *Gaither v. Martin*, 3 Md. 159, absence of subscribing witness being casual.

**Miscellaneous.**—Cited in *Wilburn v. Spofford*, 4 Sneed, 704, as to when death works a revocation of powers of agent; *Cronin v. Patrick County*, 89 Fed. 83, 4 Hughes, 532, as to title taken by assignee of bonds made, so as to pass by assignment merely.

8 Wheat. 294-312, 5 L. 620, HUGHES v. UNION INS. CO.

**Debt.**—In action of, a less sum may be recovered than is demanded, where amount is made up of distinct accounts, or the precise sum demanded is diminished by extrinsic circumstances, p. 310.

Cited, without application, Buckwalter v. United States, 11 Serg. & R. 197.

**Debt.**—When action will lie for, discussed, p. 310.

Cited generally, on this point, in Dillingham v. Skein, Hemp. 182, F. C. 3,912a; Collins v. Johnson, Hemp. 280, F. C. 3,015a; United States v. Elliot, 25 Fed. Cas. 1001.

**Marine insurance.**—Contract of marine insurance construed, and certain acts held not a deviation, p. 307.

Cited generally in Thwing v. Washington Ins. Co., 10 Gray, 454, where a similar contract was construed.

8 Wheat. 312-326, 5 L. 624, BUEL v. VAN NESS.

**Appeal and error.**—The appellate jurisdiction of the Supreme Court may be exercised by a writ of error issued by the clerk of a Circuit Court, under the seal of that court, p. 321.

Cited in Worcester v. Georgia, 6 Pet. 537, 4 L. 492, as an instance where the record was authenticated by the clerk, and no exception was taken to that mode of procedure. Cited, without application, Johnson v. Howe, 2 Stew. 29.

**Appeal and error.**—Writ of error need not itself state that it is directed to a final judgment of the State court, or that the court is the highest court of law or equity of the State, p. 321.

Cited in Underwood v. McVeigh, 131 U. S. 122, App., 21 L. 954, as an instance where writ of error has been directed to the subordinate court to which the record has been remitted. Cited in Fleming v. Clark, 12 Allen, 198, where the court holds, that before a writ of error can rightfully issue, there must have been a final decision in the highest court of the State, to which the question could be taken.

**Writ of error** must be allowed either by presiding judge of State court, or by judge of Supreme Court of United States, p. 320.

Cited, with approval, in Ferris v. Coover, 11 Cal. 180, holding further, judge must see that he is acting within the law; Hart v. Burnett, 20 Cal. 171, holding further, the action on application is so far judicial in nature, that judge may refuse the citation when, in his judgment, it is clear that writ will not lie for want of jurisdiction; to same effect is Greely v. Townsend, 25 Cal. 608.



**Jurisdiction** of United States Supreme Court extends to a case where both parties claim a right or title under the same act of congress, p. 324.

Cited in *Lapham v. Almy*, 13 Allen, 304, and *Rice v. Thayer*, 105 Mass. 261, 7 Am. Rep. 519, where rule was applied in case of a demand by an informer against collector of internal revenue for a share of penalty paid to collector.

**Duties.**— Under act of 1799, the collector's share of a forfeiture is payable to the collector in office at time seizure was made, and not to his successor at time of condemnation, p. 325.

Distinguished in *Waddell v. Morris*, 14 Wend. 81, where it is held a former marshal cannot maintain an action at law against his successor in office to recover a proportionate amount of a sum allowed for care and custody of property seized and detained under order of court.

**Stare decisis.**— Erroneous constructions, adopted without examination, are not binding as authority, p. 322.

Cited in dissenting opinion, *Harrison v. Nixon*, 9 Pet. 530, 9 L. 218. Cited also in *Decatur v. Paulding*, 14 Pet. 607, 612, 10 L. 614, 617 (appendix).

**Appeal and error.**— Appellate jurisdiction of Supreme Court in cases from State courts, under the Federal Constitution, laws and treaties, is not limited by value of matter in dispute, p. 322.

8 Wheat. 326-337, 5 L. 628, *NICHOLLS v. WEBB*.

**Bills and notes.**— Demand of payment, and notice of nonpayment, need not be made by a notary public in the case of promissory notes, in order to bind indorser, p. 331.

Followed in *Nelson v. Bank*, 69 Fed. 800, 32 U. S. App. 554, holding, all that is required is that due presentment and demand shall be made, and that indorser shall be seasonably notified of dishonor, and holder looks to him for payment; *Bay v. Church*, 15 Conn. 17, 18, where note was payable in one State and indorser was inhabitant of another; *Bond v. Bragg*, 17 Ill. 71, holding further, protest, of itself, is not evidence of demand of payment, nonpayment and notice, of promissory note; *Kaskaskia Bridge Co. v. Shannon*, 1 Gilm. 24, applying rule to inland bill of exchange; *Smith v. Little*, 10 N. H. 532; *Sussex Bank v. Baldwin*, 17 N. J. L. 489, where demand was made by one not a notary. Cited in *Bernard v. Barry*, 1 G. Greene, 390, holding, however, such protest is admissible as part of notary's testimony in proving demand and notice; *Carter v. Burley*, 9 N. H. 567; *Wheeler v. State*, 9 Heisk. 395.

**Bills and notes.**—Notarial protest is not itself evidence in chief, of part of demand of payment of promissory note, p. 331.

Cited and applied in *Waldron v. Turpin*, 15 La. 555, 35 Am. Dec. 212; *Corbin v. Planters' Bank*, 87 Va. 664, 24 Am. St. Rep. 675, 13 S. E. 99. Cited in *Sanderson v. Sanderson*, 20 Fla. 303, holding such certificate of protest properly in evidence because the right of objection was not taken at trial.

Distinguished in *Williams v. Putnam*, 14 N. H. 542, 40 Am. Dec. 205, and *Dougherty v. Hildt*, 1 McLean, 335, F. C. 4,027, holding, when the indorser of a note lives in one State, and the maker in another, the dishonor may be proved by protest; *Simpson v. White*, 40 N. H. 543, on statutory grounds; *Burk v. Shreve*, 39 N. J. L. 216, where statute made certificate evidence in all cases; to same effect, *Ashe v. Beasley*, 6 N. Dak. 193, 69 N. W. 188.

**Evidence.**—Rules of evidence must expand according to the exigencies of society, p. 332.

Cited to this point, in dissenting opinion, *Musson v. Lake*, 4 How. 285, 11 L. 977; *Vaughan v. Phebe*, 1 Mart. & Y. 22, 17 Am. Dec. 778.

**Evidence.**—Courts are cautious in the introduction of new doctrines of evidence, p. 332.

Cited to this effect, in *County of Mahaska v. Ingalls*, 16 Iowa, 85.

**Bills and notes.**—Protest of foreign bills of exchange is admissible evidence of demand on drawee, p. 333.

This holding is approved and followed, *Dickens v. Beal*, 10 Pet. 582, 9 L. 542; dissenting opinion, *Musson v. Lake*, 4 How. 279, 282, 11 L. 974, 975; *Jones v. Heaton*, 1 McLean, 318, F. C. 7,468, where bill was drawn in one State to be paid in another; *Indseth v. Pierce*, 13 Fed. Cas. 34, where bill drawn in United States was payable in Norway. Cited generally, *National Bank v. Chancellor*, 9 W. Va. 70; *Dumont v. Pope*, 7 Blackf. 369, as to whether protest of inland bill of exchange is evidence for any purpose.

**Bills and notes — Evidence.**—Books of notary, proved to have been regularly kept, are admissible in evidence, after his decease, to prove a demand and notice in case of promissory note, p. 337.

Rule applied in similar case, *Hatfield v. Perry*, 4 Harr. 465; *Planters' Bank v. Bass*, 2 La. Ann. 438, where notary was also shown to be agent of bank; *Porter v. Judson*, 1 Gray, 176, ruling similarly; *Barnard v. Planters' Bank*, 4 How. (Miss.) 106, 107, 108, observing further that memoranda need not be wholly in handwriting of notary; *Ogden v. Glidwell*, 5 How. (Miss.) 182; *Bodley v. Scarborough*, 5 How. (Miss.) 729; *Halliday v. McDougall*, 20 Wend. 85, case of a bill of exchange; *Austin v. Wilson*, 24 Vt. 636, collecting authorities. Approved in *Dobson v. Laval*, 4 McCord, 58. Cited in *Dickens v. Beal*, 10 Pet. 580, 9 L. 541, where it was held, the



testimony of notary, that he put notice of protest in post-office, without producing copy thereof or proving contents, is sufficient proof that bills or notes were protested; *Eldrege v. Chacon*, Crabbe, 299, F. C. 4,329, holding notary's statement in protest, that he has given indorser notice of nonpayment, is prima facie evidence of such notice; *Carter v. Burley*, 9 N. H. 568; *Brewster v. Arnold*, 1 Wis. 282; *Musson v. Lake*, 4 How. 283, 11 L. 976, dissenting opinion. See also extended note on "Protest as Evidence," 96 Am. Dec. 603, 605, 612, where the authorities are collected. Cited generally, *United States v. Libby*, 1 Wood. & M. 226, F. C. 15,597.

Criticised in *Bank v. Cooper*, 1 Harr. 16, as making the notary judge of what is legal notice.

**Evidence.**—Memoranda of acts done, made in the ordinary course of business, and in discharge of prescribed duty, are admissible evidence of such acts in the event of the maker's death, p. 337.

The following citing cases affirm and apply this rule: *Gale v. Norris*, 2 McLean, 471, F. C. 5,190, applying rule to entries in merchants' book of account made by clerk, since deceased; *Hatfield v. Perry*, 4 Harr. 465, a case almost identical in fact; *Spann v. Baltzell*, 1 Fla. 321, 46 Am. Dec. 360, where entries made by a notary, authenticated by his oath, were admitted in evidence, although he could not remember the facts stated in such entries; *Robinson v. Dibble*, 17 Fla. 462, applying rule to account-books of testator offered by his executor; *Bank of Tennessee v. Smith*, 9 B. Mon. 611, where entries were made by bank's employees; *Augusta v. Windsor*, 19 Me. 321, entries made by a physician; *Shove v. Wiley*, 18 Pick. 562, admitting as evidence entries by bank clerk to show demand and notice on maker of note; *Kennedy v. Doyle*, 10 Allen, 166, 168, reviewing authorities and holding entry of baptism, made by priest in church record of baptisms, is, after death of priest, competent evidence of date of baptism; *Lassone v. Boston Co.*, 66 N. H. 353, 356, 359, 24 Atl. 903, 905, 17 L. R. A. 527, item of account for repairs, in a wheelwright's book of account, is admissible in proof of damage; *Livingston v. Arnoux*, 56 N. Y. 518, where receipt given by sheriff, since deceased, was admitted to prove redemption from execution sale; *Allen v. Parish*, 3 Ohio, 125, where copy of deed, made by notary public, was admitted in evidence, the original having been lost; *Chaffee v. United States*, 18 Wall. 541, 21 L. 912, but holding entries of canal collectors inadmissible to show amount of liquor shipped, because not written from personal knowledge of the amounts, but from invoice merely; *North Bank v. Abbot*, 13 Pick. 471, 25 Am. Dec. 339, admitting entries by bank clerk to prove demand and notice, clerk having absconded; *Little Rock Co. v. Dallas Co.*, 66 Fed. 525, 30 U. S. App. 55, collecting cases, but holding certain entries inadmissible as the person making them was alive; *Williamson v. Doe*, 7 Blackf. 18, refusing to admit entries because no proof of death. Cited in general discussion, without

special application of the rule, in *Constable v. Steamship Co.*, 154 U. S. 70, 38 L. 913, 14 S. Ct. 1069; *County of Mahaska v. Ingalls*, 16 Iowa, 88; *Browning v. Flanagan*, 22 N. J. L. 572; *Henry v. Oves*, 4 Watts, 48; note, 98 Am. Dec. 621, on use of memoranda by witness to refresh memory.

Modified in *Maxwell v. Wilkinson*, 113 U. S. 658, 28 L. 1038, 5 S. Ct. 692; *Putnam v. United States*, 162 U. S. 695, 40 L. 1121, 16 S. Ct. 926; *Farmers' Bank v. Whitehill*, 16 Serg. & R. 89, holding such memoranda not competent evidence unless contemporaneous with the transaction. Distinguished in *Mutual Ins. Co. v. Hillmon*, 145 U. S. 295, 36 L. 710, 12 S. Ct. 912, where ordinary letters of friendship of deceased were sought to be introduced in evidence under the rule; *Chicago Lumber Co. v. Hewitt*, 64 Fed. 318, 319, 22 U. S. App. 646, where memoranda, based on other memoranda, were held inadmissible in absence of testimony explaining original; *Morton v. Smith*, 4 T. B. Mon. 314, where letters of plaintiff's agent to plaintiff were held inadmissible against defendant; *Bradbury v. Bridges*, 38 Me. 349, memoranda were not shown to have been made in discharge of official duty, or in ordinary course of business; *Batchelder v. Sanborn*, 22 N. H. 332, on ground that books in question were those of one of parties to suit; *Wheeler v. Walker*, 45 N. H. 359, where corporation sought to introduce its own books in support of its claim against a stranger; *Philadelphia Bank v. Officer*, 12 Serg. & R. 50, it not being shown maker of memoranda was beyond process of court; *Swan v. Thurman*, 112 Mich. 418, 70 N. W. 1024, holding books of account inadmissible in action for goods sold and delivered, where only supporting testimony was that of book-keeper, who merely transcribed entries from slips handed him by salesmen.

Miscellaneous.—Cited in *Green v. Gross*, 12 Neb. 124, 10 N. W. 461, to point that seal of notary proves itself.

#### 8 Wheat. 338-365, 5 L. 631, FLECKNER v. BANK OF THE UNITED STATES.

**Bills and notes.**—A note, void for usury, is void in the hands of every holder, pp. 354-355.

Approved and followed in *German Bank v. De Shon*, 41 Ark. 340.

**Bank of United States.**—Bank is not prohibited from discounting notes, or receiving transfers of notes in payment of debts due the bank, although forbidden to deal in notes, p. 349.

Approved and applied in *Bank of United States v. Waggener*, 9 Pet. 399, 9 L. 171, where the same section of the charter was interpreted; *First National Bank v. National Exchange Bank*, 92 U. S. 128, 23 L. 681, where bank was permitted to accept stock in satisfaction of a debt, although dealing in stocks was expressly prohibited; *Bates et al. v. Bank*, 2 Ala. 467, where similar section in State statute creating bank was construed; *Neilsville Bank v. Tut-*



hill, 4 Dak. 303, 30 N. W. 156, where bank was organized under State laws, the court holding the power to purchase notes follows from the power to discount; *Smith v. Exchange Bank*, 26 Ohio St. 151, holding, "purchasing and discounting paper is only a mode of loaning money." Cited, *arguendo*, in *Pearson v. Railroad Co.*, 62 N. H. 549, 13 Am. St. Rep. 604.

**Banks and banking.**—Taking interest in advance by bankers, upon loans, in course of ordinary business, is not usurious, p. 354.

The following cases cite and apply this rule: *Bank v. Cook*, 60 Ark. 293, 294, 46 Am. St. Rep. 174, 175, 30 S. W. 37, 29 L. R. A. 765, and *McGill v. Ware*, 4 Scam. 26, 27, highest legal rate of interest taken in advance; also, *Vahlberg v. Keaton*, 51 Ark. 541, 14 Am. St. Rep. 77, 11 S. W. 879, 4 L. R. A. 464; *Haas v. Flint*, 8 Blackf. 67, loan made by insurance company; *English v. Smock*, 34 Ind. 132, where interest to be taken was on bonds and was not taken by bankers; *Tholen v. Duffy*, 7 Kan. 409, where rule is made general by extending privilege to others than bankers; *Newell v. National Bank*, 12 Bush (Ky.), 60; *Duncan v. Maryland Sav. Inst.*, 10 Gill & J. 311; *Lyons v. State Bank*, 1 Stew. 469; *Bank of Utica v. Wager*, 2 Cow. 767; *Stribbling v. Bank*, 5 Rand. 144; *Grigsby v. Weaver*, 5 Leigh, 213. Cited generally in *Planters' Bank v. Snodgrass*, 4 How. (Miss.) 627; *Bank of Geneva v. Howlett*, 4 Wend. 332; note, *Bank of Newport v. Cook*, 46 Am. St. Rep. 189.

Distinguished in *Sessions v. Richmond*, 1 R. I. 305, where defendant agreed to forfeit a particular sum in case of failure to pay another principal sum at a given time, the particular sum amounting to more than legal interest on the principal; *Carolina Bank v. Parrott*, 30 S. C. 67, 8 S. E. 201, where, in absence of agreement, interest above the legal rate was taken.

**Bank discount** is the deduction made by bank upon its loans of money, upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank, p. 354.

Cited and rule adopted in *Youngblood v. Birmingham Co.*, 95 Ala. 523, 36 Am. St. Rep. 246, 12 So. 579, 20 L. R. A. 60; *Phila., etc., Co. v. Towner*, 13 Conn. 260; *Pape v. Capitol Bank*, 20 Kan. 447, 451, 27 Am. Rep. 186, 189; *Lazear v. National Bank*, 52 Md. 128; *Farmers & Mechanics' Bank v. Baldwin*, 23 Minn. 205, 23 Am. Rep. 687. Cited generally in *Salmon Falls Bank v. Leyser*, 116 Mo. 70, 72, 22 S. W. 508, 509; *Niagara Bank v. Baker*, 15 Ohio St. 87; *Anderson v. Cleburne*, 4 Tex. App. 255; note, *Lazear v. Bank*, 36 Am. Rep. 360; *National Bank v. Johnson*, 104 U. S. 276, 26 L. 744; *Danforth v. National Bank*, 48 Fed. 273, 3 U. S. App. 7, 17 L. R. A. 624.

**Bank of United States.**—Charter of, does not avoid securities upon which usurious interest has been taken by way of discount, pp. 354, 355.

Cited in *National Bank v. Moore*, 2 Bond, 180, F. C. 10,041, where same construction was adopted as to a usurious contract under national banking act; also, *Darby v. Boatman's Sav. Inst.*, 6 Fed. Cas. 1182, but holding contract void as to excess interest beyond legal rate; *Wiley v. Starbuck*, 44 Ind. 313, where national bank reserved interest at higher rate than allowed by State statute; *Bandel v. Isaac*, 13 Md. 220, where same construction was placed on a similar clause contained in Maryland Constitution; *Farmers' Bank v. Harrison*, 57 Mo. 510, and *Farmers' Bank v. Burchard*, 33 Vt. 372, where bank was organized under State statute containing restriction as to rate of interest. Cited in *McBroom v. Scottish Investment Co.*, 153 U. S. 325, 38 L. 732, 14 S. Ct. 855; *Stribbling v. Bank*, 5 Rand. 141; *Lynchburg Bank v. Scott*, 91 Va. 657, 50 Am. St. Rep. 864, 22 S. E. 489, 29 L. R. A. 827.

Distinguished in *Hogan v. Hensley*, 22 Ark. 414, as being exception to general rule, that usurious contract is void, and is a privilege confined to bankers. Questioned in *Market Bank v. Smith*, 16 Fed. Cas. 758.

**Bank of United States.**—Acts of, in violation of charter, cannot be attacked in collateral proceedings, p. 355.

The principal case is cited upon this point and the holding followed in *National Bank v. Whitney*, 103 U. S. 103, 26 L. 444, where bank had violated prohibitory clause of banking law in regard to taking real estate securities for loans; *Union Water Co. v. Murphy Co.*, 22 Cal. 630, where rule is extended to corporations generally; *Neillsville Bank v. Tuthill*, 4 Dak. 307, 30 N. W. 158, where it was claimed bank had acted ultra vires in the purchase of notes; *Southern Life Ins. Co. v. Lanier*, 5 Fla. 165, 53 Am. Dec. 463, where attempt was made to avoid contract on ground that directors of corporation had abused corporate powers; *Bond v. Central Bank*, 2 Ga. 113, where bank, in making contract, had disregarded provisions in charter; *Lazear v. National Bank*, 52 Md. 122, 36 Am. Rep. 357, where defendant attempted to show bank had violated its charter in discounting notes, the payment of which defendant had guaranteed; *Grand Gulf Bank v. Archer*, 8 Smedes & M. 173, 181, collecting authorities; *Haynes v. Covington*, 13 Smedes & M. 411; *Union Bank v. Hunt*, 7 Mo. App. 51; *Wright v. Lee*, 2 S. Dak. 614, 51 N. W. 711, where parties having dealt with de facto directors sought to attack the validity of their election. Cited, in general discussion, in *Philadelphia Loan Co. v. Towner*, 13 Conn. 259; *Commercial Bank v. Nolan*, 7 How. (Miss.) 528.

**Corporations.**—Act of an officer, done in ordinary course of business, actually confided to such officer, is prima facie evidence that such act falls within scope of his authority, p. 357.

Approved and followed in *Stamford Bank v. Ferris*, 17 Conn. 270, where cashier transferred bank's securities on books of bank to



himself; *Haynes v. Beckman*, 6 La. Ann. 225, where cashier transferred note by indorsement without express authority of directors; *Donnell v. Lewis County Bank*, 80 Mo. 171, where cashier borrowed money for bank; *Bank v. Haskell*, 51 N. H. 121, 12 Am. Rep. 72, where cashier informed surety note was paid, when, in fact, it was not; *Commercial Ins. Co. v. Union Ins. Co.*, 19 How. 323, 15 L. 638, where president of company was held out as having power to contract for insurance; *Ringling v. Kohn*, 6 Mo. App. 337, where bank cashier borrowed money for bank. Cited, *arguendo*, in *Smith v. Lawson*, 18 W. Va. 227, 41 Am. Rep. 689.

Distinguished in *United States v. Bank of Columbus*, 21 How. 363, 16 L. 133, where the act of officer was not one that fell within his ordinary duties; *Farmers & Merchants' Bank v. Smith*, 77 Fed. 135, 40 U. S. App. 690, where transactions with cashier were known to be outside the legitimate sphere of his operations; *Spyker v. Spence*, 8 Ala. 340, where acts of bank president were *ultra vires*.

**Corporations.**—Banks, and other commercial corporations, may bind themselves by the acts of their authorized officers and agents, without the corporation seal, p. 358.

Cited and rule applied in *Bank of Metropolis v. Guttschlick*, 14 Pet. 27, 10 L. 339, where declaration stated, merely, that bank agreed to certain contract by its officers; *Gottfried v. Miller*, 104 U. S. 527, 26 L. 853, where seal was omitted from contract of assignment; *Crowley v. Genesee Co.*, 55 Cal. 277, where an admission that one who made contract was president and manager of corporation was held sufficient evidence of his authority; *Savings Bank v. Davis*, 8 Conn. 202, 203, 208, where bank, by mere vote of directors, appointed an agent and authorized him to convey real estate belonging to it; *City of Davenport v. Peoria Ins. Co.*, 17 Iowa, 283, collecting authorities and holding insurance company bound by its agent; *Garrison v. Combs*, 7 J. J. Marsh. 85, 22 Am. Dec. 121, where agent of corporation assigned note, the seal of corporation not being affixed to assignment; *Fitch v. Steam Co.*, 80 Me. 38, 12 Atl. 734, where mortgage was executed by agent; *Baptist Church v. Milford*, 8 N. J. L. 185, where action of assumpsit was maintained on implied contract; *Saxton v. Texas Ry. Co.*, 4 N. Mex. 203, 16 Pac. 854, where contracts sealed with private seal of official, made for benefit of corporation, were held to be simple unsealed contracts of corporation; *Bank of Genesee v. Patchin Bank*, 19 N. Y. 319, where indorsement by cashier in his official capacity of bill of exchange was held indorsement of bank; dissenting opinion in *Mulcahy v. Emigrant Bank*, 89 N. Y. 435, where bank was held bound by acts of teller exercised in performance of his ordinary powers; *Turnpike Co. v. M'Carson*, 1 Dev. & B. 310, where corporation appointed manager by vote of directors; *Bank v. Bivingsville*, 10 Rich. L. 101, and *Bates v. Bank*, 2 Ala.

462, where appointment of agent was implied from acts of company. Cited in dissenting opinion of Marshall, C. J., in *Bank of U. S. v. Dandridge*, 12 Wheat. 102, 6 L. 566; *Planters' Bank v. Sharp*, 6 How. 322, 12 L. 456, in general discussion; *Everett v. United States*, 6 Port. 182, 30 Am. Dec. 588; dissenting opinion, *Lay v. Austin*, 25 Fla. 941, 7 So. 144, the case upholding an assignment by corporate officers as a corporate act; *Butts v. Cuthbertson*, 6 Ga. 171, holding corporation bound by note executed by its agent; *Union Bank v. Ridgely*, 1 Harr. & G. 421, holding that acceptance of a bond by a corporation need not be express or under seal but might be implied; *Leavitt v. Oxford, etc., R. Co.*, 3 Utah, 271, 1 Pac. 358, holding corporation may be bound by acts of some of its directors; *Waddill v. Sebree*, 88 Va. 1016, 29 Am. St. Rep. 769, 14 S. E. 851, discussing agent's power generally; *Janesville Bridge Co. v. Stoughton*, 1 Pinn. 672. See also 42 Am. Rep. 311, note, 50 Am. St. Rep. 153, note, on this subject. Cited, arguendo, *Saxton v. Texas & S. F. Ry. Co.*, 4 N. Mex. 203, 16 Pac. 854, holding private seal of officer of corporation affixed to contract will not be considered seal of corporation so that the contract will be a specialty.

Distinguished as to facts, *Crescent City Bank v. Carpenter*, 26 Ind. 114; *Getty v. Milling Co.*, 40 Kan. 284, 19 Pac. 619, where acts of officers were outside their general authority and resulted in no benefit to corporation; *Union Bank v. Ridgely*, 1 Harr. & G. 423, 425, *Spykes v. Spence*, 8 Ala. 339, 340, where acts of president of banking corporation were outside his expressed or implied powers.

**Banks.**—Cashier is executive officer of bank, through whom the whole moneyed operations of bank are conducted, and has power, in absence of positive restrictions, to apply negotiable funds of bank to discharge its debts and obligations, p. 360.

Cited and principle applied in *Everett v. United States*, 6 Port. 180, 30 Am. Dec. 587, where cashier transferred securities of bank; *Merchants' Bank v. State Bank*, 10 Wall. 650, 19 L. 1020 (reversing S. C., 3 Cliff 207, F. C. 9,449), where it was held jury might infer, from general powers of cashier, authority to pledge bank's credit by certifying a check; *Carey v. Giles*, 10 Ga. 27, where cashier had made transfer of securities, after board of directors had resigned and presidency had been assumed by a person who was neither officer or director; *Merchants' Ins. Co. v. Chauvin*, 8 Rob. (La.) 51; *Kimball v. Cleveland*, 4 Mich. 608; *Maxwell v. Planters' Bank*, 10 Humph. 509, where cashier indorsed note and delivered it to another bank in payment of debt; *Smith v. Lawson*, 18 W. Va. 227, 41 Am. Rep. 689, collecting authorities and holding that a bank president was authorized to transfer bank's note; *U. S. Nat. Bank v. First Nat. Bank*, 79 Fed. 299, 49 U. S. App. 72, holding it within implied powers of bank president to indorse negotiable paper passing through bank in ordinary course of business. Cited,



**Xenia Bank v. Stewart**, 114 U. S. 29, 29 L. 103, 5 S. Ct. 848, holding declarations of cashier as to question of payment admissible against the bank; **Stamford v. Benedict**, 15 Conn. 445, collecting cases; **Merchants' Bank v. Rawls**, 7 Ga. 196, 50 Am. Dec. 396; **Montgomery v. Commercial Bank**, 1 Smedes & M. Ch. 645; **State v. Commercial Bank**, 6 Smedes & M. 234, 45 Am. Dec. 284, as to authority of cashier of bank generally; **Morris Canal Co. v. Fisher**, 9 N. J. Eq. 680; **City Bank v. Perkins**, 29 N. Y. 569, 86 Am. Dec. 338, affirming the rule; **First Nat. Bank v. Ocean Bank**, 60 N. Y. 292, 19 Am. Rep. 188, where authorities are collected; **Ridgway v. Farmers' Bank**, 12 Serg. & R. 265, 14 Am. Dec. 686, approving the rule; **Harrisburg Bank v. Tyler**, 3 Watts & Serg. 376, discussing powers of cashier; note, 36 Am. Dec. 198. Extended note on "Power of cashier to transfer and indorse negotiable paper," 77 Am. Dec. 761, 762; note, 12 Am. Rep. 75.

Distinguished in **Daviess Co. Sav. Assn. v. Sailor**, 63 Mo. 27, where act of cashier, in discharging surety from a note, was beyond his authority; **Savings Bank v. Hughes**, 62 Mo. App. 581, where there was an instruction implying cashier had power to discharge surety without payment of note; **Leggett v. N. J. Mfg. Co.**, 1 N. J. Eq. 553, 23 Am. Dec. 734, where cashier executed mortgage in name of corporation; **Marshall v. Express Co.**, 7 Wis. 34, 73 Am. Dec. 395. Disapproved in **Lamb v. Cecil**, 25 W. Va. 294, where cashier assigned discounted notes of bank to depositor in payment of his deposits.

**Liquidation.**—To liquidate a balance means to pay it, p. 362.

Cited and this definition adopted in **Richmond v. Irons**, 121 U. S. 61, 30 L. 875, 7 S. Ct. 804; **Austin v. Tecumseh Bank**, 49 Neb. 418, 59 Am. St. Rep. 546, 68 N. W. 629, 35 L. R. A. 446.

**Agency.**—Subsequent ratification has retrospective effect, and is equivalent to a prior command, where it does not prejudice the rights of strangers, p. 363.

Approved and rule applied in **Everett v. United States**, 6 Port. 183, 30 Am. Dec. 590, where acts of bank officers were subsequently ratified by directors; **Supervisors v. Schenck**, 5 Wall. 781, 18 L. 559, holding that a municipal corporation had ratified by its acts; **Johnson v. Smith**, 21 Conn. 636, where church corporation ratified by adoption; **Stanton v. N. Y. & Eastern Ry. Co.**, 59 Conn. 285, 21 Am. St. Rep. 118, 22 Atl. 304, where corporation ratified contract made for its benefit before its organization; **St. Croix Co. v. Mittlestadt**, 43 Minn. 94, 44 N. W. 1080, where corporation sought to avoid transaction after ratification thereof; **Rich v. State Bank**, 7 Neb. 209, 29 Am. Rep. 387, where corporation ratified an unauthorized act of one of its officials; **Davis v. School District**, 44 N. H. 407, where school district ratified acts of its committee; **Bank of Northern Liberties v. Cresson**, 12 S. & R. 311, where bank accepted

security offered by one of its officers, although directors in accepting had not followed by-laws. Cited but without special application of the rule in *Pickering v. Lomax*, 145 U. S. 315, 36 L. 718, 12 S. Ct. 862; *In re Kansas City Stone Co.*, 9 Bank. Reg. 80, 14 Fed. Cas. 130; *Union Bank v. Ridgely*, 1 Harr. & G. 415; *Dispatch Line v. Bellamy Co.*, 12 N. H. 237, 37 Am. Dec. 218.

8 Wheat. 365-370, 5 L. 637, *NICHOLAS v. ANDERSON*.

Virginia act respecting land grants to soldiers construed.

Cited in *Richardson v. Richardson*, 6 Ohio, 126, 25 Am. Dec. 746, and *Pruseux v. Welch*, 20 Fed. Cas. 26, as to meaning of expression "beyond sea," but not in point.

8 Wheat. 371-379, 5 L. 639, *THE PITT*.

Nonintercourse act of 1818 construed.

No citations.

8 Wheat. 380-391, 5 L. 641 *THE MARY ANN*.

**Admiralty pleading.**—A libel alleging a vessel sailed from ports of New York and Perth Amboy without the captain having delivered manifests required by law, is defective, since the manifest need be delivered at a single port only, p. 385.

**Admiralty pleading.**—In cases of seizure for breach of laws, the libel must state the matters relied on as grounds of forfeiture, and this may be done in words of statute, except where words of statute are general, embracing a whole class of individual subjects, p. 389.

Principle applied in *United States v. Weed*, 5 Wall. 69, 18 L. 533, holding when vessel has been prosecuted as prize, it cannot be condemned as for a statutory forfeiture; *United States v. Huckabee*, 16 Wall. 431, 21 L. 463, condemnation and confiscation of property of Confederate government; dissenting opinion, *United States v. Reese*, 92 U. S. 233, 23 L. 570, as to charging offense, in indictment, in words of statute; *United States v. Mann*, 95 U. S. 586, 24 L. 533, where declaration, in suit by United States against bank cashier for refusing to permit revenue collector to enter bank for purpose of examining articles subject to taxation, was held bad, because of failure to allege there were unstamped paid bank checks in custody of cashier; *Stettiners v. United States*, 5 Cr. C. C. 580, F. C. 13,387, an indictment for circulating small notes as currency should aver that the note passed was "paper currency;" *United States v. Spirits*, 51 Fed. 423, to information of forfeiture of certain spirits, imported in violation of laws of importation; *State v. Miller*, 60 Vt. 93, 12 Atl. 528, holding whether indictment in words of statute is sufficient depends on whether every fact necessary to



constitute the offense is charged or necessarily implied from language used. Cited generally in *United States v. Arms and Ammunition*, 24 Fed. Cas. 863, as authority for holding, in libels of forfeiture in rem, it is sufficient to describe offense and manner of its commission in words of statute creating; *United States v. Pond*, 2 Curt. 268, F. C. 16,067, as to necessary allegations in indictment for opening letter, which had been opened in post-office, by one to whom it was not addressed.

**Admiralty practice.**—Where pleadings are so defective that no decree can be founded on them, and case appears to have merit, Supreme Court will remand cause to court below with directions to permit amendments and further proof, p. 390.

Cited to this point in *The Martha*, Blatchf. & H. 166, F. C. 9,144, as to allowance of amendments to pleadings; and *The Samuel Marshall*, 49 Fed. 757, where libel claiming lien under general maritime law was amended so as to assert lien under state law.

Distinguished, *The Mabey*, 10 Wall. 420, 19 L. 963, not sufficient excuse having been shown for not taking evidence when case was before lower court.

8 Wheat. 391-397, 5 L. 644, *THE SARAH*, S. C., on second appeal, 1 Pet. 594, 7 L. 258.

**Admiralty jurisdiction** of District Court extends to all cases of seizure made on waters navigable by vessels of ten tons burden or upwards, p. 394.

Approved and rule applied in *The Wave*, Blatchf. & H. 240, F. C. 17,297, holding further, rule applies although water lies within body of a State; *United States v. Winchester*, 99 U. S. 374, 25 L. 480, but seizures made on land are without its admiralty jurisdiction; *Leland v. Ship Medora*, 2 Wood. & M. 109, F. C. 8,237, does not extend to revenue seizures on land. Cited but without application of the rule in *The Eagle*, 8 Wall. 26, 19 L. 370. Reporter's note to *The Sarah* is cited on the subject of admiralty jurisdiction in *Waring v. Clark*, 5 How. 455, 483, 486, 12 L. 233, 246, 247.

**Admiralty.**—In cases of admiralty jurisdiction questions of fact are determined by the court, p. 394.

Rule approved and adopted in *The Margaret*, 9 Wheat. 429, 6 L. 127. Approved in *Ten Cases v. United States*, 34 Fed. 100.

**District Court.**—Where seizures are made on land, United States District Court proceeds as court of common law, and must submit questions of fact to jury, p. 394.

Rule applied in *Union Ins. Co. v. United States*, 6 Wall. 764, 765, 766, 18 L. 881, 882, and *United States v. Athens Armory*, 2 Abb. (U. S.) 138, F. C. 14,473, affirming decision, same case, 35 Ga. 352, proceedings for confiscation and forfeiture of real property

used for insurrectionary purposes; *Confiscation Cases*, 7 Wall. 462, 19 L. 199, affirming the rule; *Garnhart v. United States*, 16 Wall. 165, 21 L. 276, where striking out of answer denying facts in information for breach of revenue laws, and rendering judgment thereon, was held error; *United States v. Distillery*, 6 Biss. 490, F. C. 14,966; *United States v. Whisky*, 1 Bond, 590, F. C. 15,938, proceedings in rem for violation of internal revenue law; *Reynolds v. Steamboat*, 10 Minn. 249, 250, not all proceedings in rem are proceedings in admiralty. Cited generally in *Ex parte Graham*, 10 Wall. 543, 19 L. 982, holding proceedings for confiscation of real property used for insurrectionary purposes are not proceedings in admiralty, although they conform as near as may be to such proceedings. Cited but not specially applied in *United States v. Woolen Cloth*, 1 Paine, 437, F. C. 15,150, and in dissenting opinion, *Confiscation Cases*, 20 Wall. 113, 22 L. 325.

**Appeal and error.**—Where the District Court has proceeded without jurisdiction, the Supreme Court in reversing its decision may remand the cause with direction for amendment, p. 395.

Cited in *Stickney v. Wilt*, 23 Wall. 164, 23 L. 54, 11 Bank. Reg. 107, dissenting opinion, and *Cleveland Ins. Co. v. Globe Ins. Co.*, 98 U. S. 376, 25 L. 204, as an instance, holding further, p. 379, 25 L. 205, fact that subordinate court was without jurisdiction does not prevent Supreme Court from assuming jurisdiction for purpose of reversing judgment or decree rendered.

**Miscellaneous.**—Cited in *Coffey v. United States*, 116 U. S. 435, 29 L. 684, 6 S. Ct. 436; S. C., on rehearing, 117 U. S. 234, 29 L. 891, 6 S. Ct. 717, and *United States v. Spirits*, 28 Fed. Cas. 122, as authority for holding general rules of pleading in regard to admiralty suits in rem apply to a suit in rem for a forfeiture.

8 Wheat. 398-406, 5 L. 645, **THE FRANCES AND ELIZA.**

**Nonintercourse act** of 1818 construed, and touching at British port from necessity held not a violation of.

No citations.

8 Wheat. 407-421, 5 L. 407, **THE LUMINARY.**

**Admiralty.**—In an instance or revenue case, by a *prima facie* case made out on part of prosecutor, the *onus probandi* is thrown on the claimant to explain the difficulties of the case, p. 411.

Cited and rule adopted in *United States v. Three Thousand Eight Hundred Boxes*, 8 Sawy. 134; S. C., 12 Fed. 404, where claimant having failed to explain difficulties of case, condemnation followed from defects of testimony; *The Governor Cushman*, 1 Abb. (U. S.) 18; S. C., 1 Biss. 493, F. C. 5,646, but accidents may be explained; *United States v. Matches*, 2 Biss. 49, F. C. 16,559, where cases of



matches were landed without consent of port collector; *United States v. Twenty-five Cases*, Crabbe, 396, F. C. 16,563, burden of proof is thrown on claimants, when court is satisfied there was probable cause for the proceedings; *The Fideliter*, Deady, 644, F. C. 4,756, and *Ten Hogsheads of Rum*, 1 Gall. 191, F. C. 13,830, rule applies in proceedings in rem; *Lincoln v. Smith*, 27 Vt. 358, applying principle to a State case under statute prohibiting traffic in intoxicating liquor. Cited, without special application of the rule, *United States v. Tobacco*, 6 Ben. 89, F. C. 16,106. Cited in *State v. Cunningham*, 25 Conn. 203, as an instance where greater effect was given to evidence than it possessed at common law.

Distinguished, *United States v. Thirty-one Boxes*, 28 Fed. Cas. 60, where a prima facie case was not established.

Miscellaneous.—Cited in *Glennon v. Britton*, 155 Ill. 245, 40 N. E. 598, as an instance where goods were seized, condemned and destroyed without service of process on owner.

8 Wheat. 421-463, 5 L. 651, *WORMLEY v. WORMLEY*.

**Trusts.**—Trustee cannot purchase, or acquire by exchange, the trust property, p. 441.

Cited and principle applied in *Michoud v. Girod*, 4 How. 555, 11 L. 1099, where executors became purchasers of property of their testator; *Tufts v. Tufts*, 3 Wood. & M. 489, 491, F. C. 14,233, a contract between an executrix and an expected purchaser, such purchaser being a relative, whereby it was agreed purchaser would hold for executrix under certain conditions, is voidable; *Imboden v. Hunter*, 23 Ark. 624, 79 Am. Dec. 117, holding mortgagee, with power of sale, cannot purchase for his own benefit; *White v. Ward*, 26 Ark. 447, where rule was applied to acts of agent; *Culberhouse v. Shirey*, 42 Ark. 28, applying rule to purchase of trust property by guardian and administrator; *Golson v. Dunlap*, 73 Cal. 159, 14 Pac. 577, purchase of testator's property by executor, where executor did not deal directly with cestui que trust; *McCrary v. Foster*, 1 Iowa, 276, and if any profit accrues from such purchase it shall go to cestui que trust; *MacGregor v. Gardner*, 14 Iowa, 337, conveyance by agent for purpose of acquiring title himself may be treated as fraudulent and void; *Sypher v. McHenry*, 18 Iowa, 235, and question whether bargain was advantageous to trustee is immaterial; *Pratt v. Thornton*, 28 Me. 363, 48 Am. Dec. 497, a similar case; *Fisher v. Concord R. R. Co.*, 50 N. H. 205, applying principle where agent loaned principal's money to himself; *Hawley v. Cramer*, 4 Cow. 734, and fact that transaction was fair and honest is of no effect; *Clarke v. Deveaux*, 1 S. C. 185, where trustee retained trust property as his own, and turned over to his successor Confederate notes which were represented as being equivalent to trust property; *Armstrong v. Campbell*, 3 Yerg. 236, where trustee conveyed trust property to

company of which he was a member; *Hendee v. Cleaveland*, 54 Vt. 149, holding guardian cannot sell his own property to his ward. Cited, *arguendo*, in *Piatt v. Oliver*, 2 McLean, 314, F. C. 11,115.

**Trusts.**—Whenever an interval must or may properly elapse between sale and application of purchase money by trustee, the purchaser shall not be bound to look to the application of the purchase money, p. 443.

Cited and rule applied in *Woodwine v. Woodrum*, 19 W. Va. 74, where deed of trust authorized trustee to sell at his discretion for cash, and from nature of facts money could not be applied for some time. See note, 19 Am. St. Rep. 282.

**Trusts.**—Whenever trustee is invested with discretion in disposition of trust fund, those who have confided should suffer rather than one who has purchased under apparently authorized act, p. 443.

Cited and applied in *Sims v. Lively*, 14 B. Mon. 449, where purchaser had no means of knowing what proportion of devise, his purchase being part of, was necessary to carry out testator's intention; *Keister v. Scott*, 61 Md. 509, holding, where trustee was empowered to sell property in one city and was required to invest proceeds in property in another, at great distance from first, purchaser is not bound to see to application of money; *Zucker v. Karpeles*, 88 Mich. 430, 50 N. W. 377, where vendor intrusted vendee with title to goods, who mortgaged them to innocent party; *Coonrod v. Coonrod*, 6 Ohio, 116, where devise of real and personal property was made subject to bequest of \$1,000, to be invested in land at such place as devisee might designate. Cited, *arguendo*, *Garesche v. Levering Co.*, 48 S. W. 655; *Norman v. Towne*, 130 Mass. 53; *Haydel v. Huick*, 5 Mo. App. 275; *Hughes v. Tabb*, 78 Va. 325; note, 19 Am. St. Rep. 283.

**Trusts.**—Whenever the purchaser of trust property is affected with notice of the facts which, in law, constitute the breach of trust, the sale is void as to him, p. 447.

Cited and principle applied in *Gardner v. Gardner*, 3 Mason, 221, F. C. 5,227, to case of purchaser from devisee of lands charged with debts of devisor; *Swift v. Castle*, 23 Ill. 151, where creditors of husband took mortgage on property conveyed to trustee for wife's benefit; *Nicholls v. Peak*, 12 N. J. Eq. 73, where property was sold not for purpose of executing trust; *Cardwell v. Cheatham*, 2 Head, 20, 22, where property held in trust for sole and separate use of wife was sold, and proceeds were not invested or held under same conditions; *Lamar v. Hale*, 79 Va. 158, where purchase was from trustee with knowledge that trustee was selling trust property as his own.



**Equity.**—Bona fide purchaser, without notice, to be entitled to protection must be so not only at time of the contract of conveyance, but until purchase money is actually paid, p. 449.

Case cited and rule applied in *Fowler v. Merrill*, 11 How. 395, 13 L. 744, where purchaser at execution sale had notice, prior to payment of purchase price, that property purchased was mortgaged; *Lytle v. Lansing*, 147 U. S. 70, 37 L. 84, 13 S. Ct. 259, case of purchase of negotiable municipal bonds; *Wood v. Mann*, 1 Sumn. 511, F. C. 17,951, holding a plea that part of purchase money had been paid and balance was secured by mortgage, is bad; *Merrill v. Dawson*, Hemp. 599, F. C. 9,469, holding averment that purchase money was paid before notice of fraud is absolutely necessary, and same case, p. 618, till the actual payment buyer is not injured; *Wells v. Morrow*, 38 Ala. 128, is to same effect; *Byers v. Fowler*, 12 Ark. 286, 54 Am. Dec. 288, and *Perkins v. Swank*, 43 Miss. 358, holding answer of party claiming to be such innocent purchaser must state all facts necessary to show he is entitled to rights of innocent purchaser; *Mackey v. Bowles*, 98 Ga. 733, 25 S. E. 835, where person purchased of administrator land which latter sold defrauding heirs; *Sillyman v. King*, 36 Iowa, 214, and onus is on purchaser to show purchase was made in good faith; *Kitteridge v. Chapman*, 36 Iowa, 351, and the execution of a bond which has not been negotiated is not an equivalent payment; *Hoffman Coal Co. v. Cumberland Co.*, 16 Md. 479; *Halsa v. Halsa*, 8 Mo. 309, case of a purchaser with notice from purchaser without notice under circumstances indicating fraud; *Paul v. Fulton*, 25 Mo. 164, where purchaser had not paid more than half of purchase money when suit was brought; *Bishop v. Schneider*, 46 Mo. 482, 2 Am. Rep. 540, allegations did not show purchase money had been fully paid; *Arnholt v. Hartwig*, 73 Mo. 488, where purchaser gives his check for purchase money and orders it paid, after notice of creditor's claims, he is not a bona fide purchaser; *Dougherty v. Cooper*, 77 Mo. 532, part of purchase money had been paid when fraud was discovered; *Greenlee v. Marquis*, 49 Mo. App. 294, where notes had been given for purchase money, but they had not been negotiated by vendor at time fraud was discovered; *People v. O. B. Co.*, 92 N. Y. 103, purchaser was aware of facts before delivery of deed or payment of purchase money. Approved in *Boone v. Chiles*, 10 Pet. 212, 9 L. 400. Cited, arguendo, *Cox Shoe Co. v. Adams*, 105 Iowa, 409, 75 N. W. 318, and *Jordan v. Pollock*, 14 Ga. 160, suggesting part payment of consideration is sufficient. Cited generally, *Wells-Fargo Co. v. Smith*, 2 Utah, 52, as to meaning of term "bona fide purchaser;" *Winans v. Winans*, 22 W. Va. 692, holding purchaser is liable for any part of purchase money paid by him after notice of facts affecting validity of his title. See note, 11 Am. Dec. 403.

Distinguished in *Dufphey v. Frenaye*, 5 Stew. & P. 242, where part of purchase price was paid before notice of fraud, holding

chancery will protect purchaser to that extent; *Hoult v. Donahue*, 21 W. Va. 300, holding, where one has become bona fide purchaser of equitable title, subsequent notice will not prevent him from securing what has been purchased.

**Improvements made on trust property** by purchaser thereof, become a charge on the property, p. 450.

Cited and followed in *McPhee v. Guthrie*, 51 Ga. 83, where purchase was made in good faith and without notice of fraud.

**Supreme Court** will not permit its jurisdiction to be affected by the joinder or nonjoinder of mere formal parties, p. 451.

Cited and rule applied in *Carneal v. Banks*, 10 Wheat. 188, 6 L. 299, where objection to court's jurisdiction came from mere formal parties; *Wood v. Davis*, 18 How. 469, 15 L. 461, where attempt was made to oust court of jurisdiction by joining agents of real parties in interest; *Sewing Machine Cases*, 18 Wall. 586, 21 L. 922, right of real defendant to remove cause to Federal court cannot be affected by joining with him mere nominal party; *Wilson v. Oswego*, 151 U. S. 64, 38 L. 74, 14 S. Ct. 262, affirming right to remove cause to Federal court where real parties defendant were not citizens of same State as plaintiff; to same effect, *Pond v. Sibley*, 19 Blackf. 197, 7 Fed. 135, holding officers of corporation are mere formal parties; *Society v. Hartland*, 2 Paine, 543, F. C. 13,155, holding, where one is interested in subject-matter only, but nothing is asked of him, and his rights are not put in issue, it is not necessary to make him a party; *Sands v. Smith*, 1 Dill. 294; S. C., 1 Abb. (U. S.) 372, F. C. 12,305; *Hatch v. Chicago, R. I. & P. Ry. Co.*, 6 Blatchf. 116, F. C. 6,204, where plaintiff joined citizens of his own State as nominal defendants with foreign corporation, real defendant; *Harrison v. Urann*, 1 Story, 66, F. C. 6,146, holding, whenever court can divide the merits of a case as between the parties properly before it, it will dispense with the joinder of those persons whose citizenship, if they were made parties, would oust the jurisdiction of the court; *Mason v. Crosby*, 1 Wood. & M. 361, F. C. 9,234, where suit was maintained against parties to conveyance, although all interested in equity in land were not joined as respondents; *Ruckman v. Ruckman*, 1 Fed. 590, holding, in suit to determine ownership of bond and mortgage, mortgagor is formal party; *Sioux City Ry. Co. v. Chicago Ry. Co.*, 27 Fed. 772, holding sheriff and other officials named in bill, having no real interest in subject of controversy, are nominal parties within rule; *Holly Mfg. Co. v. Chester Water Co.*, 48 Fed. 891 (affirmed, 53 Fed. 26, 3 U. S. App. 264), as to assignors being nominal parties; *Carver v. Trust Co.*, 73 Fed. 12, holding, in suit to impeach for fraud a decree of a State Supreme Court, a defendant who was not a party to that decree, because he had been dropped from the case, as having no interest in it, before it reached Supreme Court, is a mere formal party;



*Gordon v. Simonton*, 10 Fla. 196, holding joinder of improper parties cannot affect jurisdiction of court as to parties properly before it. Cited approvingly in *Taylor v. Holmes*, 14 Fed. 514. Cited without special application of the rule in *Shields v. Barrow*, 17 How. 140, 15 L. 160; *Smith v. Rines*, 2 Sumn. 350, F. C. 13,100; *Bunuel v. Stoddard*, 4 Fed. Cas. 682. Approved, but no application, *Heriot v. Davis*, 2 Wood. & M. 232, 233, F. C. 6,404; *Connolly v. Wells*, 33 Fed. 208. Explained, *Wood v. Mann*, 1 Sumn. 583, F. C. 17,952. Cited in *Field v. Lownsdale*, *Deady*, 291, F. C. 4,769; *Calderwood v. Braly*, 28 Cal. 99; *Cook v. Bank*, 52 N. Y. 113, 11 Am. Rep. 678, as an exception to general rule that all defendants must be entitled to sue in Federal courts in order to permit removal of cause; *Bonaparte v. Camden Ry. Co.*, 1 Bald. 217, F. C. 1,617. Cited generally in *Woolridge v. McKenna*, 8 Fed. 668, and *Voss v. Neineber*, 68 Fed. 948, holding, in suit by infant, jurisdiction depends on citizenship of infant and not on that of next friend. Cited, *arguendo*, as to criterion for determining who is formal party, *James v. Thurston*, 6 R. I. 431; *Hurst v. Coe*, 30 W. Va. 169, 3 S. E. 570. See note, 12 Am. Rep. 551.

Distinguished, dissenting opinion, *Florida v. Georgia*, 17 How. 508, 15 L. 200, where parties were necessary; *Kirkpatrick v. White*, 4 Wash. 599, F. C. 7,850, holding a member of corporation is a real party in interest when corporation is sued, and not a formal party; *Ward v. Arredondo*, 1 Paine, 412, 413, F. C. 17,148, holding the holder of a deed who is joined with grantor in suit to compel execution and delivery, is not a mere nominal party; *Foss v. Bank*, 1 McCrary, 477; S. C., 3 Fed. 187, trustees, when in fact interested in litigation, are not formal parties; to same effect, *Goodnow v. Litchfield*, 4 McCrary, 216; S. C., 47 Fed. 753, where assignee of alien was held to be trustee.

Miscellaneous.—Cited in *Fields v. Lamb*, *Deady*, 431, F. C. 4,775, as to reason for statute of 1866, relating to removal of causes; *Governor v. Ball*, Hemp. 545, F. C. 530, not in point. Cited as authority for holding principal is responsible for consequences of acts of agent, *Piatt v. Oliver*, 2 McLean, 317, F. C. 11,115. Cited in *Bound v. Railway Co.*, 50 Fed. 854, as to power of courts of equity to review the use of discretion given trustees; *Moody v. Bibb*, 50 Ala. 248, as to how person may make himself trustee in invitum. Cited, *Perea v. Harrison*, 7 N. Mex. 676, 41 Pac. 531, application not clear.

8 Wheat. 464-495, 5 L. 662, SOCIETY FOR THE PROPAGATION OF THE GOSPEL v. NEW HAVEN.

*Corporations*.—A corporation endowed solely by private benefactions is a private eleemosynary corporation, although created by charter from government, p. 480.

Cited and principle applied in an academy which derived part of its support from the government, *Cleveland v. Stewart*, 3 Ga.

287, and in *Regents v. Williams*, 9 Gill & J. 402, 403, 31 Am. Dec. 90, 92, applying rule to a university.

**Constitutional law.**—The capacity of private individuals, or corporations created by the crown to hold lands or other property in this country, was not affected by the Revolution, p. 481.

Cited and affirmed in *Society v. Pawlet*, 4 Pet. 502, 7 L. 935, in construction of State statute which assumed Revolution had divested foreign corporation of its property.

**Corporations.**—Courts of one State have no jurisdiction to adjudge a forfeiture of a foreign corporation's franchises, p. 483.

Cited and principle applied in *Exporting Co. v. Locke*, 50 Ala. 335, where such an adjudication was sought. See note, 8 Am. St. Rep. 199.

**Treaties.**—Where the terms of a treaty are general, courts will not, by construction, make exceptions thereto, p. 490.

Principle applied to construction of Constitution, *Rhode Island v. Massachusetts*, 12 Pet. 722, 9 L. 1260, holding where no exception is made in terms to grants of power to United States, or to restrictions on States, none will be made by implication or construction.

**Corporations** are persons within section 6, treaty of peace of 1783, with Great Britain, which provides "no future confiscations shall be made from any person by reason of part he may have taken in present war," p. 491.

Cited approvingly as an instance where corporation was considered a person, *McKinley v. Wheeler*, 130 U. S. 636, 32 L. 1050, 9 S. Ct. 640, holding corporation may locate mining claims; *Railroad Tax Cases*, 8 Sawy. 265, 283, 13 Fed. 744, 758, holding corporations are persons within meaning of fourteenth amendment to Constitution; to same effect is *Santa Clara Railroad Tax Case*, 9 Sawy. 194, 18 Fed. 404. Cited, *arguendo*, *Brown v. Sprague*, 5 Den. 549, as to effect of treaty of 1783 on rights of aliens. Cited generally, *Magill v. Brown*, 16 Fed. Cas. 419, as an instance where corporation was considered an individual.

**Constitutional law.**—Statute of Vermont, attempting to divest foreign corporation of property, held void as contrary to treaty of 1783 with Great Britain, p. 492.

Cited in *Pearsall v. Railway Co.*, 161 U. S. 662, 40 L. 843, 16 S. Ct. 708, in reviewing *Dartmouth College* doctrine, as authority for holding legislation destructive of rights acquired by corporate charter is void. Cited generally in *Wilder v. Lumpkin*, 4 Ga. 219, as to retrospective laws divesting acquired rights; also to same effect, *Loveren v. Lamprey*, 22 N. H. 445, note, 5 Am. St. Rep. 805.



**Constitutional law.**—The termination of a treaty cannot divest rights of property already vested under it, p. 493.

Rule cited and applied in *Flott v. Commonwealth*, 12 Gratt. 577, where subject of Great Britain acquired title to land in Virginia prior to 1812. Cited generally as to right of legislature to deprive citizen of vested rights in property; *Dockery v. McDowell*, 40 Ala. 481, 484; *People v. Gerke*, 5 Cal. 382, as to rights of aliens under treaties; also in dissenting opinion, *Eakin v. Raub*, 12 S. & R. 364.

Distinguished in *Chinese Exclusion Case*, 130 U. S. 610, 32 L. 1077, 9 S. Ct. 631, holding no rights can be acquired under a continued suspense of a governmental power.

**Treaties** do not become extinguished ipso facto by war between the two governments, p. 494.

Cited, *arguendo*, in *Pollard's Heirs v. Kibbe*, 14 Pet. 413, 10 L. 519, application not clear.

**Miscellaneous.**—Cited in *Bridge Co. v. Dix*, 6 How. 542, 12 L. 549, but not in point; *People v. Society*, 1 Paine, 656, F. C. 16,919, as to right of State to declare forfeiture of franchise or charter for mere nonuser; *Binney's Case*, 2 Bland Ch. 147, as to right of foreign corporation to sue in State courts; *State v. Merchants' Ins. Co.*, 8 Humph. 252, as to proceedings for forfeiture of charter.

8 Wheat. 495-542, 5 L. 670, DALY v. JAMES.

**Courts.**—Upon questions of much doubt, the Supreme Court will acquiesce in adjudications of State courts where they apply, p. 535.

Cited and rule adopted in *Jackson v. Chew*, 12 Wheat. 168, 6 L. 589, as to construction of statute relating to local law of real property; *Derby v. Jacques*, 1 Cliff. 438, F. C. 3,817, as to decisions affecting titles.

**Wills.**—Where power of sale is given in will, the power can be exercised only in the precise manner indicated, p. 535.

Cited in *Waldron v. Chasteney*, 2 Blatchf. 67, F. C. 17,058, where, under facts, executor's acts were held to conform to his powers; *De Vaughn v. McLeroy*, 82 Ga. 697, 10 S. E. 213, in construction of powers of executor the intention of the donor of the power governs. Cited in dissenting opinion, *Morrow v. Brenizer*, 2 Rawle, 193, application not clear.

Modified in *Kidwell v. Brummagin*, 32 Cal. 444, holding, where testator in his will directs executor to sell real estate within one year, the power to sell is not limited to one year unless there be express words in will to show such was the intent of testator.

**Miscellaneous.**—Cited in *Gast v. Porter*, 13 Pa. St. 536, as to powers of executor.

8 Wheat. 543-605, 5 L. 681, JOHNSON v. McINTOSH.

**Land titles.**—Discovery of lands in America gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession, p. 573.

Principle cited with approval in *Shively v. Bowlby*, 152 U. S. 50, 38 L. 350, 14 S. Ct. 567, as to discoveries and settlements made by citizens of United States in Oregon; also, *Case v. Loftus*, 14 Sawy. 217, 39 Fed. 733, 5 L. R. A. 688, and n.; *Stockton v. Williams*, 1 Doug. (Mich.) 560, to the discoverers belong the exclusive right to purchase from the natives; *Montgomery v. Ives*, 13 S. & M. 173, under this rule the discoveries of the Cabots gave the English their original titles in this country. Cited in *Worcester v. Georgia*, 6 Pet. 544, 8 L. 495, but this rule does not affect the rights of those already in possession. Cited, *arguendo*, *Holden v. Joy*, 17 Wall. 243, 21 L. 534. Cited in *Caldwell v. State*, 1 Stew. & P. 389, as containing an exhaustive discussion of general subject.

**Indians.**—While the European nations respected the rights of native Indians as occupants, they asserted the ultimate dominion over and title in the territory to be in themselves, p. 574.

Cited and rule approved in dissenting opinion, *Cherokee Nation v. Georgia*, 5 Litt. 70, 8 L. 50, and this is a right in the enjoyment of which they are entitled to protection from United States; *Mitchell v. United States*, 9 Pet. 746, 9 L. 296, and in determining what lands are occupied, the habits and modes of life of the Indian must be considered; *United States v. Fernandez*, 10 Pet. 304, 9 L. 434, affirming right of European nation to grant lands while still occupied by natives; *Marsh v. Brooks*, 8 How. 232, 12 L. 1060, holding action of ejectment may be maintained on Indian right to occupancy; *United States v. Cook*, 19 Wall. 593, 21 L. 211, holding Indians may cut and sell timber on land occupied by them if it be for the purpose of better adapting land for occupation, aliter, if cut for mere purpose of sale; *Beecher v. Wetherby*, 95 U. S. 525, 526, 24 L. 441, 442, and *Roberts v. Railway Co.*, 43 Kan. 106, 22 Pac. 1007, holding under grant from United States to State of section 16 of every township, the fee to section 16 of lands occupied by Indians was in the State; *Buttz v. Railroad Co.*, 119 U. S. 67, 30 L. 335, 7 S. Ct. 105, conveyance by United States to railroad company of lands occupied by Indians, passes fee subject to Indians' right of occupation; *Sparkman v. Porter*, 1 Paine, 471, F. C. 7,143, holding purchaser from Indian receives only mere right of possession, which is subject to extinguishment at will of Indians; *Caldwell v. Robinson*, 59 Fed. 654, holding further, this right of occupation is subject to modification at pleasure of United States; *United States v. Alask. Assn.*, 79 Fed. 156, holding United States, as paramount source of title, may dispose of public lands within Indian reserva-



tion without consent of Indians; *Caldwell v. State*, 1 Stew. & P. 338, 346, where State asserted its right to extend its civil and criminal jurisdiction over territory within its confines occupied by Indians; *Byrne v. Alas*, 74 Cal. 635, 16 Pac. 526, patentee to lands occupied by Indians takes it subject to Indians' right of occupancy; *East Haven v. Hemingway*, 7 Conn. 198, reaffirming proposition that Indians have no capacity to pass the fee to lands occupied; *Snell v. Railway Co.*, 78 Iowa, 94, 42 N. W. 590, right of possession in patentee of lands occupied by Indians vests immediately on abandonment by Indians; *Buck v. Holloway*, 2 J. J. Marsh. 164, and *Breaux v. Johns*, 4 La. Ann. 142, 50 Am. Dec. 557, where deed from Indians was held to convey no title; *Southampton v. Mecox Co.*, 116 N. Y. 7, 22 N. E. 389, where title was claimed to have been derived from Indians; *Doe v. Welsh*, 3 Hawk. 159, 169, holding further, as to when Indians holding land under treaty with United States will be considered purchasers; *Cornet v. Winton*, 2 Yerg. 145, and dissenting opinion, 155, 159, the majority holding a grant within bounds of territory held by Indians, which territory had never been ceded by Indians, conveyed no title; *State v. Foreman*, 8 Yerg. 338, 342, where act of legislature of Tennessee extending the criminal laws of the State over territory occupied by Indians within the State was held constitutional; *Mining Co. v. Dickert, eto.*, Co., 6 Utah, 196, 21 Pac. 1007, 5 L. R. A. 267, treaty-making power of government may dispose of government's title to Indians, without consent of congress; *Veeder v. Guppy*, 3 Wis. 526, affirming right of State to grant Indian lands while still in occupation of Indians.

Cited, *arguendo*, in *Cherokee Nation v. Georgia*, 5 Pet. 48, 49, 8 L. 42. Approved, but not applied, *Mitchell v. United States*, 15 Pet. 89, 10 L. 671. Cited in *Seneca Nation v. Christy*, 162 U. S. 289, 40 L. 972, 16 S. Ct. 830, but case goes off on other grounds; note, 4 Dill. 469, F. C. 1,581. Approved, *Goodfellow v. Muckey*, 1 McCrary, 244, F. C. 5,537, "the Indian title is but a right of occupancy, the fee being in United States." Cited generally in *Robinson v. Caldwell*, 67 Fed. 395, 29 U. S. App. 468; *Fellows v. Denniston*, 23 N. Y. 423, and *Caldwell v. State*, 1 Stew. & P. 409, as to nature of Indians' title; in *Danzell v. Webquish*, 108 Mass. 134, as bearing on question as to what Indians are entitled to share in division of lands under statute of 1869. Approved, but no application, *Coleman v. Tish-ho-mah*, 4 S. & M. 48; *Howard v. Moot*, 64 N. Y. 270. Cited generally in *Seneca Nation v. Christie*, 126 N. Y. 136, 27 N. E. 278; *Garner's Case*, 3 Gratt. 772, as to nature of title Indians have in lands they occupy.

Distinguished in *Doe v. Wilson*, 23 How. 463, 13 L. 586, affirming right of Indian to convey his interest.

**Constitutional law.**—The power of the crown to dismember royal provinces was asserted and exercised, p. 580.

Cited in *Rhode Island v. Massachusetts*, 12 Pet. 739, 9 L. 1266,

as an argument to show the regulation of boundaries between States is a political power; *Montgomery v. Ives*, 13 S. & M. 172, as to the manner of changing boundaries.

**Treaties — Indians.**— The exclusive right of British government to lands occupied by Indians passed to United States by the treaty of peace concluding the revolutionary war, p. 584.

Rule affirmed and followed in *Cherokee Nation v. Georgia*, 5 Pet. 48, 8 L. 42, holding Indians have only a possessory right in lands they occupy; *Thompson v. Doaksum*, 68 Cal. 595, 10 Pac. 200, the exclusive right to pre-emption of Indian lands within United States lies in congress; *United States v. Four Bottles Sour Mash*, 90 Fed. 722, in affirming primary source of title to public land in United States is in government. Cited, *arguendo*, in *Veale v. Maynes*, 23 Kan. 24, 28, as to nature of Indian title.

**Constitutional law.**— On the formation of the government of the United States, the prerogative of the crown and powers of parliament devolved on the people of the United States in their sovereign capacity, pp. 584, 588.

This proposition is cited and the principle applied in *Shively v. Bowlby*, 152 U. S. 15, 38 L. 337, 14 S. Ct. 553, where it is held the title to soil of the sea, or its arms, below high-tide mark is in the State, since at common law it was in the crown; *Sharpless v. Mayor*, 21 Pa. St. 160, 59 Am. Dec. 764, in determining the powers of the legislature; *State v. Foreman*, 8 Yerg. 279, 317, therefore dominion exercised by Great Britain over Indians passed to United States; *McCreedy v. Commonwealth*, 27 Gratt. 988, holding constitutional an act of the Virginia legislature forbidding the planting of oysters in waters of State by any person other than a resident. Cited, *arguendo*, *Rhode Island v. Massachusetts*, 12 Pet. 720, 738, 751, 9 L. 1259, 1266, 1271, as bearing on question whether power to determine boundary between States is judicial or political; *Bonaparte v. Railway Co.*, 1 Bald. 220, F. C. 1,617, as to restraints on legislative power.

**International law.**— Where territory is acquired by conquest, the rights of property of the conquered should remain unimpaired, p. 589.

Cited and principle applied in *Strother v. Lucas*, 12 Pet. 436, 9 L. 1147, the cessation of territory passes the sovereignty only; *Rhode Island v. Massachusetts*, 12 Pet. 749, 9 L. 1270, territory acquired by treaty; *Groover v. Coffee*, 19 Fla. 80, applying rule to territory acquired by cession and holding "grants" by government of parts of a disputed territory over which it exercises *de facto* political jurisdiction, are valid and will be respected; this decision was overruled on appeal, 123 U. S. 30, 31 L. 63, 8 S. Ct. 16, where the proposition in *Johnson v. McIntosh* was approved, but holding a grant by



State of land to which it has no title, although exercising de facto political jurisdiction over, conveys no title. Cited, *arguendo*, in *Pol-lard v. Kibbe*, 14 Pet. 412, 10 L. 518, as to duties of conqueror to con- quered; in *United States v. Huckabee*, 16 Wall. 434, 21 L. 464, as to when conquest is complete, but does not appear to be in point. Cited in *State v. Foreman*, 8 Yerg. 344, as to title acquired by conquest.

**Constitutional law.**—According to the theory of the British Con- stitution, all vacant lands are vested in the crown, as representing the nation, p. 595.

Cited and principle applied in *Mitchell v. United States*, 9 Pet. 747, 9 L. 296, holding titles acquired under license from crown to purchase from Indians are valid; *Rhode Island v. Massachusetts*, 12 Pet. 733, 9 L. 1264, affirming right of crown to make grants claimed by respective States; *Martin v. Waddell*, 16 Pet. 409, 10 L. 1012, holding valid grant of lands made by crown to Duke of York, such lands having been discovered by persons acting under authority of British government; also in dissenting opinion, same case, pp. 426, 427, 10 L. 1018, 1019, holding a grant from the crown passes every interest in the soil. Cited generally in *Dred Scott v. Sandford*, 19 How. 501, 15 L. 740; *Martin v. Den*, 18 N. J. L. 499, as containing a discussion of general doctrine underlying rule; *Sage v. Mayor*, 154 N. Y. 71, 61 Am. St. Rep. 597, 47 N. E. 1098, 38 L. R. A. 610, as to right of crown to interfere with vested rights. Cited, *arguendo*, in *re Indians*, 40 Atl. 353.

**Miscellaneous.**—Cited in *United States v. Arredondo*, 6 Pet. 715, 8 L. 556, not in point; in *Cherokee Tobacco*, 11 Wall. 619, 20 L. 229, as containing general discussion of power of government over In- dians; *Herr v. Johnson*, 11 Colo. 396, 18 Pac. 343, as to the law that obtained in Colorado prior to legislative enactments; *Toll Road v. Edwards*, 3 Colo. App. 77, 32 Pac. 550, as to meaning of term “public grant;” *Doyle v. McGuire*, 38 Iowa, 412, not in point.

Cited in *Southampton v. Mecox Co.*, 116 N. Y. 9, 22 N. E. 389, as an authority for holding there is no presumption that any change was intended as to title to lands from the granting of a new char- ter to a corporate town by the governor of the province; *Moore v. Commissioners*, 2 Wyo. 22, as authority for holding a territory has no authority to tax a military post trader at a post located in an Indian reservation; *Water Power Co. v. Street Ry. Co.*, 172 U. S. 491, as to definition of word “absolute.”

8 Wheat. 605-641, 5 L. 696, GRACIE v. PALMER.

**Maritime lien.**—The charterer and master cannot by contract with shipper destroy owner's lien for freight, p. 636.

Cited and principle applied in *Schooner Freeman v. Buckingham*, 18 How. 192, 15 L. 345, holding one who has made advances on faith

of bills of lading fraudulently issued by master and special owner of ship, has no lien on ship as against general owner; *Shaw v. Thompson, Olcott*, 148, F. C. 12,726, where shipper sought to evade lien, claiming to have set off freight against debts owed him by charterers; *The T. A. Goddard*, 12 Fed. 180, holding master and charterer have no authority to vary shipper's contract so as to deprive shipper of his lien on ship for safe and careful transportation. Cited, but without special application of the rule, in the following cases: *Bird of Paradise*, 5 Wall. 561, 18 L. 666; *Kimball v. Ship Anna Kimball*, 2 Cliff. 15, F. C. 7,772; *Schooner Volunteer*, 1 Sumn. 570, F. C. 16,991; *Eliza's Cargo*, 1 Low. 84, F. C. 8,517; *Perkins v. Hill*, 2 Wood. & M. 165, F. C. 10,987; *Ship Panama, Olcott*, 362, F. C. 10,703; *The Karo*, 29 Fed. 654, 656.

Distinguished in *Webb v. Anderson, Taney*, 516, F. C. 17,318, where owner was held to have lost his lien by surrender of merchandise transported; *Raymond v. Tyson*, 17 How. 62, 15 L. 50, where owner waived lien by agreeing to stipulation in charter-party inconsistent with.

**Charterparty.**—Discussion of rights and liabilities arising under when (1) charterers are given possession and management of ship; (2) when possession and management is retained by owners, p. 632.

Cited in *Reed v. United States*, 11 Wall. 601, 20 L. 220, holding where vessel is let to hire, charterer taking possession, he becomes owner during term of contract; *United States v. Shea*, 152 U. S. 187, 38 L. 407, 14 S. Ct. 521, as an authority which brings out the difference between the two kinds of affreightment contracts; *Webb v. Pierce*, 1 Curt. 106, F. C. 17,320, holding, where master hires a vessel "on shares," he to have the entire management, control and possession of her, he thereby becomes the owner, *pro hac vice*; *Donahoe v. Kittell*, 1 Cliff. 139, F. C. 3,980, where charterer becomes special owner of vessel, the master and crew become his servants and are subject to his orders; *Hill v. Steamer Golden Gate, Newb.* 314, F. C. 6,492, where charterers become special owners, they, and not general owners, are responsible for damages and contracts; *Certain Logs of Mahogany*, 2 Sumn. 596, F. C. 2,559, general owner will be deemed owner, notwithstanding charter-party, if he retain control and possession of ship; *The T. A. Goddard*, 12 Fed. 178, as to liability of those having charge of ship for proper stowage and transportation of goods; *Pickman v. Woods*, 6 Pick. 252, 254, where entire charge of vessel is given to charterers, owner does not have such a possession of cargo that he has lien on same for hire of vessel; *Bank v. Stewart*, 26 Mich. 88, as to when charterer becomes owner and assumes rights and obligation of; *Clarkson v. Edes*, 4 Cow. 480, where general owner parts with management to charterer, the latter is presumed to be the owner so that former can have no lien for freight; *Robinson*



v. Chittenden, 69 N. Y. 528, as to rule where owner retains control and management, but charters to another for voyage. Cited generally, *Schooner Volunteer*, 1 Sumn. 568, F. C. 16,991; *Hayes v. Campbell*, 55 Cal. 426, 36 Am. Rep. 46, holding the chartering of a ship for a voyage is a letting of the carrying capacity of the vessel and not the vessel itself; note, 13 Am. Dec. 88.

**Charterparty.**—Contract of affreightment is subject to construction just as other contracts, p. 634.

Cited to this effect and applied in construing charterparty, *Raymond v. Tyson*, 17 How. 60, 15 L. 49.

**Shipping.**—The master of a chartered ship has no authority to alter contract entered into between charterer and owner, p. 639.

Cited and rule applied in *Peer of the Realm*, 19 Fed. 217, holding master may refuse to sign bill of lading where same does not conform to terms of charterparty; *Hart v. Leach*, 21 Fed. 78, where master gave charterers bill of lading for gold coin when charterparty did not provide for transportation of same. Cited approvingly, but without specially applying the rule, in *Blue Star v. Keyser*, 81 Fed. 512.

**Shipping.**—Where shipper enters into contract with charterer under terms which he knows charterer cannot perform without violating his contract with owner, his contract will be considered subordinate to that between owner and charterer, p. 638.

Principle applied in *Stephenson v. The Francis*, 21 Fed. 725, where material-man tried to hold ship for supplies when he knew same were to be furnished by charterer.

**Miscellaneous.**—Cited in *Thomas v. Osborn*, 19 How. 31, 15 L. 538, as bearing on question as to when master may place lien on ship for repairs and supplies; *T. A. Goddard*, 12 Fed. 182, not in point; *Fordyce v. McFlynn*, 56 Ark. 428, 19 S. W. 962, as to carrier's liability.

8 Wheat. 642-675, 5 L. 705, *CHILDRESS v. EMORY*.

**Pleading.**—It is not necessary, in general, in deriving a title through the indorsement of a firm, to allege, in particular, who the persons are composing that firm, p. 669.

Cited and principle applied in *Bond v. Wilkinson*, 5 Blackf. 265, holding failure to aver Christian name of indorser is not objectionable; *Cochran v. Scott*, 3 Wend. 230, similar in fact to principal case; *Haviland v. Simons*, 4 Rich. L. 342, case of assignment of bill of exchange by firm. Cited, without special application, in *Winship v. Bank*, 5 Pet. 576, 8 L. 233, to the effect that the indorsement must be shown to have been authorized. Cited, *arguendo*, *Hodges v. Kimball*, 91 Fed. 848.

**Executors and administrators**, by operation of law, succeed to all the rights of their testators, p. 669.

Cited and applied in *Costley v. Wilkerson*, 49 Ala. 212, and *Christmas v. Griswold*, 8 Ohio St. 562, where, both members of a partnership having died, the right of the administrator of the one which died last to settle up the business was affirmed; *Augusta v. Kimball*, 91 Me. 608, 40 Atl. 668, 41 L. R. A. 477, nonresident trustees cannot be taxed for trust property removed from State, although they qualified as such trustees in State seeking to impose tax.

**Assignees claim by the act of the parties**, p. 669.

Cited to this point in *McNutt v. Bland*, 2 How. 15, 11 L. 161, holding, for purpose of determining jurisdiction in Federal courts, assignors will be considered real parties in interest; *Bradford v. Jenks*, 2 McLean, 134, F. C. 1,769, and if he sues in Federal courts must show his assignor might have done so; *United States Bank v. McNair*, 56 Fed. 325, holding, if assignor cannot sue in Federal courts, then his assignee may not do so.

**Federal courts have jurisdiction of suits by or against executors and administrators when citizens of different State from party suing or being sued**, though deceased might not be entitled to sue or be sued in such courts, p. 669.

Cited and rule applied in *Clarke v. Mathewson*, 2 Sumn. 263, F. C. 2,857; same case approved on appeal, 12 Pet. 171, 9 L. 1044, and in *Rice v. Houston*, 13 Wall. 67, 20 L. 484, where the administrator was considered the real party in interest; *Coal Co. v. Blatchford*, 11 Wall. 175, 20 L. 180, holding like rule applies in action by or against trustees; dissenting opinion, *Florida v. Georgia*, 17 How. 499, 15 L. 196; *Harper v. Norfolk Ry. Co.*, 36 Fed. 104, suit by administrator to recover damages for causing death of his intestate; *Wade v. Sewell*, 56 Fed. 131, the citizenship of trustee and not that of parties he represents determines jurisdiction of Federal courts; *Hill v. Henderson*, 6 S. & M. 356, affirming right of non-resident executor to remove suit to Federal court. Cited, without special application of the rule, in *Mellus v. Thompson*, 1 Cliff. 131, F. C. 9,405. Cited, arguendo, *Reinach v. Atlantic Ry. Co.*, 58 Fed. 38; *Middlebrook v. Insurance Co.*, 14 Conn. 310. Cited in *Sharp's Rifle Co. v. Rowan*, 34 Conn. 332, 91 Am. Dec. 729, "where jurisdiction depends on the party, it is the party on the record."

Distinguished as having no bearing on question for which cited, *Goff v. Norfolk Ry. Co.*, 36 Fed. 301.

**Pleading.**—In action on a note, a declaration that A. B., by his agent, C., made his note, is good in suit against A. B., p. 670.

Cited and followed in *Sherman v. Comstock*, 2 McLean, 20, F. C. 12,764, as to similar declaration in action on a check.



**Pleading.**—An objection that plaintiff is not executor or administrator must be taken by way of plea in abatement, and cannot be raised on general demurrer, p. 671.

Cited and rule applied in *Kane v. Paul*, 14 Pet. 42, 10 L. 346, holding, under plea of general issue, a certificate of probate and qualification shows right in executor; dissenting opinion, *Noonan v. Bradley*, 9 Wall. 408, 19 L. 762; *Dental Co. v. Wetherbee*, 2 Cliff. 562, F. C. 3,810, holding objection to plaintiff corporation's capacity to sue must be taken by plea in abatement; *Johnson v. Wilson*, 1 Pinn. 68, holding further as to proper procedure in objecting to right of foreign administrator to sue; *Weathers v. Newman*, 1 Blackf. 233. Cited generally, *Cotton v. Ward*, 45 Ala. 361. Cited in *Pollard v. Buttery*, 3 Blackf. 239, as authority for holding a plea of the general issue, where executor sues on cause of action arising during lifetime of testator, admits plaintiff is such executor.

Modified in *Noonan v. Bradley*, 9 Wall. 401, 17 L. 760, holding objection to appointment of administrator may be taken by special plea in bar. Denied in *Thomas v. Cameron*, 16 Wend. 582, where the statement in *Childress v. Emory* is said to be dictum.

Distinguished, *Black v. Allen Co.*, 42 Fed. 624, 9 L. R. A. 437, if statute requires of foreign administrator ancillary letters in State where he sues, a bill in equity which shows on its face that this has not been done, may be attacked by demurrer.

Waiver of law is abolished in the United States, p. 675.

Cited to this effect in *Thompson v. French*, 10 Yerg. 456.

Miscellaneous.—Cited in dissenting opinion, *Marshall v. B. & O. Ry. Co.*, 16 How. 350, 14 L. 968, as to citizenship of corporation; *Adams v. Douglas County*, *McCahon*, 241, F. C. 52, as to amount involved in controversy to give Federal courts jurisdiction; *The Boston, Blatchf. & H.* 314, F. C. 1,669, as an exception to common-law rule that administrators and executors must obtain letters within jurisdiction where court sits.

8 Wheat. 675-681, 5 L. 713, *SIGLAR v. HAYWOOD*.

**Executors and administrators.**—The judgment on a plea of plene administravit, if against administrator, unless plea is false, should be de bonis testatoris, p. 680.

Cited and rule applied in *Smith v. Chapman*, 93 U. S. 42, 23 L. 796, holding, in action against executor upon contract of his testator, unless devastavit is shown, judgment de bonis propriis is erroneous; *Justices v. Sloan*, 7 Ga. 39, such should be form of judgment whenever executor or administrator is sued in his representative capacity, except where he pleads to release himself and pleas are found against him.

**Executors and administrators.**—In action against administrator, if plea of plene administravit be found against administrator, the

verdict ought to find the amount of assets unadministered, and defendant is liable for that sum only, p. 680.

Cited and applied in *Janett v. Wilson*, 1 Ark. 140, and if verdict does not find specially amount of assets in hands of administrator, judgment founded thereon is bad; *King v. Anthony*, 2 Blackf. 132, action against administrator; *Johnson v. Hawkins*, 2 Blackf. 461.

Modified in *Thrash v. Sumwalt*, 5 Ala. 16, holding, if verdict be for plaintiff on such plea, it will be concluded jury have passed on quantity of assets and affirmed plaintiff's allegations.

**Executors and administrators.**—The plea of plene administravit, though not sustained, is not necessarily a false plea, p. 679.

**Miscellaneous.**—Cited in *Folger v. Shaw*, 2 Wood. & M. 546, F. C. 4,899, as an instance where judgment was rendered in case where only one party appeared and argued cause.

8 Wheat. 681-690, 5 L. 714, CITY OF WASHINGTON v. PRATT.

**Tax sales.**—Under charter of city of Washington, when an individual owns several lots, if the sale of one or more produce the amount of taxes actually due on the whole, the corporation cannot proceed to sell further, p. 687.

Cited and followed in *Mason v. Fearson*, 9 How. 257, 13 L. 129, holding subsequent legislation on the general subject did not affect this rule. Cited generally in *Penn v. Clemans*, 19 Iowa, 380, as to right to sell for taxes several distinct parcels of land in gross.

**Taxes.**—Where several lots are assessed to the same person, the lien on each lot is several and distinct, p. 687.

Cited and principle applied in *Fowler v. St. Joseph*, 37 Mo. 239, where assessment for street improvements was made on property adjoining street improved.

**Tax sales.**—Under act of 1812 for sale of lots for delinquent taxes in city of Washington, advertisement must contain a particular statement of amount of taxes due on each lot, p. 688.

Cited to this point in *Lyon v. Hunt*, 11 Ala. 313, 46 Am. Dec. 224, holding further as to what must be shown by one claiming title through tax sale; *Cahoon v. Coe*, 57 N. H. 569, "in all cases of sale for taxes every prerequisite to the exercise of the power must precede its exercise;" and to same effect, *Morrill v. Taylor*, 6 Neb. 243.

**Tax sales.**—Under act of 1812, providing for sale of lots for delinquent taxes in city of Washington, a sale is illegal unless lots have been assessed to proper owners thereof, p. 685.

Cited in *Traey v. Reed*, 13 Sawy. 629, 38 Fed. 74, 2 L. R. A. 778, and n., construing similar Oregon statute; *Milner v. Clarke*, 61 Ala. 260, in construing similar Alabama statute; *Dowell v. Portland*, 13 Or. 252, 263, 10 Pac. 309, 315, where sale was made under an assessment to



stranger to title, sale was held void; *Hawthorne v. Portland*, 13 Or. 277, 278, 10 Pac. 346, holding, where statute requires assessment to be made in name of owner, an assessment to the estate of H. is insufficient.

Distinguished in *Alvord v. Collin*, 20 Pick. 426, on statutory grounds.

**Statutory construction.**— Statutes affecting rights of freehold must be strictly construed, p. 683.

Cited in *Mason v. Fearson*, 9 How. 260, 13 L. 260, as applicable to statute providing for tax sales; *Early v. Doe*, 16 How. 619, 14 L. 1083, a sale for taxes which does not conform to provisions of statute is void; *Scott v. Babcock*, 3 G. Greene, 143, holding tax deed invalid because of failure of tax collector to observe provisions of statute.

Miscellaneous.— Cited in *United States v. Thoman*, 156 U. S. 359, 39 L. 452, 15 S. Ct. 380, as to construction to put on word “may” in statute conferring a power to be exercised for the benefit of the public; *Carrol v. Perry*, 4 McLean, 26, F. C. 2,456, as to court of equity exercising concurrent jurisdiction with court of law.

8 Wheat. 690-697, 5 L. 717, *SNEED v. WISTER*.

**Statutory construction.**— If judgment be on contract for payment of money, a party is as well entitled to interest in action upon appeal bond as if he were to proceed on the judgment, p. 696.

Cited to this point in *The Wanata*, 95 U. S. 618, 24 L. 467, as to right to recover interest and costs from sureties on appeal bond in admiralty proceeding.

**Trial.**— Defendant cannot crave oyer of a deed in an action on a bond for performance of covenants in deed, p. 695.

Cited in *Whittenton Co. v. Memphis Co.*, 21 Fed. 899, in construing Tennessee statute as to when proof is necessary. Cited in *Mealey v. Insurance Co.*, 23 Fed. 25, on general subject of oyer.

Distinguished in *Jackson v. Rundlet*, 1 Wood. & M. 384, F. C. 7,145, on ground that the question was not raised.

**Trial.**— If oyer be improperly demanded, the defect is aided on a general demurrer, but it is fatal to the plea when it is set down as a cause for demurrer, p. 695.

**Trial.**— Oyer is not demandable of a record, p. 695.

Cited and applied, *Renner v. Reed*, 3 Ark. 343, holding oyer of original writ cannot be required.

**Pleading.**— Nil debet is an improper plea to an action upon a specialty or deed, where it is foundation of action, p. 695.

Cited with approval, *Anderson v. Sloan*, 1 Colo. 487; *Crigler v. Quarles*, 10 Mo. 326.

8 Wheat. 697-698, 5 L. 719, *HUGH v. HIGGS*.

Practice.—No action at law will lie on the decretal order of a court of equity, p. 698.

Approved in *Elliott v. Ray*, 2 Blackf. (Ind.) 31, unless the decree be foreign and have, by statute, the effect of a judgment at law; *Woodruff v. Clark*, 6 Blackf. 338, holding, in action of assumpsit, defendant cannot set off decree in chancery in his favor; *Boyle v. Schindel*, 52 Md. 4, 5, holding action at law will not lie in same jurisdiction to recover sum of money decreed to be paid by equity; *Van Buskirk v. Mulock*, 18 N. J. L. 191, action to recover alimony; note, 11 Am. Dec. 724.

Criticised in *Pennington v. Gibson*, 16 How. 79, 14 L. 852, holding action of debt may be maintained upon a decree in equity which is for a specific amount. Denied in *Knapp v. Knapp*, 59 Fed. 642, where action at law was maintained on decree in equity awarding alimony; *Green v. Foley*, 2 Stew. & P. 443; *Phillips v. Thompson*, 3 Stew. & P. 382. Denied in *Mutual Ins. Co. v. Newton*, 50 N. J. L. 574, 14 Atl. 758, although case goes off on another point. Denied in effect, *Thrall v. Waller*, 13 Vt. 235, 37 Am. Dec. 593, holding action of debt will lie upon decree fixing balance of account between partners.

8 Wheat. 699-700, 5 L. 719, *GRACIE v. PALMER*.

Federal courts.—In action in United States Circuit Court it is not necessary to aver on the record that defendant is an inhabitant of the district, or was found therein at time of serving writ, p. 699.

Rule cited and followed in *Feese v. Phelps*, 1 McAll. 17, F. C. 13,818, if allegations show diverse citizenship that is sufficient; *McCloskey v. Cobb*, 2 Bond, 17, F. C. 8,702. Principle applied to action in State court, *Hall v. Mobley*, 13 Ga. 319, holding it is not indispensable to aver residence of defendant in county where suit is brought.

Modified in *Laskey v. Newtown Co.*, 50 Fed. 635, holding under acts of 1887 and 1888, where jurisdiction depends on diverse citizenship only, complaint must show that one of the parties resides in district where action is brought; to same effect, *Central Trust Co. v. Virginia Iron Co.*, 55 Fed. 773.

Federal courts.—Where defendant is sued in United States Circuit Court, in district of which he is not a resident, a general appearance constitutes a waiver of the irregularity, p. 700.

The following citing cases affirm and apply this principle: *Martin v. Baltimore & Ohio Ry. Co.*, 151 U. S. 688, 38 L. 317, 14 S. Ct. 539, as to failure to object to petition for removal of cause until after trial of cause; *Interior Co. v. Gibney*, 160 U. S. 220, 40 L. 402, 16 S. Ct. 273, provision in judiciary act as to particular district in which defendant shall be sued, confers a personal privilege which may be waived; *Winans v. McKean Co.*, 6 Blatchf. 219, F. C. 17,862;



McCloskey v. Cobb & Co., 2 Bond. 18, F. C. 8,702, return of service by marshal is conclusive evidence that defendant was found within district where sued; Flanders v. Insurance Co., 3 Mason, 160, F. C. 4,852, corporation having entered general appearance, it cannot object to service; Page v. Chillicothe, 6 Fed. 601, act of congress dividing district of Ohio and providing suits shall be brought in district of which defendant is a resident, confers a personal privilege which may be waived; Edwards v. Insurance Co., 20 Fed. 453, defendant having removed cause cannot object that it was originally improperly brought; Romaine v. Union Co., 28 Fed. 638, 639, where authorities are collected; Spies v. Chicago Ry. Co., 32 Fed. 713, after court has obtained jurisdiction, fact that case can be tried with greater convenience in district of defendant's residence, is not good cause for removal; Platt v. Manning, 34 Fed. 818; Cooley v. McArthur, 35 Fed. 373, and if defendant waives this personal privilege, plaintiff cannot make it for him; Southern Ex. Co. v. Todd, 56 Fed. 106, 12 U. S. App. 351, holding, under acts of 1887 and 1888, which require when jurisdiction is founded on diverse citizenship alone, suit must be brought in district of residence of either plaintiff or defendant, the act confers a personal privilege which may be waived by general appearance; Creagh v. Insurance Co., 83 Fed. 850, 851, filing of petition and bond for removal of case from State court constitutes a waiver of right to object to jurisdiction in Federal court; Lee v. Insurance Co., 15 Fed. Cas. 142; Thornburg v. Savage Min. Co., 23 Fed. Cas. 1120; Wilson v. Pierce, 30 Fed. Cas. 154. Principle applied to action in State court, Baars v. Gordon, 21 Fla. 36, general appearance waives process; Bank of Valley v. Bank, 3 W. Va. 391; Mahany v. Kephart, 15 W. Va. 618, appearance for any purpose other than to take advantage of defective process is waiver of irregularity; Shepherd v. Brown, 30 W. Va. 18, 3 S. E. 189, holding repeated appearance to a notice waives objection that it was not served on time; Blackburn v. S. M. Co., 2 Flipp. 531, F. C. 1,467, where jurisdiction of corporation was acquired by its appearance and answer. Approved, but no application, Clarke v. Navigation Co., 1 Story, 540, F. C. 2,859. Cited generally, Winter v. Ludlow, 30 Fed. Cas. 334; Buckingham v. Bailey, 4 S. & M. 546, as to when jurisdiction is conferred by consent. Cited, *arguendo*, Denniston v. Potts, 11 S. & M. 41, as to when party may confer jurisdiction by waiving right to be sued in district or county of which he is resident.

Distinguished in Shaw v. Quincy Mining Co., 145 U. S. 453, 36 L. 173, 12 S. Ct. 938, where defendant appeared specially for purpose of taking objection; Steele v. Harkness, 9 W. Va. 24, where defendant appeared specially to take advantage of irregularity in process, and his objection being overruled he answered to action. Modified in Trust Co. v. Virginia Iron Co., 55 Fed. 773, holding, under statute of 1887 and 1888, where jurisdiction depends on diverse citizenship alone, either plaintiff or defendant must be resident of district where action is brought in order to confer jurisdiction on court.

# GENERAL INDEX

TO THE

## FOUR VOLUMES OF WHEATON CONTAINED IN THIS BOOK. FORMED BY CONSOLIDATION.

N. B.—Figures at right of title show volume to whose index it belongs.

Figures in parenthesis refer to marginal paging of the volumes contained in this book respectively, while the black-faced figures indicate the page of this book on which the marginal paging, referred to is found.

### ACTION—8.

No action at law will lie on the decretal order of a court of equity.

*Hugh v. Higgs,* (697) 719

### ADMIRALTY—5.

1. The courts of the United States have no jurisdiction, under the act of April 30, 1790, c. 33, of the crime of manslaughter, committed by the master upon one of the seamen on board a merchant vessel of the United States, lying in the river Tigris, in the empire of China, 35 miles above its mouth, off Wampoa, about 100 yards from the shore, in four and a half fathoms water, and below low water-mark.

*United States v. Wiltberger,* (76, 93) 37, 42

2. In the same act, the description of place contained in the 8th sec., within which the offenses therein enumerated must be committed, in order to give the courts of the Union jurisdiction over them, cannot be transferred to the 12th sec., so as to give those courts jurisdiction over a manslaughter committed in the river of a foreign country, and not on the high seas.

*Id.* (96) 43

3. History and extent of the criminal jurisdiction of the Admiralty.

*Id.* note 1, (106) 45

4. Information under the act of the 3d of March, 1807, c. 77, to prevent the importation of slaves into the United States. The alleged unlawful importation attempted to be excused upon the plea of distress. Excuse repelled, and condemnation pronounced.

*The Josefa Segunda,* (338, 351) 104, 107

5. Upon a piratical capture, the property of the original owners cannot be forfeited for the misconduct of the captors, in violating the municipal laws of the country where the vessel seized by them is carried.

*Id.* (1b.) 104, 107

6. But where the capture is made by a regularly commissioned captor, he acquires a title to the captured property, which can only be divested by recapture, or by the sentence of a competent tribunal of his own country; and the property is subject to forfeiture for a violation, by the captor, of the revenue or other municipal laws of the neutral country into which the prize is carried.

*Id.* (1b.) 104, 107

7. Speech of Mr. (now Chief Justice) Marshall, in Congress, in the case of Thomas Nash, alias Jonathan Robbins.

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### ADMIRALTY—6.

1. A question of fact, under the 46th section of the collection law of the 2d of March, 1799, c. 128, exempting from duty the wearing apparel, and other personal baggage, of persons arriving in the United States.

*The Robert Edwards,* (187) 238

2. Where the *res gesta*, in a revenue cause, are incapable of explanation consistently with the in-

Wheat. 5, 6, 7, 8.

nocence of the party, condemnation follows, although there be no positive testimony of the offense having been committed.

*Id.* (1b.) 238

3. Although a mere intention to evade the payment of duties be not, *per se*, a cause of forfeiture, yet when a question arises, whether an act has been committed which draws after it that consequence, such intention will justify the court in not putting on the conduct of the party, in respect to the act in question, an interpretation as favorable as under other circumstances it would be disposed to do.

*Id.* (191) 239

4. In all proceeding *in rem*, on an appeal, the property follows the cause into the Circuit Court, and is subject to the disposition of that court. But it does not follow the cause into the Supreme Court, on an appeal to that court.

*The Collector,* (194) 239

5. After an appeal from the District to the Circuit Court, the former court can make no order respecting the property, whether it has been sold, and the proceeds paid into court, or whether it remains specifically, or its proceeds remain, in the hands of the marshal.

*Id.* (1b.) 239

6. It is a great irregularity for the marshal to keep the property, or the proceeds thereof, in his own hands, or to distribute the same among the parties entitled, without a special order from the court; but such an irregularity may be cured by the assent and ratification of all the parties interested, if there be no *mala fides*.

*Id.* (194) 239

7. Under the 67th section of the collection act of the 2d of March, 1799, c. 128, where goods were entered by an agent of the owner on his behalf, and the entry included only a part of the goods which the packages contained, and the owner subsequently made a further, or post entry of the residue of the goods; and the packages being opened several days afterwards and examined by the collector in the presence of two merchants, and their contents found to agree with the two entries taken together, but to differ materially from the first entry; held, that the collector was not precluded from making a seizure of the goods after the second entry, for a variance between the contents of the packages and the first entry, and that such seizure must be followed by confiscation, unless it should appear that such difference proceeded from accident and mistake, and not from an intention to defraud the revenue.

*The United States v. Six Packages of Goods,* (520) 321

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### ADMIRALTY—7.

1. An offense against a temporary statute cannot be punished after the expiration of the act, unless a particular provision be made by law for that purpose.

*The Irresistible,* (551) 520

2. The proviso in the repealing clause of the Neutrality Act of the 20th of April, 1818, did not



authorize a forfeiture under the act of the 3d of March, 1817, (which was included in the repeal), after the time when that act would have expired by its own limitation.

*The Irresistible,*

(552) 520

#### ADMIRALTY—8.

1. The non-intercourse act of the 18th of April 1818, c. 65, prohibits the coming of British vessels to the ports of the United States, from a British port closed against the commerce of the United States, either directly, or through an open British port; but it does not prohibit the coming of such vessels from a British closed port, through a foreign port (not British), where the continuity of the voyage is fairly broken.

*The Pitt,*

(371, 377) 639, 640

2. A libel of information, under the ninth sec. of the slave trade act of March 2d, 1807, c. 77, alleging that the vessel sailed from the ports of New York and Perth Amboy, without the captain's having delivered the manifests required by law to the collector or surveyor of New York and Perth Amboy, is defective; the act requiring the manifest to be delivered to the collector or surveyor of a single port.

*The Mary Ann,*

(380, 385) 641, 642

3. Under the same section, the libel must charge the vessel to be of the burthen of forty tons or more. In general, it is sufficient to charge the offense in the words directing the forfeiture; but if the words are general, embracing a whole class of individual subjects, but must necessarily be so construed as to embrace only a subdivision of that class, the allegation must conform to the legislative sense and meaning.

*Id.*

(385) 642

4. Where the libel is so informal and defective, that the court cannot enter upon a decree upon it, and the evidence discloses a case of forfeiture, this court will not amend the libel itself, but will remand the cause to the court below, with directions to permit it to be amended.

*Id.*

(390) 483

5. In cases of seizures made on land under the revenue laws, the District Court proceeds as a court of common law, according to the course of the exchequer on informations *in rem*, and the trial of issues of facts is to be by jury; but in cases of seizures on waters navigable from the sea by vessels of ten or more tons burthen, it proceeds as an instance court of Admiralty, by libel, and the trial is to be by the court.

*The Sarah,*

(391, 394) 644

6. A libel charging the seizure to have been made on water, when in fact it was made on land, will not support a verdict, and judgment or sentence thereon; but must be amended or dismissed. The two jurisdictions, and the proceedings under them, are to be kept entirely distinct.

*Id.*

(394) 644

7. Note on the jurisdiction of the Instance Court in revenue causes.

*Id.* Note 1,

(396) 645

8. If a British ship come from a foreign port (not British) to a port of the United States, the continuity of the voyage is not broken, and the vessel is not liable to forfeiture, under the act of April 18th, 1818, c. 65, by touching at an intermediate British closed port, from necessity, and in order to procure provisions, without trading there.

*The Frances and Eliza,*

(398) 645

9. A case of forfeiture, under the twenty-seventh section of the registry of vessels act, of December 31, 1792, c. 146, for the fraudulent use of a register, by a vessel not actually entitled to the benefit of it.

*The Luminary,*

(407) 647

10. Where the *onus probandi* is thrown on the claimant, in an instance or revenue cause, by a *prima facie* case, made out on the part of the prosecutor, and the claimant fails to explain the difficulties of the case by the production of papers and other evidence which must be in his possession, or under his control, condemnation follows from the defects of testimony on the part of the claimant.

*Id.*

(411) 648

See Prize.

#### AGENT—5.

1. The acts of agents do not derive their validity from professing on the face of them to have been done in the exercise of their agency.

*Mechanics' Bank v. Bank of Columbia,*

(326, 337) 100, 103

2 The liability of the principal for the acts of his agent depends upon the facts, 1st, That the act was done in the exercise, and, 2d. Within the limits of the power delegated.

*Id.*

(337) 103

3. In ascertaining these facts, as connected with the exercise of any written instrument, not under seal, parol testimony is admissible.

*Id.*

(1b.) 103

#### AGENT AND PRINCIPAL—6.

H. and others, merchants in Baltimore, consigned a vessel and cargo to W. and others, merchants in Amsterdam, with instructions to them respecting her ulterior destination, which showed, that on the failure of getting a freight to Batavia, or of selling the vessel at a price limited, she was to proceed to St. Petersburg, and there take in a return cargo of Russia goods for the United States, but with instructions to the master committing to him the management of the ulterior voyage. No freight to Batavia could be obtained, and the vessel could not be sold for the price limited at Amsterdam; and W. and others, purchased in Amsterdam, with the concurrence of the master, a return cargo of Russian goods, partly with the money of H. and others, and partly with money advanced by themselves. On the return of the vessel to Baltimore, H. and others objected to the purchase of this cargo in Amsterdam, as being contrary to express orders, and gave notice to W. and others, of their determination to hold them responsible for all losses sustained in consequence of this breach of instructions; but received the goods and sold them. W. and others brought an *assumpsit* against H. and others, to recover from them the moneys advanced. The declaration contained the three usual money counts. Held, 1st. That the plaintiffs had a demand in law against the defendants, which could be maintained in this form of action. 2d. That whether the plaintiffs could, or could not, be made responsible in any form of action which might be devised for the possible loss resulting from the breaking up of the intended voyage to St. Petersburg, the defendants were not entitled to a deduction from the plaintiffs' demand, for the amount of such loss.

*Willinks v. Hollingsworth,* (240, 251) 251, 253

#### ALIEN—7.

1. British subjects born before the revolution, are equally incapable with those born after, of inheriting, or transmitting the inheritance of lands in this country.

*Blight's lessee v. Rochester,* (535, 544) 516, 518

2. The treaties of 1783, and 1794, only provide for titles existing at the time those treaties were made, and not to titles subsequently acquired.

*Id.*

(544) 518

3. Actual possession is not necessary to give the party the benefit of the treaty; but the existence of title at the time is necessary.

*Id.*

(545) 519

4. Where J. D., an alien and British subject, came into the United States subsequent to the treaty of 1783, and before the signature of the treaty of 1794, died, seized of the lands in question. Held, that the title of his heirs was not protected by the treaties.

*Id.*

(544) 518

5. In what cases citizenship may be presumed so as to confirm a title to lands.

*Id.*

(545) 519

#### ALIEN—8.

See Constitutional Law, 16, 17, 18.

#### AMENDMENT—8.

See Admiralty, 4.

#### ASSIGNMENT—5.

1. Where a chose in action is assigned by the proprietor, he cannot interfere to defeat the rights of the assignee in the prosecution of a suit brought to enforce those rights.

*Mandeville v. Welch,*

(277, 283) 87, 89

2. It makes no difference, in this respect, whether the assignment be good at law, or in equity.

*Id.*

(283) 89

3. A bill of exchange is an assignment to the payee, of the debt due from the drawee to the drawer.

*Id.*

(285) 90

4. But this principle does not apply to a partial assignment of the fund.

*Id.*

(286) 90

Wheat. 5, 6, 7, 8.

## ASSIGNMENT—8.

See Chancery, 14, 15, 16.

## ATTORNEY—8.

1. A power of attorney, though irrevocable on its face, or as being given as a security, is revoked by the death of the party.

*Hunt v. Rousmanier*, (174, 201) 589, 596

2. A power of attorney, coupled with an interest in the thing, survives the party giving it, and may be executed after his death.

*Id.* (203) 597

3. How far a court of equity will compel the specific execution of a contract, intended to be secured by an irrevocable power of attorney, which was revoked by operation of law on the death of the party.

*Id.* (207) 598

## AWARD—5.

1. Where claims against a party, both in his own right, and in a representative character, are submitted to the award of arbitrators, it is a valid objection to the award, that it does not precisely distinguish between moneys which are to be paid by him in his representative character, and those for which he is personally bound.

*Lyle v. Rodgers*, (394, 407) 117, 120

2. An award may be void in part, and good for the residue. But if the part which is void be so connected with the rest as to affect the justice of the case between the parties, the whole is void.

*Id.* (409) 121

## BANKRUPT—6.

See Constitutional Law, 2. Local Law, 5, 6.

## BANKRUPT—7.

See Fraud.

## BASTARD—5.

Note on the history of the disabilities and rights of illegitimate children in different ages and countries.

Note 1, (262) 83,  
See Local Law, 5, 6, 7.

## BILLS OF EXCHANGE—5.

1. Bills of exchange and negotiable promissory notes are distinguished from all other parol contracts by the circumstance that they are *prima facie* evidence of valuable consideration, both between the original parties and against third persons.

*Mandeville v. Welch*, (277, 283) 87, 89

2. A bill of exchange is an assignment to the payee, of the debt due from the drawee to the drawer.

*Id.* (285) 90

3. But this principle does not apply to a partial assignment of the fund.

*Id.* (286) 90

## BILLS OF EXCHANGE AND PROMISSORY NOTES—6.

1. Where the second day of grace falls on Saturday, it is the last day of grace; and notice of non-payment given to the drawer of a bill on that day, after a demand upon the acceptor on the same day, is sufficient to charge the drawer.

*Bussard v. Levering*, (102) 215

2. Notice to the drawer, by putting the same into the post-office, where the persons live in different places, is good.

*Id.* (1b.) 215

3. After demand of the maker of a note, on the third day of grace, notice to the indorser on the same day, is sufficient by the general law merchant.

*Lindenberger v. Beall*, (104) 216

4. Evidence of a letter, containing notice, having been put into the post-office, directed to the indorser, at his place of residence, is sufficient proof of the notice to be left to the jury, and it is unnecessary to give notice to the defendant to produce the letter before such evidence can be admitted.

*Id.* (1b.) 216

Wheat. 5, 6, 7, 8.

5. No protest of a promissory note, or inland bill of exchange, is necessary.

*Young v. Bryan*, (146) 228

6. A protest of an inland bill or promissory note is not necessary, nor is it evidence of the facts stated in it.

*The Union Bank v. Hyde*, (572) 333

7. The following undertaking of the endorser of a promissory note, "I do request that hereafter any notes that may fall due in the Union Bank, in which I am, or may be indorser, shall not be protested, as I will consider myself bound in the same manner as if the said notes had been or should be legally protested," held to be ambiguous as to whether it amounted to a waiver of demand and notice; and parol proof admitted to show that it was the understanding of the parties, that the demand and notice required by law to charge the indorser, should be dispensed with.

*Id.* (1b.) 333

## BILLS OF EXCHANGE AND PROMISSORY NOTES—7.

1. A bill, or note, is *prima facie* evidence, under a count for money had and received, against the drawer or indorser.

*Page's Administrator v. The Bank of Alexandria*, (35) 390

2. But the presumption, that the contents of the bill or note have been received by the party sued, and for the use of the plaintiff, may be rebutted by circumstances; and a recovery cannot be had, in such a case, where it is proved that the money was actually received by another party.

*Id.* (1b.) 390

## BILLS OF EXCHANGE AND PROMISSORY NOTES—8.

1. Banks, and other commercial corporations, may bind themselves by the acts of their authorized officers and agents, without the corporate seal.

*Fleckner v. U. S. Bank*, (338, 357) 631, 635

2. The negotiability of a promissory note, payable to order, is not restrained by the circumstance of its being given for the purchase of real property in Louisiana, and the notary, before whom the contract of sale is executed, writing upon it the words "*ne varietur*," according to the laws and usages of that state, and other countries governed by the civil law.

*Id.* (363) 637

3. The statutes of usury of England, and of the states of the Union, expressly provide that usurious contracts shall be utterly void; but, without such a provision, they are not void as against parties who are strangers to the usury.

*Id.* (355) 635

4. The statute incorporating the Bank of the United States does not avoid securities on which usurious interest may have been taken, and the usury cannot be set up as a defense to a note on which it is taken. It is merely a violation of the charter, for which a remedy may be applied by the government.

*Id.* (1b.) 335

See Evidence, 6, 7, 8.

## BOUNDARY—5.

See Local Law, 21, 22.

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1. Penalty on liquidated damages. *Fletcher v. Dycke*, 2 T. R. 32, distinguished from *Taylor v. Sandiford*, (18) 386

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8. Practice in Real Actions. *Green v. Watkins*, *ante*, Vol. VI., 260, commented on and confirmed in *Macker's heirs v. Thomas*,

(531) 515

#### CHANCERY—5.

1. A deposit of title deeds as security for a debt, creates a lien which is considered an equitable mortgage.

*Maudeville v. Welch*, (277, 284) 87, 90

2. So also the deposit of a note, not negotiable, as security for a debt, will entitle the creditor, after notice to the maker, to enforce in equity his lien against the depositor and his assignees in bankruptcy.

*Id.* (284) 90

3. But this doctrine proceeds upon the supposition that the deposit is clearly established to have been made as security for the debt, and not upon the ground that the mere fact of a deposit unexplained affords such proof.

*Id.* (Ib.) 90

4. In equity, a final decree cannot be pronounced until all the parties in interest are brought before the court.

*Marshall v. Beverley*, (313, 315) 97

5. Where a bill was filed for a perpetual injunction, on judgments obtained on certain bills of exchange drawn by the plaintiff, and negotiated to the defendant, and which had subsequently passed from the latter into the hands of third persons, by whom the judgments were obtained; held, that the injunction could not be decreed until their answers had come in, although the bill stated, and the defendant admitted, that he had paid the judgments, and was then the only person interested in them, because such statement and admission might be made by collusion.

*Id.* (Ib.) 97

6. In appeals to this court, from the circuit courts, in chancery cases, the parol testimony which is heard at the trial in the court below ought to appear in the record.

*Comm v. Penn*, (424) 125

7. A final decree in equity, or an interlocutory decree, which in a great measure decides the merits of the cause, cannot be pronounced, until all the parties to the bill, and all the parties in interest, are before the court.

*Id.* (Ib.) 125

8. Explanation of the former decree of this court in the case of *Campbell v. Pratt et al.* (9 Cranch, 500, S. C.)

(429) 126

#### CHANCERY—6.

1. There is no difference in respect to the conclusiveness of a judgment at law and of a decree in chancery. Both are conclusive as to the facts directly in controversy.

*Hopkins v. Lee*, (109, 113) 218, 219

2. A decree cannot be pronounced, on the testimony of a single witness, unaccompanied by corroborating circumstances, against a positive denial, by the defendant, of any matter directly charged by the bill, in the defendant's answer, or answer in support of his plea.

*Hughes v. Blake*, (453) 303

3. A replication to a plea is an admission of the sufficiency of the plea, as much as if it had been set down for argument, and allowed; and all that the defendant has to do, is to prove it in point of fact, and a dismission of the bill on the hearing is then a matter of course.

*Id.* (Ib.) 303

4. Under what circumstances a plea of a former judgment at law, for the same cause of action, is a good bar in equity.

*Id.* (Ib.) 303

5. To establish the existence of a trust, the *onus probandi* lies on the party who alleges it.

*Prevost v. Gratz*, (481) 311

6. In general, length of time is no bar to a trust clearly established to have once existed; and where fraud is imputed and proved, length of time ought not to exclude relief.

*Id.* (497) 315

7. But as length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of the original transactions, it operates, by way of presumption, in favor of innocence, and against imputation of fraud.

*Prevost v. Gratz*, (497) 315

8. The lapse of forty years, and the death of all the original parties, deemed sufficient to presume the discharge and extinguishment of a trust, proved once to have existed by strong circumstances; by analogy to the rule of law, which after a lapse of time presumes the payment of a debt, surrender of a deed, and extinguishment of a trust, where circumstances require it.

*Id.* (Ib.) 315

9. The general rule is, that time is not of the essence of a contract of sale; and a failure on the part of the purchaser, or vendor, to perform his contract, on the stipulated day, does not, of itself, deprive him of his right to a specific performance, when he is able to comply with his part of the engagement.

*Brashier v. Gratz*, (528) 322

10. But circumstances may be so changed that the object of the party can no longer be accomplished, and he cannot be placed in the same situation as if the contract had been performed in due time. In such a case, a court of equity will leave the parties to their remedy at law.

*Id.* (Ib.) 322

11. Part performance will, under some circumstances, induce the court to relieve.

*Id.* (Ib.) 322

12. But where a considerable length of time has elapsed, where the party demanding a specific performance has failed to perform his part of the contract, and the demand is made after a great change in the title and the value of the land, and there is a want of reciprocity in the obligations of the respective parties, a court of equity will not interfere.

*Id.* (Ib.) 322

13. Who are necessary parties in equity.

*Kerr v. Watts*, (550, 558) 328, 330

14. Application of the law of set-off and lien in equity, under peculiar circumstances.

*Leeds v. The Marine Insurance Company*, (565) 332

#### CHANCERY—7.

1. The vendor of real property, who has not taken a separate security for the purchase money, has a lien for it, on the land, as against the vendee and his heirs.

*Bailey v. Greenleaf*, (46, 50) 393, 395

2. This lien is defeated by an alienation to a *bona fide* purchaser without notice.

*Id.* (50) 395

3. Nor can it be asserted against creditors holding under a *bona fide* conveyance from the vendee.

*Id.* (Ib.) 395

4. *Quære*, Whether the lien can be asserted against the assignees of a bankrupt, or other creditors coming in under the purchaser by act of law.

*Id.* (Ib.) 395

5. The *dietum* of Sugden in his *Law of Vendors*, 364, examined and questioned.

*Id.* (Ib.) 395

6. It is a rule, both of law and equity, that a party must recover on the strength of his own title, and not on the weakness of his adversary's.

*Watts v. Lindsey's heirs*, (158, 161) 423, 424

7. The decree must conform to the allegations in the pleadings, as well as the proofs in the cause.

*Crockett v. Lee*, (522, 525) 513, 514

See *Local Law*, 3, 28, 29, 30.

See *Practice*, 1.

#### CHANCERY—8.

1. A letter of attorney may, in general, be revoked by the party making it, and is revoked by his death.

*Hunt v. Roumanier*, (174, 201) 589, 596

2. Where it forms a part of a contract, and is a security for the performance of any act, it is usually made irrevocable in terms, or, if not so made, is deemed irrevocable in law.

*Id.* (201) 596

3. But a power of attorney, though irrevocable during the life of the party, becomes (at law) extinct by his death.

*Id.* (202) 596

4. But if the power be coupled with an interest, it survives the person giving it, and may be executed after his death.

*Id.* (Ib.) 596

Wheat. 5, 6, 7, 8.

5. To constitute a power coupled with an interest, there must be an interest in the thing itself, and not merely in the execution of the power.

*Hunt v. Rousmanier*, (204) 597

6. How far a court of equity will compel the specific execution of a contract, intended to be secured by an irrevocable power of attorney, which was revoked by operation of law on the death of the party.

*Id.* (207) 598

7. The general rule, both at law and in equity, is, that parol testimony is not admissible to vary a written instrument.

*Id.* (211) 599

8. But in cases of fraud and mistake, courts of equity will relieve.

*Id.* (1b.) 599

9. It seems that a court of equity will relieve in a case of mistake of law merely.

*Id.* (1b.) 599

10. A post-nuptial voluntary settlement, made by a man, who is not indebted at the time, upon his wife, is valid against subsequent creditors.

*Sexton v. Wheaton*, (229) 603

11. The statute 13 Eliz. c. 5, avoids all conveyances not made on a consideration deemed valuable in law as against previous creditors.

*Id.* (242) 607

12. But it does not apply to subsequent creditors, if the conveyance is not made with a fraudulent intent.

*Id.* (238) 606

13. What circumstances will constitute evidence of such a fraudulent intent.

*Id.* (250) 609

14. An insolvent debtor has a right to prefer one creditor to another, in payment, by an assignment *bona fide* made, and no subsequent attachment, or subsequently acquired lien, will avoid the assignment.

*Spring v. S. C. Ins. Co.*, (268, 282) 614, 617

15. Such an assignment may include choses in action, as a policy of insurance, and will entitle the assignee to receive from the underwriters the amount insured in case of a loss. It is not necessary that the assignment should be accompanied by an actual delivery of the policy.

*Id.* (268) 614

16. Upon a bill of interpleader, filed by underwriters against the different creditors of an insolvent debtor, claiming the fund proceeding from an insurance made for account of the debtor, some on the ground of special liens, and others under the assignment, the rights of the respective parties will be determined. But, on such a bill, those of the co-defendants who fail in establishing any right to the fund, are not entitled to an account from the defendant, whose claims are allowed, of the amount and origin of those claims.

*Id.* (292) 619

17. On a bill of interpleader, the plaintiffs are, in general, entitled to their costs out of the fund. Where the money is not brought into court, they must pay interest upon it.

*Id.* (293) 620

18. Under the act of assembly of Virginia, of October, 1783, for the better locating and surveying the lands given to the officers and soldiers on continental and state establishments, the state of Virginia has no right to call upon the person who was appointed one of the principal surveyors, to account for the fees received by him, of one dollar for every hundred acres, on delivering the warrants, towards raising a fund for the purpose of supporting all contingent expenses; the bill filed by the Attorney-General of the state, to compel an account, not sufficiently averring the want of any proper private parties *in esse* to claim it.

*Nicholas v. Anderson*, (365, 369) 637, 638

19. *Quere*, Whether, in such a case, the assignees of the warrants, or a part of them, suing in behalf of the whole, could maintain a suit in equity for an account?

*Id.* (370) 638

20. A trustee cannot purchase or acquire by exchange, the trust property.

*Wormley v. Wormley*, (421, 438) 651, 655

21. Where the trustee, in a marriage settlement, has a power to sell, and re-invest the trust property, whenever, in his opinion, the purchase money may be laid out advantageously for the *cestuis que trust*, that opinion must be fairly and honestly exercised; and the sale will be void where he appears to have been influenced by private and selfish interests, and the sale is for an inadequate price.

*Id.* (442) 656

Wheat. 5, 6, 7, 8.

22. *Quere*, How far a *bonæ fidei* purchaser, without notice of the breach of trust, in such a case, is bound to see to the application of the purchase money?

*Wormley v. Wormley*, (442) 656

23. Where the purchase money is to be re-invested upon trusts that require time and discretion, or the acts of sale and re-investment are contemplated to be at a distance from each other, the purchaser is not bound to look to the application of the purchase money.

*Id.* (443) 657

24. But wherever the purchaser is affected with notice of the facts, which, in law, constitute the breach of trust, the sale is void as to him; and a mere general denial of all knowledge of fraud will not avail him, if the transaction is such as a court of equity cannot sanction.

*Id.* (447) 658

25. A *bonæ fidei* purchaser, without notice, to be entitled to protection, must be so, not only at the time of the contract or conveyance, but until the purchase money is actually paid.

*Id.* (449) 658

26. This court will not suffer its jurisdiction, in an equity cause, to be ousted, by the circumstance of the joinder or non-joinder of merely formal parties, who are not entitled to sue, or liable to be sued, in the United States courts.

*Id.* (451) 659

27. Note on the subject of who are necessary parties to a bill in equity.

*Id.* note 1, (1b.) 659

#### CHARTER-PARTY—8.

See Shipping.

#### CHARITIES—8.

See Constitutional Law, 15, 16, 17, 18.

#### COLLECTOR—6.

See Embargo.

#### COLLECTOR—8.

See Construction of Statute, 3.

#### CONSTITUTIONAL LAW—5.

1. The act of the state of Pennsylvania, of the 28th of March, 1814 (providing, sec. 21, that the officers and privates of the militia of that state, neglecting or refusing to serve, when called into actual service, in pursuance of any order or requisition of the President of the United States, shall be liable to the penalties defined in the act of Congress of the 28th of February, 1795, c. 277, or to any penalty which may have been prescribed since the date of that act, or which may hereafter be prescribed by any law of the United States, and also providing for the trial of such delinquents by a state court martial, and that a list of the delinquents fined by such court should be furnished to the Marshal of the United States, &c., and also to the Comptroller of the Treasury of the United States, in order that the further proceedings directed to be had thereon by the laws of the United States might be completed), is not repugnant to the constitution and laws of the United States.

*Houston v. Moore*, (1, 12) 19, 21

2. The powers granted to Congress are not exclusive of similar powers existing in the states, unless where the constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states.

*Id.* (49) 30

3. The example of the first class is to be found in the exclusive legislation delegated to Congress over places purchased by the consent of the legislature of the state in which the same shall be, for forts, arsenals, dock-yards, &c.; of the second class, the prohibition of a state to coin money or emit bills of credit; of the third class, the power to establish a uniform rule of naturalization, and the delegation of admiralty and maritime jurisdiction.

*Id.* (1b.) 30

4. In all other classes of cases, the states retain concurrent authority with Congress.

*Id.* (1b.) 30

5. But in cases of concurrent authority, where the laws of the states and of the Union are in direct and manifest collision on the same subject, those



of the Union being the supreme law of the land, are of paramount authority, and the state laws, so far, and so far only, as such incompatibility exists, must necessarily yield.

*Houston v. Moore*, (49) 30

6. The act of the 3d of March, 1819, c. 76, s. 5, referring to the law of nations for a definition of the crime of piracy, is a constitutional exercise of the power of Congress to define and punish that crime.

*United States v. Smith*, (153, 157) 57, 58

7. Congress has authority to impose a direct tax on the District of Columbia, in proportion to the census directed to be taken by the constitution.

*Loughborough v. Blake*, (317) 98

8. The power of Congress to lay and collect taxes, duties, &c., extends to the District of Columbia, and to the territories of the United States, as well as to the states.

*Id.* (318) 98

9. But Congress are not bound to extend a direct tax to the district and territories.

*Id.* (322) 99

10. The constitutional provision, that direct taxes shall be apportioned among the several states according to their respective numbers, to be ascertained by a census, was not intended to restrict the power of imposing direct taxes to states only.

*Loughborough v. Blake*, (319) 98

11. The power of Congress to exercise exclusive jurisdiction in all cases whatsoever within the District of Columbia, includes the power of taxing it.

*Id.* (324) 100

12. The present constitution of the United States did not commence its operation until the first Wednesday in March, 1789, and the provision in the constitution, that "no state shall make any law impairing the obligation of contracts," does not extend to a state law enacted before that day, and operating upon rights of property vested before that time.

*Owings v. Speed*, (420) 124

#### CONSTITUTIONAL LAW—6.

1. The record of a judgment in one state is conclusive evidence in another, although it appears that the suit, in which it was rendered, was commenced by an attachment of property, the defendant having afterwards appeared and taken defense.

*Mayhew v. Thatcher*, (129) 223

2. An act of a state legislature which discharges a debtor from all liability for debts contracted previous to his discharge, on his surrendering his property for the benefit of his creditors, is a law impairing the obligation of contracts within the meaning of the constitution of the United States, so far as it attempts to discharge the contract: and it makes no difference in such a case, that the suit was brought in a state court of the state, of which both the parties were citizens, where the contract was made, and the discharge obtained, and where they continued to reside until the suit was brought.

*Farmers and Mechanics' Bank v. Smith*, (131) 224

3. To an action of trespass against the sergeant at arms of the House of Representatives of the United States, for an assault and battery and false imprisonment, it is a legal justification and bar, to plead that a Congress was held and sitting, during the period of the trespasses complained of, and that the House of Representatives had resolved that the plaintiff had been guilty of a breach of the privileges of the House, and of a high contempt of the dignity and authority of the same; and had ordered that the Speaker should issue his warrant to the sergeant at arms, commanding him to take the plaintiff into custody, wherever to be found, and to have him before the said House, to answer to the said charge; and that the Speaker did accordingly issue such a warrant, reciting the said resolution and order, and commanding the sergeant at arms to take the plaintiff into custody, &c., and delivered the said warrant to the defendant: By virtue of which warrant the defendant arrested the plaintiff, and conveyed him to the bar of the House, where he was heard in his defense, touching the matter of the said charge, and the examination being adjourned from day to day, and the House having ordered the plaintiff to be detained in custody, he was accordingly detained by the defendant until he was finally adjudged to be guilty, and convicted of the charge aforesaid, and ordered to be forthwith brought to the bar, and reprimanded by the Speaker, and then discharged from custody; and

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after being thus reprimanded, was actually discharged from the arrest and custody aforesaid.

*Anderson v. Dunn*, (204) 242

4. This court has, constitutionally, appellate jurisdiction under the judiciary act of 1789, c. 20, s. 25, from the final judgment or decree of the highest court of law or equity of a state, having jurisdiction of the subject-matter of the suit, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such, their validity; or of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party, under such clause of the constitution, treaty, statute, or commission.

*Cohens v. Virginia*, (264, 375) 257, 284

5. It is no objection to the exercise of this appellate jurisdiction, that one of the parties is a state, and the other a citizen of that state.

*Id.* (Ib.) 257, 284

6. The act of Congress of the 4th of May, 1812, entitled, "An act further to amend the charter of the city of Washington," which provides (s. 6) that the corporation of the city shall be empowered for certain purposes, and under certain restrictions, to authorize the drawing of lotteries, does not extend to authorize the corporation to force the sale of the tickets in such lottery, in states where such sale may be prohibited by the state laws.

*Id.* (Ib.) 257, 284

7. Decision of the House of Lords respecting the power of commitment for contempts in the case of *Burdett v. Abbott*, 14 East's Rep. 1. Note to the case of

*Anderson v. Dunn*, note 3, (221) 246

8. Resolutions of the legislature of Virginia of 1810, upon the proposition from Pennsylvania to amend the constitution so as to provide an impartial tribunal to decide disputes between the state and federal judiciaries. Note to

*Cohens v. Virginia*, note 1, (358) 280

#### CONSTITUTIONAL LAW—7.

1. This court has authority to issue a *habeas corpus*, where a person is imprisoned under the warrant or order of any other court of the United States.

*Ex-parte Kearney*, (38, 41) 391, 392

2. But this court has no appellate jurisdiction in criminal cases, confided to it by the laws of the United States, and cannot revise the judgments of the circuit courts, by writ of error, in any case where a party has been convicted of a public offense.

*Id.* (41) 392

3. Hence the court will not grant a *habeas corpus*, where a party has been committed for a contempt adjudged by a court of competent jurisdiction.

*Id.* (Ib.) 392

4. In such a case, this court will not inquire into the sufficiency of the cause of commitment.

*Id.* (Ib.) 392

5. The case of *Crosby*, Lord Mayor of London, 3 Wils. 188, commented on, and its authority confirmed.

*Id.* (Ib.) 392

6. A commitment for a contempt by a court of competent jurisdiction, in the exercise of its jurisdiction, is conclusive, and cannot be inquired into in any other tribunal.

*Id.* (Ib.) 392

7. Where a party claiming title to lands under an act of Congress, brought a bill for a conveyance, and stated several equitable circumstances in aid of his title, and the state court where the suit was brought having dismissed the bill, and the cause being brought to this court by appeal, under the 25th section of the judiciary act of 1789, c. 20, upon the ground of an alleged misconstruction of the act of Congress under which the title was claimed, by the state court: Held, that this court could not take into consideration any distinct equity arising out of the contracts or transactions of the parties, and creating a new and independent title, but was confined to an examination of the plaintiff's title as depending upon the construction of the act of Congress.

*Matthews v. Zane*, (164, 206) 425, 435

Wheat. 5, 6, 7, 8.



8. Note on the extent of the appellate jurisdiction of this court in cases arising in the state courts under the constitution, treaties, and laws of the Union.

*Matthews v. Zane*, Note 1, (206) 435  
See Jurisdiction.

### CONSTITUTIONAL LAW—8.

1. The act of the state of Kentucky, of the 27th of February, 1797, concerning occupying claimants of land, whilst it was in force, was repugnant to the constitution of the United States, but it was repealed by a subsequent act of the 31st of January, 1812, to amend the said act; and the last-mentioned act is also repugnant to the constitution of the United States, as being in violation of the compact between the states of Virginia and Kentucky, contained in the act of the legislature of Virginia, of the 18th of December, 1789, and incorporated into the constitution of Kentucky.

*Green v. Biddle*, (1, 69) 547, 564

2. By the common law, the statute law of Virginia, the principles of equity, and the civil law, the claimant of lands who succeeds in his suit, is entitled to an account of mesne profits, received by the occupant from some period prior to the judgment of eviction, or decree.

*Id.* (74, 81) 565, 567

3. At common law, whoever takes and holds possession of land, to which another has a better title, whether he be a *bonæ fidei* or a *malæ fidei* possessor, is liable to the true owner for all the rents and profits which he has received; but the disseisor, if he be a *bonæ fidei* occupant, may recoup the value of the meliorations made by him against the claim of damages.

*Id.* (75, 80) 565, 567

4. Equity allows an account of rents and profits in all cases, from the time of the title accrued (provided it does not exceed six years), unless under special circumstances, as where the defendant had no notice of the plaintiff's title, nor had the deeds in which the plaintiff's title appeared in his custody, or where there has been laches in the plaintiff in not asserting his title, or where his title appeared by deeds in a stranger's custody; in all which, and other similar cases, the account is confined to the time of filing the bill.

*Id.* (78) 566

5. By the civil law, the exemption of the occupant from an account for rents and profits is strictly confined to the case of a *bonæ fidei* possessor, who not only supposes himself to be the true owner of the land, but who is ignorant that his title is contested by some other person claiming a better right. And such a possessor is entitled only to the fruits or profits which were produced by his own industry, and even to those, unless they were consumed.

*Id.* (79) 566

6. Distinctions between these rules of the civil and common law, and of the Court of Chancery, and the provisions of the acts of Kentucky, concerning occupying claimants of land.

*Id.* (81, 82) 567

7. The invalidity of a state law, as impairing the obligation of contracts, does not depend upon the extent of the change which the law effects in the contract.

*Id.* (84) 568

8. Any deviation from its terms, by postponing or accelerating the period of its performance, imposing conditions not expressed in the contract, or dispensing with the performance of those which are expressed, however minute or apparently immaterial in their effect upon the contract, impairs its obligation.

*Id.* (Ib.) 568

9. The compact of 1789, between Virginia and Kentucky, was valid under that provision of the constitution, which declares that "no state shall, without the consent of Congress, enter into any agreement or compact with another state, or with a foreign power"—no particular mode, in which that consent must be given, having been prescribed by the constitution; and Congress having consented to the admission of Kentucky into the Union, as a sovereign state, upon the conditions mentioned in the compact.

*Id.* (85) 568

10. The compact is not invalid upon the ground of its surrendering rights of sovereignty, which are unalienable.

*Id.* (88) 569

11. This court has authority to declare a state law unconstitutional, upon the ground of its im-

Wheat. 5, 6, 7, 8. U. S., Book 5.

pairing the obligation of a compact between different states of the Union.

*Green v. Biddle*, (92) 570

12. The prohibition of the constitution embraces all contracts, executed or executory, between private individuals, or a state and individuals, or corporations, or between the states themselves.

*Id.* (Ib.) 570

13. The appellate jurisdiction of this court, in cases brought from the state courts, arising under the constitution, laws, and treaties of the Union, is not limited by the value of the matter in dispute.

*Buell v. Van Ness*, (312, 321) 624, 626

14. Its jurisdiction in such cases extends to a case where both parties claim a right or title under the same act of Congress, and the decision is against the right or title claimed by either party.

*Id.* (323) 627

15. A corporation for religious and charitable purposes, which is endowed solely by private benefactions, is a private eleemosynary corporation, although it is created by a charter from the government.

*Society, &c., v. New Haven*, (464, 480) 662, 666

16. The capacity of private individuals (British subjects), or of corporations created by the crown, in this country, or in Great Britain, to hold lands or other property in this country, was not affected by the revolution.

*Id.* (481) 666

17. The proper courts in this country will interfere to prevent an abuse of the trusts confided to British corporations holding lands here to charitable uses, and will aid in enforcing the due execution of the trusts; but neither those courts, nor the local legislature where the lands lie, can adjudge a forfeiture of the franchises of the foreign corporation, or of its property.

*Id.* (483) 667

18. The property of British corporations, in this country, is protected by the sixth article of the treaty of peace of 1783, in the same manner as those of natural persons; and their title, thus protected, is confirmed by the ninth article of the treaty of 1794, so that it could not be forfeited by any intermediate legislative act, or other proceeding, for the defect of alienage.

*Id.* (489, 491) 668, 669

19. The termination of a treaty, by war, does not divest rights of property already vested under it.

*Id.* (492) 669

20. Nor do treaties, in general, become extinguished, *ipso facto*, by war between the two governments. Those stipulating for a permanent arrangement of territorial, and other national rights, are, at most, suspended during the war, and revive at the peace, unless they are waived by the parties, or new and repugnant stipulations are made.

*Id.* (493) 669

21. The act of the legislature of Vermont, of the 30th of October, 1794, granting the lands in that state, belonging to "The Society for Propagating the Gospel in Foreign Parts," to the respective towns in which the lands lie, is void, and conveys no title under it.

*Id.* (464) 662

22. An insolvent debtor who has received a certificate of discharge from arrest and imprisonment under a state insolvent law, is not entitled to be discharged from execution at the suit of the United States.

*United States v. Wilson*, (253) 610

23. Note as to the effect of local statutes of limitation in suits brought by the United States, in their courts.

*Id.* note 2, (256) 611

24. Note to the case of *Green v. Biddle*, Appr. note I.

(3) 721

25. A title to lands, under grants to private individuals, made by Indian tribes or nations northwest of the river Ohio, in 1773 and 1775, cannot be recognized in the courts of the United States.

*Johnson v. McIntosh*, (543) 681

26. Discovery, the original foundation of titles to land on the American continent, as between the different European nations, by whom conquests and settlements were made here.

*Id.* (573) 688

27. The European governments asserted the exclusive right of granting the soil to individuals, subject only to the Indian right of occupancy.

*Id.* (574) 688

28. Practice of Spain, France, Holland, and England, as to newly discovered countries.

*Id.* (Ib.) 688



29. Recognition of the same principle in the wars, negotiations, and treaties between the different European powers.

*Johnson v. McIntosh*, (581) 690

30. Adoption of the same principle by the United States.

*Id.* (584) 691

31. The exclusive right of the British government to the lands occupied by the Indians has passed to that of the United States.

*Id.* (587) 692

32. Foundation and limitation of the right of conquest.

*Id.* (588) 692

33. Application of the principle of the right of conquest to the case of the Indian savages.

*Id.* (590) 692

34. Effect of the proclamation of 1763.

*Id.* (593) 693

35. Case of the Mohegans.

*Id.* (598) 694

36. Memorial of 1755.

*Id.* (Ib.) 694

37. Opinions of the Attorney-General, &c.

*Id.* (599) 695

38. Titles in New England under Indian grants.

*Id.* (600) 695

39. Charter of Rhode Island.

*Id.* (601) 695

40. The courts of the United States have jurisdiction of suits by or against executors and administrators, if they are citizens of different states, &c., although their testators or intestates might not have been entitled to sue, or liable to be sued in those courts.

*Childress v. Emory*, (642) 705

#### CONSTRUCTION OF STATUTE—6.

1. Where, in a contract with the Secretary of War for supplying the troops of the United States with provisions, specific prices are stipulated for rations issued at certain places mentioned in the contract; and it is further provided, that "should any rations be required at any places not specified in this contract, the price of the same shall be hereafter agreed on between the public and the contractor;" if the parties cannot agree upon the price for the rations thus required, a reasonable compensation is to be allowed, and is to be proved by competent evidence, and settled by a jury; and the contractor, upon the trial, is at liberty to show, that the sum allowed by the Secretary at War is not a reasonable compensation.

*United States v. Wilkins*, (135) 225

2. Under the 3d and 4th sections of the act of the 3d of March, 1797, c. 74, the defendant is entitled, at the trial, to the full benefit of any credit in his favor, whether arising out of the particular transaction for which he was sued, or out of distinct and independent transactions, which would constitute a legal or equitable set-off, in whole or in part, of the debt sued for by the United States.

*Id.* (Ib.) 225

See Admiralty, 1, 2, 3, 7.

See Embargo,

#### CONSTRUCTION OF STATUTE—8.

1. An American private armed vessel, duly commissioned, making collusive captures of enemy's property during the late war with Great Britain, and under color of such captures introducing goods and merchandise into the United States, contrary to the provisions of the act of March 1, 1809, c. 195, revived and continued in force by the act of March 2, 1811, c. 306, thereby broke the condition of the bond given pursuant to the third section of the statute of June 26th, 1812, c. 430, requiring "that the owners, officers, and crew, who shall be employed on board such commissioned vessel, shall and will observe the treaties and laws of the United States."

*Greeley v. United States*, (259) 612

2. Where such breach appears upon demurrer, the defendants cannot, by law, claim a hearing under the judiciary act of September 24th, 1789, c. 20, s. 26.

*Id.* (Ib.) 612

3. Under the ninety-first section of the duty act of 1799, c. 128, the share of a forfeiture, to which the collector, &c., of the district, is entitled, is to be paid to the person who was the collector, &c., in office at the time the seizure was made, and not to his successor in office at the time of condemnation and the receipt of the money.

*Buell v. Van Ness*, (312, 320) 624, 626

4. The act of the 10th of April, 1816, c. 44, incorporating the Bank of the United States, does not, by the ninth rule of the fundamental articles, prohibit the bank from discounting promissory notes, or receiving a transfer of notes in payment of a debt due the bank.

*Fleckner v. Bank United States*,

(338, 349) 631, 633

5. The Bank of the United States, and every other bank, not restrained by its charter, and also private bankers, on discounting notes and bills, have a right to deduct the legal interest from the amount of the note or bill, at the time it is discounted.

*Id.* (350) 634

6. The Bank of the United States is not restrained, by the ninth rule of the fundamental articles of its charter, from thus deducting interest, at the rate of six per cent., on notes or bills discounted by it.

*Id.* (351) 634

7. Under the eighth section of the act of 1812, to amend the act for the incorporation of the city of Washington, a sale of unimproved squares or lots in the city, for the payment of taxes, is illegal, unless such squares and lots have been assessed to the true and lawful proprietors thereof.

*Corporation of Washington v. Pratt*,

(681) 714

8. The lien upon each lot, for the taxes, is several and distinct, and the purchaser of each holds his lot unencumbered with the taxes due on the other lots held by his vendor.

*Id.* (Ib.) 714

9. The advertisement must contain a particular statement of the amount of taxes due on each lot separately.

*Id.* (Ib.) 714

10. If the sale of one or more lots produce the amount of taxes actually due on the whole by the same proprietor, the corporation cannot proceed to sell further.

*Id.* (Ib.) 714

See Admiralty, 1, 2, 3, 8.

#### CONSULS—6.

See Prize, 12, 13, 24, 25.

#### CONTRACT—6.

See Agent and Principal.

See Chancery, 9, 10, 11, 12.

See Sale.

#### CONTRACT—8.

In what cases a court of equity will relieve against a mistake of law merely.

*Hunt v. Rousmanier*, (174, 211) 589, 599

#### CORPORATION—8.

See Bills of Exchange, 1, 4.

See Constitutional Law, 15, 16, 17, 18.

#### COVENANT—7.

1. In general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty, and not as liquidated damages.

*Taylor v. Sandiford*, (13, 17) 384, 385

2. *A fortiori*, when it is expressly reserved as a penalty.

*Id.* (17) 385

3. Thus, where in a building contract, the following covenant was contained, "The said houses to be completely finished on or before the 24th of December next, under a penalty of \$1,000 in case of failure," it was held, that this was not intended as liquidated damages for the breach of that single covenant only, but applied to all the covenants made by the same party in that agreement; that it was in the nature of a penalty, and could not be set-off in an action brought by the party to recover the price of the work.

*Id.* (Ib.) 385

4. An agreement to perform certain work within a limited time, under a certain penalty, is not to be construed as liquidating the damages which the party is to pay for the breach of his covenant.

*Id.* (Ib.) 385

5. The case of *Fletcher v. Dycke*, 2 Term Rep. 32, commented on, and distinguished from the present.

*Id.* (Ib.) 385

Wheat. 5, 6, 7, 8.

## COVENANT—8.

1. Where the acts stipulated to be done, are to be done at different times, the covenants are to be construed as independent of each other.

*Goldsbrough v. Orr*, (217, 223) **600, 602**

2. Application of this principle to the peculiar circumstances of the case.

*Id.* (225) **602**

## DEBT—8.

1. In debt, a less sum may be recovered than that demanded in the writ, where an entire sum is demanded, and it is shown by the counts to consist of several distinct debts, or where the precise sum demanded is diminished by extrinsic circumstances.

*Hughes v. Union Ins. Co.*, (294, 310) **620, 624**

2. Note on the same subject.

*Appr. Note 11.*

## DEED—5.

See Local Law, 1, 4, 15, 16.

## DEED—7.

The doctrine of estoppel, or the principle of legal policy, which forbids a party from denying the title under which he has received a conveyance, does not apply as between vendor and vendee, especially where the latter has not received possession from the former.

*Blight's Lessee v. Rochester*, (535, 547) **516, 519**  
See Ejectment, Evidence, Fraud.

## DEED—8.

See Evidence, 5.  
See Frauds.

## DEVISE—8.

1. J. B. devises all his real estate to the testator's son, J. B., Jun., and his heirs lawfully begotten; and, in case of his death without such issue, he orders A. Y., his executors and administrators, to sell the real estate within two years after the son's death; and he bequeaths the proceeds thereof to his brothers and sisters, by name, and their heirs forever, or such of them as shall be living at the death of the son, to be divided between them in equal proportions, share and share alike. All the brothers and sisters die, leaving issue. Then A. Y. dies, and afterwards J. B., Jun., the son, dies without issue. "Heirs" is a word of limitation; and none of the testator's brothers and sisters being alive at the death of J. B., Jun., the devise to them failed to take effect.

*Daly v. James*, (495, 531) **670, 678**

2. *Quere*, Whether a sale by the executors, &c., under such circumstances, is to be considered as valid in a court of law.

*Id.* (535) **679**

3. However this may be, a sale thus made, after the lapse of two years from the death of J. B., Jun., is without authority, and conveys no title.

*Id.* (Ib.) **679**

4. *Quere*, Under what circumstances a court of equity might relieve, in case the trustee should refuse to exercise the power within the prescribed period, or should exercise the same after that period.

*Id.* (536) **679**

5. A power to A. Y., and his executors or administrators, to sell, may be executed by the executors of the executors of A. Y.

*Id.* (495) **670**

## DUTIES—6.

See Admiralty, 1, 2, 3, 7.

## EJECTMENT—7.

1. Possession of land by a party, claiming it as his own in fee, is *prima facie* evidence of his ownership and seizin of the inheritance.

*Ricard v. Williams*, (59, 105) **398, 409**

2. But possession alone, unexplained by collateral circumstances, which show the quality and extent of the interest claimed, evidences no more than the mere fact of present occupation by right.

*Id.* (105) **409**

Wheat. 5, 6, 7, 8.

3. But if the party be in under title, and by mistake of law supposes himself possessed of a less estate than really belongs to him, the law will remit him to his full right and title.

*Ricard v. Williams*, (106) **409**

4. It is a general rule that a disseisor cannot qualify his own wrong, but must be considered as disseisor in fee.

*Id.* (107) **410**

5. But this rule is introduced only for the benefit of the disseisee, for the sake of electing his remedy.

*Id.* (Ib.) **410**

6. And it must also appear that the party found in possession entered without right; for if his entry were congeable, or his possession lawful, his entry and possession will be considered as limited by his right.

*Id.* (Ib.) **410**

## EMBARGO—6.

1. Under the embargo act of the 25th April, 1808, c. 170 (LXVI.), if a vessel, not actually arriving at her port of original destination, excites an honest suspicion in the mind of the collector that her demand of a permit to land the cargo was merely colorable, this is not a termination of the voyage so as to preclude the right of detention.

*Otis v. Walter*, (583) **336**

2. Under what circumstances the collector has a right to land the cargo of the vessel thus detained.

*Id.* (Ib.) **336**

## ESTOPPEL—7.

See Deed.

## EVIDENCE—5.

1. On an indictment for piracy, the national character of a merchant vessel of the United States may be proved without the production of the certificate of registry, or evidence that it was seen on board.

*United States v. Furlong et al.* (184, 199) **64, 68**

2. Where a check was drawn by a person who was the cashier of an incorporated bank, and it appeared doubtful upon the face of the instrument whether it was an official or private act, parol evidence was admitted to show that it was a private act.

*Mechanics' Bank v. Bank of Columbia*, (326, 336) **100, 103**

3. The acts of agents do not derive their validity from professing on the face of them to have been done in the exercise of their agency; but the liability of the principal depends upon the facts, 1st. That the act was done in the exercise, and 2d. Within the limits of the power delegated: And in ascertaining these facts as connected with the execution of written instruments, except deeds, parol testimony is admissible.

*Id.* (337) **103**

4. The books of a corporation, established for public purposes, are evidence of its acts and proceedings.

*Owings v. Speed*, (420, 423) **124**

See Bills of Exchange, 1.

See Local Law, 11, 12, 15, 16, 17, 18, 19, 20.

See Prize, 3, 5, 11.

## EVIDENCE—6.

1. A judgment or decree of a court of competent jurisdiction is conclusive wherever the same matter is again brought in controversy.

*Hopkins v. Lee*, (109, 113) **218, 219**

2. But the rule does not apply to points which come only collaterally under consideration, or are only incidentally considered, or can only be argumentatively inferred from the decree.

*Id.* (Ib.) **218, 219**

3. A replication to a plea in Chancery is an admission of its sufficiency in point of equity, and all that the defendant has to do, is to prove it in point of fact.

*Hughes v. Blake*, (453, 472) **303, 308**

4. Effect of length of time in raising a legal and equitable presumption of the extinguishment of a trust, payment of a debt, &c.

*Prevost v. Gratz*, (481, 504) **311, 316**

5. A parol exchange of lauds, or parol evidence, that a conveyance should operate as an exchange, will not convey any estate or interest in lands.

*Clark v. Graham*, (577) **334**

See Bills of Exchange and Promissory Notes.



## EVIDENCE—7.

1. Presumptions of a grant, arising from the lapse of time, are applied to corporeal, as well as incorporeal hereditaments.

*Rieard v. Williams*, (59, 109) 398, 410

2. They may be encountered and rebutted by contrary presumptions, and can never arise where all the circumstances are perfectly consistent with the non-existence of a grant.

*Id.* (109) 410

3. *A fortiori*, they cannot arise where the claim is of such a nature as is at variance with the supposition of a grant.

*Id.* (110) 411

4. In general, the presumption of a grant is limited to periods analogous to those of the statute of limitations, in cases where the statute does not apply.

*Id.* (1b.) 411

5. Where the statute applies, the presumption is not generally resorted to; but if the circumstances of the case are very cogent, and require it, a grant may be presumed within a period short of the statute.

*Id.* (1b.) 411

6. Under the laws of Massachusetts and Connecticut, the power of an administrator to sell the real estate of his intestate, under an order of the Court of Probates, must be exercised within a reasonable time after the death of the intestate.

*Id.* (115) 412

7. The case of such a power to sell is not within the purview of the statute of limitations of Connecticut, which limits all rights of entry and action to fifteen years after the title accrues; but the reasonable time, within which the power must be exercised, is to be fixed by analogy to that statute.

*Id.* (117) 412

8. One heir, notwithstanding his entry as heir, may afterwards, by disseisin of his co-heirs, acquire an exclusive possession, upon which the statute will run both against his co-heirs and against creditors.

*Id.* (120) 413

9. An heir may claim an estate by title distinct or paramount to that of his ancestor; and if his possession is exclusive under such claim, against all other persons, until the statute period has run, he is entitled to the protection of the bar.

*Id.* (121) 413

10. A person having an interest only in the question, and not in the event of the suit, is a competent witness.

*Evans v. Eaton*, (356, 421) 472, 488

11. In general, the liability of a witness to a like action, or his standing in the same predicament with the party sued, if the verdict cannot be given in evidence for or against him, is an interest in the question, and does not exclude him.

*Id.* (424) 489

12. Where a deposition has once been read in evidence without opposition, it cannot be afterwards objected to as being irregularly taken.

*Evans v. Hettich*, (453) 496

13. It is no objection to the competency or credibility of a witness, that he is subject to fits of derangement, if he is sane at the time of giving his testimony.

*Id.* (470) 500

14. The doctrine that if witnesses concur in proof of a material fact, they ought to be believed in respect to that fact, whatever may be the other contradictions in their testimony ought to be received under many qualifications and with great caution.

*The Santissima Trinidad*, (338) 468

15. Application of the maxim, *falsus in uno, falsus in omnibus*.

*Id.* (339) 468

16. The decisions of the board of commissioners under the acts of Congress providing for indemnification of claimants to public lands in the Mississippi Territory (commonly called the Yazoo lands), are conclusive between the parties in all cases within the jurisdiction of the commissioners.

*Brown v. Jackson*, (218, 237) 438, 443

17. This determination reconciled with that of the court in *Brown v. Gilman*, *ante*, Vol. IV., p. 255.

*Id.* (240) 444

18. The practice of the state courts cannot sanction the admission of depositions in the courts of the United States, which are not taken according to the laws of the United States, and the rules of their courts.

*Evans v. Eaton*, (426) 489

## EVIDENCE—8.

1. Where a party claims, in the admiralty, under a condemnation in a foreign court, the libel, or other proceeding anterior to the sentence, must be produced, as well as the sentence itself.

*The Nereyda*, (108, 168) 574, 588

2. What evidence of proprietary interest is required on further proof.

*Id.* (171) 589

3. General rule, that parol testimony is not admissible to vary a written instrument.

*Hunt v. Rousmanier*, (174, 211) 589, 599

4. In equity, cases of fraud and mistake are exceptions to this rule.

*Id.* (211) 599

5. Evidence that a subscribing witness to a deed had been diligently inquired after, having gone to sea, and been absent for four years, without having been heard from, is sufficient to let in secondary proof of his handwriting.

*Spring v. S. C. Ins. Co.*, (268, 282) 614, 617

6. No demand of payment, or notice of non-payment, by a notary public, is necessary in the case of promissory notes. A protest is (strictly speaking) evidence in the case of foreign bills of exchange only.

*Nicholas v. Webb*, (326, 331) 628, 629

7. But it is a principle, that memorandums made by a person, in the ordinary course of his business, of acts which his duty, in such business, requires him to do for others, are, in case of his death, admissible evidence of acts so done. *A fortiori*, the acts of a public officer are so admissible, though they may not be strictly official, if they are according to general usage, and the ordinary course of his office.

*Id.* (334) 630

8. Therefore, the books of a notary public, proved to have been regularly kept, are admissible in evidence, after his decease, to prove a demand of payment, and notice of non-payment, of a promissory note.

*Id.* (1b.) 630

See Admiralty, 10.

## EXECUTOR AND ADMINISTRATOR—8.

1. An executor or administrator is not liable to a judgment beyond the assets to be administered, unless he pleads a false plea.

*Siglar v. Haywood*, (675) 713

2. If he fail to sustain his plea of *plene administravit*, it is not necessarily a false plea, within his own knowledge; and if it be found against him, the verdict ought to find the amount of assets unadministered, and the defendant is liable for that sum only.

*Id.* (1b.) 713

3. In such a case, the judgment is *de bonis testatoris*, and not *de bonis propriis*.

*Id.* (1b.) 713

## FRAUD—7.

1. A debtor has a right to prefer one creditor to another in payment, and his private motives for giving the preference cannot affect the exercise of the right, if the preferred creditor has done nothing improper to procure it.

*Marbury v. Brooks*, (565) 524

2. But any unlawful consideration, moving from the preferred creditor, to induce the preference, will avoid the deed which gives it.

*Id.* (577) 527

3. It is not necessary, to the validity of such a deed, that the creditors, for whose benefit it is made, should have notice of the execution of the deed, provided they afterwards assent to the provisions made for their benefit.

*Id.* (1b.) 527

4. Nor is it any objection to the validity of the deed, that it was made by the grantor, in the hope and expectation, that it would prevent a prosecution for a felony, connected with his transactions with his creditors; if the favored creditors have done nothing to excite that hope, and the deed was not made with their concurrence, and with a knowledge of the motives which influenced the grantor, or was not afterwards assented to by them under some express or implied engagement to suppress the prosecution.

*Id.* (1b.) 527

5. Nor will it be invalidated by the fact that the trustee, to whom the conveyance is made, being the father-in-law of the debtor, received the con-

Wheat. 5, 6, 7, 8.

veyance with a view of concealing the felony, and preventing a prosecution of his son-in-law, provided it was not executed with the concurrence of the *cestuis que trust*, and a knowledge on their part of the motives which influenced the trustee, or was not afterwards assented to by them under some engagement to suppress the prosecution.

*Marbury v. Brooks*, (579) 528

#### FRAUDS.—8.

The stat. 13 Eliz., c. 5, avoids all conveyances not deemed valuable in law, as against previous creditors; but not as against subsequent creditors, unless made with a fraudulent intent.

*Sexton v. Wheaton*, (229, 242) 603, 607

See Chancery, 20, 21, 22, 23, 24, 25.

#### FREIGHT.—8.

See Shipping.

#### GRANT.—5.

See Local Law, 4, 9, 10, 13, 15, 16, 17.

#### IMPROVEMENTS.—8.

1. Common law as to accountability of *male fidei* and *bona fidei* possessor, for rents and profits.

*Green v. Biddle*, (1, 74) 547, 565

2. Rule of equity as to rents and profits.

*Id.* (77) 566

3. Rule of civil law.

*Id.* (79) 566

See Constitutional Law, 1, 2, 3, 4, 5, 6.

#### INDIAN TITLES.—8.

See Constitutional Law, 24-38.

#### INFORMATION.—8.

See Admiralty, 2, 3, 4, 5, 6.

#### INSOLVENT.—8.

See Chancery, 14, 15, 16.

See Constitutional Law, 22.

#### INTERPLEADER.—8.

See Chancery, 16.

#### INSURANCE.—6.

1. Where, in a policy of insurance, a technical total loss is asserted as the ground of recovery, the loss must be occasioned by the immediate operation of some of the perils insured against, and it is not sufficient that the voyage be abandoned for fear of the operation of the peril.

*Smith v. The Universal Ins. Co.*, (176) 235

2. The insurers do not undertake that the voyage shall be performed without delay, or that the perils insured against shall not occur; they undertake only for losses sustained by those perils; and if any peril does begin to act upon the subject, yet if it be removed before any loss takes place, and the voyage is not thereby broken up, but is, or may be resumed, the insured cannot abandon for a total loss.

*Id.* (116) 235

3. Insurance on munitions of war, laden on board a neutral vessel, on a voyage from New York, to and at a port or ports, place or places, in the Gulf of Mexico, from the Balize to Campeachy, both inclusive, and from either back to New York, &c., with a memorandum, that the insurers should be free from any loss arising from illicit or prohibited trade. The goods insured were prohibited from being imported into the ports of New Spain, in possession of the royalists, by the laws of Old Spain, but were permitted to be introduced into such ports as were in possession of the insurgents. The vessel and cargo arrived off a place in possession of the patriot General Mina, and the master made an agreement to sell the cargo to him, deliverable from time to time, as he should want it, at St. Ander. But before the cargo could be delivered, the vessel was chased off by Spanish armed ships, and after making several attempts to return, was compelled to proceed to the Balize for repairs; after Wheat. 5, 6, 7, 8.

which she again approached the coast, but found it still in possession of the Royalists, General Mina having retired into the interior. The objects of the voyage being thus defeated, the vessel returned to New York with the original cargo on board; and the insured then abandoned to the underwriters, not having before had information of the breaking up of the voyage. Held, that the insured were not entitled to recover as for a total loss of the voyage.

*Smith v. The Universal Ins. Co.*, (176) 235

4. In a claim for a technical total loss, the loss of the voyage must be occasioned by the immediate operation of a peril insured against.

*Id.* (185) 237

5. If a peril begins to act upon the subject, yet if it be removed before any loss takes place, and the voyage is not thereby broken up, but is or may be resumed, the insured cannot abandon for a total loss.

*Id.* (116) 237

#### INSURANCE.—7.

1. Under a policy containing the following clause, "And lastly, it is agreed, that if the above vessel, upon a regular survey, should be thereby declared unseaworthy, by reason of her being unsound or rotten, then the assurers shall not be bound to pay their subscription on this policy," and it was found by the jury that the vessel was seaworthy at the time of the commencement of the risk, and when she sailed on the voyage insured, held, that proof, by a regular survey, of unsoundness at any subsequent period of the voyage, discharged the underwriters.

*Dorr v. The Pacific Ins. Co.*, (581) 528

2. An exemplification of a condemnation of the vessel in a foreign court of vice-admiralty, reciting the certificate of surveyors, that the vessel was unworthy of being repaired, and unsafe and unfit ever to go to sea again, and produced in evidence by the insured to prove the loss, is "a regular survey," in the language of the above clause.

*Id.* (116) 526

3. But the survey must correspond with the contract, and if the vessel be declared unseaworthy for any additional cause, besides being "unsound or rotten," it is not conclusive evidence of unseaworthiness.

*Id.* (116) 528

#### INSURANCE.—8.

1. An insurance broker is entitled to a lien on the policy for premiums paid by him on account of his principal: and though he parts with the possession, if the policy afterwards comes into his hands again, his lien is revived, unless the manner of his parting with it manifests his intention to abandon the lien. In such a case, an intermediate assignee takes *cum onere*.

*Spring v. S. C. Ins. Co.*, (268, 286) 614, 618

2. But in the case of other liens acquired on the policy, if it be assigned, *bona fide*, for a valuable consideration, while out of the possession of the person acquiring the lien, and afterwards return into his hands, the lien does not revive as against the assignee.

*Id.* (287) 618

3. Insurance for \$18,000 on vessel valued at that sum, and \$2,000 on freight valued at \$12,000, on the ship *Heury*, "at and from Teneriffe, and at and from thence to New York, with liberty to stop at Matanzas; the property warranted American." The policy was executed in 1807; and in the same year another policy was made, by the same underwriters, on freight for the same voyage, to the amount of \$10,000, and the property was also warranted American, but there was no liberty to stop at Matanzas. The following representation was made to the underwriters on the part of the plaintiff, who was both owner and master of the ship: "We are to clear out for New Orleans, the property will be under cover of Mr. John Paul, of Baltimore, who goes supercargo on board, yet Mr. Paul will only have part of the cargo to his consignment. There will be three other persons on board that will have the remainder of the cargo in their care. We are to stop at the Matanzas, to know if there are any men-of-war off the Havana." The vessel sailed from Teneriffe on the 17th of April, 1807, with a cargo belonging to Spanish subjects, but appearing to be the property of John Paul Dumeste, a citizen of the United States, and the same person called John Paul in the representation. The cargo was shipped under a charter-party executed by the plaintiff and Dumeste, representing New Orleans



as the place of destination. The ship arrived at the Havana on the 7th of July, having put into Matanzas to avoid British cruisers, and unladed the cargo, which was there received by the Spanish owners, and the freight, amounting to \$7,000, paid to the plaintiff, who received it "in full of all demands, for freight or otherwise, under or by virtue of the aforesaid charter-party and cargo." At the Havana the ship took in a new cargo, belonging to merchants in New York, and was lost, with the greater part of the cargo, on the voyage from Havana to New York. An action of debt was brought on the first policy for the value of the ship and freight. The sum demanded in the writ was \$20,000, but the plaintiff limited his demand at the trial to \$18,000 on the ship, and \$420 for the freight actually earned on the voyage from Havana to New York. Held, that he was entitled to recover.

*Hughes v. Union Ins. Co.*, (294, 304) **620, 622**

## JUDGMENT—7.

See Evidence, 16, 17.  
See Prize, 11, 12, 17.

## JURISDICTION—6.

1. The Circuit Court has jurisdiction of a suit brought by the indorsee of a promissory note, who is a citizen of one state, against the indorser, who is a citizen of a different state, whether a suit could be brought in that court by the indorsee against the maker or not.

*Young v. Bryan*, (146) **228**

2. A division of the judges of the Circuit Court, on a motion for a new trial, in a civil or a criminal case, is not such a division of opinion as is to be certified to this court for its decision, under the 6th section of the judiciary act of 1802, c. 291, [XXI.]

*United States v. Daniel*, (542) **326**

3. A state court cannot issue a *mandamus* to an officer of the United States.

*M'Clung v. Silliman*, (598) **340**

4. See Constitutional Law, 4, 5, 6.  
5. See Practice, 2, 3.

## JURISDICTION—7.

A writ of error lies from this court, upon a judgment of the circuit courts awarding a peremptory *mandamus*.

*The Columbian Insurance Company v. Wheelright*, (534) **516**

See Constitutional Law, 1, 2, 3, 7, 8.  
See Evidence, 16, 17.  
See Prize, 11, 12, 16, 17.

## JURISDICTION—8.

1. The jurisdiction of this court is not affected by the joinder or non-joinder of mere formal parties in an equity suit.

*Wormley v. Wormley*, (451) **569**

2. Its jurisdiction, in a case arising under the occupying claimant laws of Kentucky, is not excluded by the tribunal appointed by the compact of 1789, between Virginia and Kentucky.

*Green v. Biddle*, (90) **569**

See Admiralty, 5, 6, 7.  
See Chancery, 26.

## LEX LOCI—6.

See Local Law, 13.

## LICENSE—7.

See Patent.

## LIEN—8.

1. By a charter-party, the sum of \$30,000 was agreed to be paid for the use or hire of the ship, on a voyage from Philadelphia to Madeira, and thence to Bombay, and at the option of the charterer to Calcutta, and back to Philadelphia (with an addition of \$2,000 if she should proceed to Calcutta), the whole payable on the return of the ship to Philadelphia, and before the discharge of her cargo there, in approved notes, not exceeding an average time of ninety days from the time at which she should be ready to discharge her cargo. The charterer proceeded in the ship to Calcutta, and, with the consent of the master (who was appointed by the ship-owners), entered into an agreement with P. & Co., merchants there, that if they would make him an advance of money, he would deliver to them a bill of lading, stipulating for the delivery

of the goods purchased therewith to their agents in Philadelphia, free of freight, who should be authorized to sell the same, and apply the proceeds to the repayment of the said advance, unless the charterer's bills drawn on G. & S., of Philadelphia, should be accepted, in which event the agents of P. & Co. should deliver the goods to the charterer. The goods were shipped accordingly, and a bill of lading signed by the master, with the clause, "freight for the said goods having been settled here." The bills of exchange drawn by the charterer were refused acceptance, and the agents of P. & Co. demanded the goods, which the owners of the ship refused to deliver without the payment of freight. Held, that the owners of the ship had a lien on these goods for the freight.

*Gracie et al. v. Palmer et al.*

(605) **696**

See Insurance, 1, 2.

## LIMITATION OF ACTIONS—5.

See Local Law, 2, 3.

## LIMITATION OF ACTIONS—6.

See Chancery, 5, 6, 7, 8.

## LIMITATION OF ACTIONS—7.

1. Presumption of grants, grounds on which it rests, and to what applicable.

*Ricard v. Williams*, (59, 109) **398, 410**

2. Presumption of grants, how far limited to periods analogous to those of the statute of limitations.

*Id.*, (110) **410**

3. The reasonable time, within which the power of the administrator to sell real estate for the payment of debts, under the local law of Massachusetts and Connecticut, must be exercised, is to be fixed by analogy to the statute of limitations.

*Id.*, (117) **412**

4. One heir may, by disseisin of his co-heirs, acquire an exclusive possession, upon which the statute will run, both against his co-heirs, and against creditors.

*Id.*, (120) **413**

## LIMITATION—8.

See Constitutional Law, 23.

## LOCAL LAW—5.

1. Under the laws of Tennessee, where lands are sold by a summary proceeding for the payment of taxes, it is essential to the validity of the sale and of the deed made thereon, that every fact necessary to give the court jurisdiction should appear upon the record.

*M'Clung v. Ross*, (116, 119) **46, 48**

2. Under the statute of limitations of Tennessee, the running of the statute can only be stopped by actual suit, if the party claiming under it has peaceable possession for seven years. But such possession cannot exist if the party having the better right takes actual possession in pursuance of his right.

*Id.*, (121) **49**

3. One tenant in common may oust his co-tenant, and hold in severalty; but a silent possession, unaccompanied by any act amounting to an ouster, or giving notice to the co-tenant that his possession is adverse, cannot be construed into an adverse possession.

*Id.*, (124) **50**

4. The statute of limitations of Tennessee does not, like other statutes of limitation, protect a mere naked possession, but its operation is limited to a possession acquired and held under a grant, or a deed founded on a grant.

*Id.* Note 1, (121) **49**

5. Previous to the year 1775, H. S., of Virginia, cohabited with A. W., and had by her the appellants, whom he recognized as his children. In July, 1775, he made his will, which was duly proved after his decease, in which he described them as the children of himself, and of his wife A., and devised the whole of his property to them and their mother. In June, 1776, he was appointed a Colonel in the Virginia line, upon the continental establishment, and died in the service, having, in July, 1776, intermarried with the mother, and died, leaving her pregnant with a child who was afterwards born, and named R. S. After the death of H. S., and the birth of his posthumous son, a warrant for a tract of military lands was granted by the state of Virginia to the posthumous son R. S., who died in 1796, in his minority, without wife or children, and without having located or disposed of the warrant.

Wheat. 5, 6, 7, 8.

His mother also died before 1796. Held, that the children of H. S. were not entitled to the lands, as devisees under his will, under the act of Assembly; nor did the will so far operate as to render them capable of taking under the act, as being named his legal representatives in the will.

*Stevenson's Heirs v. Sullivan,*

(207, 255) 70, 82

6. The appellants were not legitimated by the marriage of H. S. with their mother, and his recognition of them as his children, under the 19th sec. of the act of descents of Virginia, of 1785, which took effect on the 1st of January, 1787, and provides, that "where a man, having by a woman one or more children, shall afterwards intermarry with such woman, such child or children, if recognized by him, shall be thereby legitimated."

*Id.*

(257) 82

7. The appellants were not, as illegitimate children of H. S. and A. W., capable of inheriting from R. S. under the 18th sec. of the same act of descents, which provides that, "In making title by descent, it shall be no bar to a party that any ancestor, through whom he derives his descent from the intestate is, or hath been, an alien. Bastards also shall be capable of inheriting, or of transmitting inheritance, on the part of their mother, as if they had been lawfully begotten of such mother."

*Id.*

(260) 83

8. The following entry is invalid for want of that certainty and precision required by law: "William Perkins and William Hoy enter 6,714 acres of land on a treasury warrant, No. 10,692; to join L. Thompson and James M'Millan's entry of 1,000 acres that is laid on the adjoining ridge, between Spencer's Creek and Hingston's fork of Licking, on the east, and to run east and south for quantity." The entry referred to in the foregoing was as follows: "9th of December, 1782, Lawrence Thompson and James M'Millan, assignee of Samuel Baker, enter 1,000 acres on a treasury warrant, No. 4,222, on the dividing ridge between Hingston's fork of Licking, and Spencer's Creek, a west branch of said fork, to include a large pond, in the centre of a square, and a white oak tree marked X, also an elm tree marked VS, near the side of the pond."

*Perkins et al. v. Ramsey,*

(269) 84

9. There are cases in which a grant is absolutely void; as where the state has no title to the thing granted, or where the officer had no authority to issue the grant, &c. In such cases, the validity of the grant is necessarily examinable at law.

*Polk's Lessee v. Wendell,*

(293, 303) 92, 94

10. A grant raises a presumption that every prerequisite to its issuing has been complied with, and a warrant is evidence of the existence of an entry; but where the entry has never in fact been made, and the warrant is forged, no right accrues under the act of North Carolina of 1777, and the grant is void.

*Id.*

(303) 94

11. Where a party, in order to prove that there were no entries to authorize the issuing of the warrants, offered to give in evidence certified copies of warrants from the same office, of the same dates and numbers, but to different persons, and for different quantities of land. Held, that this was competent evidence to prove the positive fact of the existence of the entries specified in the copies; but that in order to have a negative effect in disproving the entries alleged to be spurious, the whole abstract ought to be produced in court, or inspected under a commission, or the keeper of the document examined as a witness, from which the court might ascertain the fact of the non-existence of the contested entries.

*Id.*

(310) 96

12. In such a case, certificates from the secretary's office of North Carolina, introduced to prove, that on entries of the same dates with those alleged to be spurious, other warrants issued, and other grants were obtained in the names of various individuals, but none to the party claiming under the alleged spurious entries, is competent circumstantial evidence to be left to the jury. In such a case, parol evidence that the warrants and locations had been rejected by the entry-taker as spurious, is inadmissible.

*Id.*

(311) 96

13. It seems, that whether a grant be absolutely void, or voidable only, a junior grantee is not, by the law of Tennessee, permitted to avail himself of its nullity as against an innocent purchaser without notice.

*Id.*

(1b.) 96

Wheat. 5. 6, 7, 8.

14. The 17th section of the act, incorporating the Mechanics' Bank of Alexandria, providing, "that all bills, bonds, notes and every other contract or engagement on behalf of the corporation, shall be signed by the president, and countersigned by the cashier; and the funds of the corporation, shall, in no case, be liable for any contract or engagement, unless the same shall be signed and countersigned as aforesaid," does not extend to contracts and undertakings, implied in law.

*Mechanics' Bank v. Bank of Columbia,*

(326, 335) 100, 103

15. It is essential to the validity of a grant, that the thing granted should be so described as to be capable of being distinguished from other things of the same kind. But it is not necessary that the grant itself should contain such a description, as without the aid of extrinsic testimony to ascertain precisely what is conveyed.

*Blake v. Doherty,*

(359, 362) 109, 110

16. Natural objects called for in a grant may be proved by testimony, not found in the grant, but consistent with it.

*Id.*

(362) 110

17. The following description, in a patent of the land granted, is not void for uncertainty, but may be made certain by extrinsic testimony: "A tract of land in our middle district, on the west fork of Cane Creek, the waters of Elk River, beginning at a hickory, running north 1,000 poles to a white oak; then east, 800 poles, to a stake; thence west 800 poles to the beginning, as her plat herunto annexed doth appear."

*Id.*

(359) 109

18. The plat and certificate of survey annexed to the patent, and a copy of the entry on which the survey was made, are admissible in evidence for this purpose.

*Id.*

(364) 110

19. A general plan made by authority, conformably to an act of the local legislature, may also be submitted, with other evidence, to the jury, to avail *quantum valere potest*, in ascertaining boundary.

*Id.*

(1b.) 110

20. But a demarcation, or private survey, made by direction of a party interested under the grant, is inadmissible evidence, because it would enable the grantee to fix a vagrant grant by his own act.

*Id.*

(365) 110

21. The boundary of the state of Kentucky extends only to low water-mark on the western side of the river Ohio; and does not include a peninsula, or island, on the western or north-western bank, separated from the main land by a channel or bayou, which is filled with water only when the river rises above its banks, and is, at other times, dry.

*Handly's Lessee v. Anthony,*

(374) 113

22. When a river is the boundary between two nations or states, if the property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one state (Virginia) is the original proprietor, and grants the territory on one side only, it retains the river within its domain, and the newly-erected state extends to the river only, and the low water-mark is its boundary.

*Id.*

(379) 113

23. Note on the laws of Louisiana.

*Appendix, Note II.*

(32) 139

24. History of the Spanish law.

*Id.*

(33) 139

25. Account of the *Fuero Juzgo*.

*Id.*

(34) 140

26. Of the *Fuero Viejo*.

*Id.*

(36) 140

27. Authority of the Decretals in Spain.

*Id.*

(39) 141

28. Analysis of the *Fuero Real*.

*Id.*

(41) 142

29. Of the *Partidas*.

*Id.*

(42) 142

30. Laws *de Estilo*.

*Id.*

(43) 143

31. Laws of *Toro*.

*Id.*

(45) 144

32. *Ordenamiento Real*.

*Id.*

(1b.) 144

33. The *Recopilacion*.

*Id.*

(46) 144

34. *Recopilacion de las Indias*.

*Id.*

(51) 146

35. The Ordinance of Bilboa.

*Id.*

(52) 146



## LOCAL LAW—6.

1. The Circuit Court for the District of Columbia has authority to adjourn to a distant day, and the adjourned session is considered as the same term.

*Mechanics' Bank of Alexandria v. Withers*,  
(106) 217

2. Where the regular term began on the 3d Monday in April, and the court continued to sit, *de die in diem*, until the 16th of May, when it adjourned to the 4th Monday of June. Held, that a defendant, against whom an office judgment had been entered on the 16th of May, had a right, under the laws and practice of Virginia, to appear at the adjourned session, and have the default set aside, on giving special bail, and pleading issuably.

*Id.* (Ib.) 217

3. Under the act of assembly of Virginia, the defendant may enter special bail, and defend the suit at any time before the entering up of judgment upon a writ of inquiry executed; and the appearance of the defendant, or the entry of special bail, before such judgment, discharges the appearance bail.

*Bartle v. Coleman*, (475) 309

4. If the defendant does not appear, or give special bail, the appearance bail may defend the suit, and is liable to the same judgment as the defendant would have been liable to; but the defendant cannot appear and consent to a reference, the report and judgment on which is to bind the appearance bail as well as himself. Such a joint judgment is erroneous, and will be reversed as to both.

*Id.* (Ib.) 309

5. The third section of the act of Congress, of March 30th, 1803, for the relief of insolvent debtors in the District of Columbia, does not create any express or implied exception to the operation of the statute of limitations, by making the insolvent a trustee for his creditors, in respect to his future property, or by making any demand, included in the schedule of his debts, a debt of record.

*Bowie v. Henderson*, (514) 319

6. The including of a demand in the schedule of the insolvent's debts, is sufficient evidence to sustain an issue on a replication of a new promise to the plea of the statute of limitations, if the period of limitation has not elapsed after the date of the schedule.

*Id.* (Ib.) 319

7. The decision of this court, in *Massie v. Watts*, 6 Cranch, 148, revised and confirmed.

*Kerr v. Watts*, (550) 328

8. The rule applied in equity to the relief of *bona fide* purchasers without notice, is not applicable to the case of purchasers of military land warrants under the laws of Virginia.

*Id.* (Ib.) 328

9. Such purchasers are considered as affected with notice by the record of the entry, and also of the survey; and subsequent purchasers are considered as acquiring the interest of the person making the entry; so that purchasers under conflicting entries are considered as purchasing under distinct rights, in which case the rule, as to innocent purchasers, does not apply.

*Id.* (Ib.) 328

10. The principle, that only parties, or privies, or purchasers *pedente lite*, are bound by a decree in equity, how applied to this case.

*Id.* (Ib.) 328

11. The surveys actually made on the military land warrants of Virginia, have not the force of judicial acts, or of acts done by the deputations of officers as general agents of the continental officers.

*Id.* (Ib.) 328

12. A power to convey lands must possess the same requisites, and observe the same solemnities, as are necessary in a deed directly conveying the lands.

*Clark v. Graham*, (577) 334

13. A title to lands can only be acquired and lost according to the laws of the state in which they are situate.

*Id.* (Ib.) 334

14. The laws of Ohio require all deeds of land to be executed in the presence of two witnesses, and a deed executed in the presence of one witness only is void. *Id.* (Ib.) 334

15. It is a universal rule, that course and distance yield to natural and ascertained objects.

*Preston's Heirs v. Bowmar*, (580) 336

16. But where these objects are wanting, and the course and distance cannot be reconciled, there is

no universal rule that obliges us to prefer the one to the other.

*Preston's Heirs v. Bowmar*, (Ib.) 336

17. Cases may exist in which the one or the other may be preferred according to the circumstances.

*Id.* (Ib.) 336

18. In a case of doubtful construction, the claim of the party in actual possession ought to be maintained, especially where it has been upheld by the decisions of the state tribunals.

*Id.* (Ib.) 336

19. The power given to the corporation of Georgetown, by the act of Maryland, of November, 1797, c. 56, to graduate the streets of that city, is a continuing power, and the corporation may from time to time alter the graduations so made.

*Goszler v. The Corporation of Georgetown*,  
(593) 339

20. The ordinance of May, 1799, by which the corporation of Georgetown first exercised the power of graduating the streets, is not in the nature of a compact, and may be altered by the corporation.

*Id.* (Ib.) 339

21. Under the laws in relation to the Mutual Assurance Society of Virginia, property offered for insurance, on which the premium has not been paid, and which is sold without notice, is not liable for the premium in the hands of the vendee.

*The Mutual Assurance Society v. Faxon*,  
(606) 342

22. The execution by a public officer of a power to sell lands for the non-payment of taxes, must be in strict pursuance of the law under which it is made, or no title is conveyed.

*Thatcher v. Powell*, (119) 221

23. It is essential to the validity of the sale of lands for taxes, under the laws of Tennessee, that it should appear on the record of the court, by which the order of sale is made, that the sheriff had returned that there were no goods and chattels of the delinquent proprietor, out of which the taxes could be made.

*Id.* (Ib.) 221

24. The publications which are required by law to be made, subsequent to the sheriff's return, and previous to the order of sale, are indispensable preliminaries to a valid order of sale.

*Id.* (Ib.) 221

25. In summary proceedings, where a court exercises an extraordinary power under a special statute, which prescribes its course, that course ought to be strictly pursued, and the facts which give jurisdiction, ought to appear on the face of the record. Otherwise the proceedings are not merely voidable, but absolutely void, as being *coram non jndice*.

*Id.* (Ib.) 221

26. In construing local statutes respecting real property, this court is governed by the decisions of the state tribunals.

*Id.* (Ib.) 221

27. As by the laws of Louisiana, questions of fact in civil cases are tried by the court, unless either of the parties demand a jury; in an action of debt on a judgment, the interest on the original judgment may be computed, and make part of the judgment in Louisiana, without a writ of inquiry and the interventions of a jury.

*Mayhew v. Thatcher*, (129) 223

## LOCAL LAW—7.

1. A warrant and survey authorize the proprietor of them to demand the legal title, but do not, in themselves, constitute a legal title; until the consummation of the title by a grant, the person who acquires an equity holds a right, subject to examination.

*Miller v. Kerr*, (1) 381

2. Where the register of the land-office of Virginia had, by mistake, given a warrant for military services in the Continental line, on a certificate authorizing a warrant for services in the state line, and in recording it, pursued the certificate, and not the warrant, it was held that this court could not support a prior entry and survey, on a warrant thus issued by mistake, against a senior patent.

*Id.* (Ib.) 381

3. Where the plaintiffs seek to set aside the legal title, because they have the superior equity, it is consistent with the principles of the court to rebut this equity by any circumstances which may impair it; and the legal title cannot be made to yield to an equity founded on the mistake of a ministerial officer.

*Id.* (6) 382

Wheat. 5, 6, 7, 8.



4. Where plats are returned and grants made, without an actual survey, the rule of construction which has been adopted, in order to settle the conflicting claims of different parties, is, that the most material, and most certain calls shall control those which are less material and less certain.

*Newson v. Pryor*, (7) 382

5. A call for a natural object, as a river, a known stream, a spring, or even a marked line, shall control both course and distance.

*Id.* (10) 383

6. There is no distinction between a call to stop at a river, and a call to cross a river.

*Id.* (12) 384

7. Where a grant was made for 5,000 acres of land, "lying on both sides of the two main forks of Duck River, beginning, &c., and running thence west 894 poles, to a white oak, thence south 894 poles, to a stake, crossing the river, thence east 894 poles, to a stake, thence north 894 poles, to the beginning, crossing the south fork;" it was held, that it must be surveyed so as to extend the second line of the grant such a distance on the course called for as would cross Duck River to the opposite bank.

*Id.* (1b.) 384

8. Under the laws of Massachusetts and Connecticut, the power of the administrator to sell the real estate for the payment of debts must be exercised within a reasonable time, which is to be fixed by analogy to the statute of limitations.

*Ricard v. Williams*, (59, 115) 397, 412

9. The patent issued on a military warrant under the law of Virginia, is *prima facie* evidence that every prerequisite of the law was complied with.

*Bouldin v. Massie*, (122, 148) 414, 420

10. The loss of a paper must be established before its contents can be proved; but where the patent issues upon an assignment of the warrant, and the legal title is thus consummated, the assignment itself being no longer a paper essential to that title, the same degree of proof of its existence cannot be required as if it were relied on as composing part of the title.

*Id.* (154) 422

11. Where there is a strong degree of probability that the assignment has been lost or destroyed, through accident, its non-production, by the party claiming under it, ought not to operate against him so as to defeat his legal title.

*Id.* (155) 422

12. The original law of Virginia, which authorizes the assignment of warrants, did not require that it should be made by indorsement, or by an instrument annexed to the warrant.

*Id.* (156) 422

13. It is a rule, both at law and in equity, that a party must recover on the strength of his own title, and not on the weakness of his adversary's title.

*Watts v. Lindsey*, (158, 161) 423, 424

14. To support an entry, the party claiming under it must show that the objects called for are so described, or are so notorious, that others, by using reasonable diligence, can readily find them.

*Id.* (161) 424

15. The following entry was pronounced under the circumstances, to be void for uncertainty: "7th of August, 1787. Capt. Ferdinand O'Neal enters 1,000 acres, &c., on the waters of the Ohio, beginning at the north-west corner of Stephen T. Mason's entry, No. 654, thence with his line east 400 poles, north 400 poles, west 400 poles, south 400 poles." The entry of Stephen T. Mason referred to, being as follows: "7th of August, 1787. Stephen T. Mason, Assignee, &c., enters 100 acres of land on part of a military warrant, No. 2012, on the waters of the Ohio, beginning 640 poles north from the mouth of the third creek running into the Ohio, above the mouth of the Little Miami River; thence running west 160 poles; north 400 poles; east 400 poles; thence to the beginning."

*Id.* (159) 423

16. The Ohio and Little Miami Rivers are indented and notorious objects.

*Id.* (161) 424

17. But the third creek above the mouth of the Little Miami is to be taken according to the numerical order of the creeks, unless some other stream has by general reputation or notoriety been so considered.

*Id.* (162) 424

18. Cross Creek, the stream which the party claiming under O'Neal's entry assumed for the beginning to run the 640 poles north from the mouth of the third creek, as called for in Mason's entry, not being in fact numerically the third creek above Wheat. 5, 6, 7, 8.

the mouth of the Little Miami, and there being no satisfactory proof that it had acquired that designation by reputation—the claim was pronounced invalid.

*Watts v. Lindsey*, (162) 424

19. A statute, for the commencement of which no time is fixed, commences from its date.

*Matthews v. Zane*, (164, 211) 425, 436

20. The lands included within the Zanesville District, by the act of Congress of the 3d of March, 1803, c. 343, s. 6, could not, after that date, be sold at the Marietta land-office.

*Id.* (209) 436

21. The decision of this court in *Matthews v. Zane*, 5 Cranch, 92, revised and confirmed.

*Id.* (1b.) 436

22. A patent is a title from its date, and conclusive against all those whose rights did not commence previous to its emanation.

*Hoofnagle v. Anderson*, (212, 214) 437

23. Courts of equity consider an entry as the commencement of title, and will sustain a valid entry against a patent founded on a prior defective entry, if issued after such valid entry was made.

*Id.* (214) 437

24. But they never sustain an entry made after the date of the patent.

*Id.* (215) 437

25. The above case attempted to be taken out of the general rule upon the ground that the equity of the party claiming under the entry commenced before the legal title of the other party was consummated.

*Id.* (1b.) 437

26. But the circumstances of the case, and the equity arising out of it, were not deemed by the court sufficient to take it out of the general rule.

*Id.* (1b.) 437

27. The owner of a survey made in conformity with his entry, and not interfering with any other person's right, may abandon his survey after it has been recorded.

*Taylor v. Myers*, (23) 387

28. The proviso in the act of Congress of March 2d, 1807, c. 76, s. 1, which annuls all locations made on lands previously surveyed, applies to subsisting surveys, to those in which an interest is claimed; not to those which have been abandoned, and in which no person has an interest.

*Id.* (1b.) 377

29. A question on the validity of a certificate for a settlement right in Kentucky, and of the entry thereof in the surveyor's office.

*Crocket v. Lee*, (522) 513

30. It is a settled rule, that the decree must conform to the allegations in the pleadings, as well as the proofs in the cause.

*Id.* (525) 514

31. Therefore, when the question is on the validity of a location, and neither its vagueness nor its certainty are distinctly put in issue by the pleadings, the testimony to that point will be disregarded by this court; but if the merits appear to justify it, the cause will be remanded to the court below, with directions to permit the pleadings to be amended.

*Id.* (1b.) 514

32. The turnpike road stock, paid in as a part of the capital of the Union Bank of Alexandria, before its incorporation, became the common property of the association, so as to be subject to be sold and distributed among the members, after the charter, which directed that the capital stock should consist of money only, was accepted; and those who subscribed the road stock, or their assignees, are not entitled to have the same returned specifically to them.

*Holbrook v. Union Bank of Alex.*, (553) 521

#### LOCAL LAW—8.

1. Under the act of assembly of Maryland of 1795 (c. 56), if the defendant appears, and dissolves the attachment, a declaration and subsequent pleadings are not necessary, as in other actions, but the cause may be tried upon a short note.

*Goldsbrough v. Orr*, (217) 600

2. It seems, under the same act, that an attachment will not lie in a case *ex contractu* for unliquidated damages for the non-delivery of goods. But where the plaintiff is entitled to a stipulated sum of money, in lieu of a specific article to be delivered, an attachment will lie.

*Id.* (226) 603

3. Note of the case of *Smith v. Gilmor*, in the Court of Appeals of Maryland.

*Id.* Note 3. (227) 603



4. The act of assembly of Kentucky, of the 7th of February, 1812, "giving interest on judgments for damages, in certain cases," applies as well to cases depending in the circuit courts of the Union as to proceedings in similar cases in the state courts.

*Sneed v. Wister*, (690) 717

5. The party is as well entitled to interest in an action on an appeal bond as if he were to proceed on the judgment, if the judgment be on a contract for the payment of money. He is entitled to interest from the rendition of the original judgment.

*Id.* (1b.) 717

See Chancery, 18, 19.

See Bills of Exchange, 2.

See Constitutional Law, 1, 2, 6, 21, 22, 23.

#### MANSLAUGHTER—5.

See Admiralty, 1, 2.

#### MARRIAGE SETTLEMENT—8.

See Chancery, 10.

See Fraud.

#### MISTAKE—8.

See Chancery, 8, 9.

#### NON-INTERCOURSE ACT—8.

See Admiralty, 1, 8.

#### NOTES—7.

See Bills of Exchange, &c.

#### PATENT—7.

1. A party cannot entitle himself to a patent for more than his own invention; and if the patent be for the whole of a machine, he can maintain a title to it only by establishing that it is substantially new in its structure and mode of operation.

*Evans v. Eaton*, (356, 428) 472, 490

2. If the same combination existed before in machines of the same nature, up to a certain point, and the party's invention consists in adding some new machinery, or some improved mode of operation, to the old, the patent should be limited to such improvement; for if it includes the whole machine, it includes more than his invention, and therefore cannot be supported.

*Id.* (430) 490

3. When the patent is for an improvement, the nature and extent of the improvement must be stated in the specification, and it is not sufficient that it be made out and shown at the trial, or established by comparing the machine specified in the patent with former machines in use.

*Id.* (432) 491

4. The former judgment of this court in the same case, (*ante*, Vol. III., p. 454) commented on, explained, and confirmed.

*Id.* (428) 490

5. It is no objection to the competency of a witness in a patent cause that he is sued in another action for an infringement of the same patent.

*Evans v. Hettich*, (453, 468) 496, 500

6. The 6th section of the patent act of 1793, c. 156, which requires a notice of the special matter to be given in evidence by the defendant under the general issue, does not include all the matters of defense which the defendant may be legally entitled to make. And where the witness was asked, whether the machine used by the defendant was like the model exhibited in court of the plaintiff's patented machine, held, that no notice was necessary to authorize the inquiry.

*Id.* (469) 500

#### PAYMENT—7.

1. A person owing money under distinct contracts, has a right to apply his payments to whichever debt he may choose, and this power may be exercised without any express direction given at the time.

*Taylor v. Sandiford*, (13, 19) 384, 386

2. A direction may be evidenced by circumstances, as well as by words; and a positive refusal

to pay one debt, and an acknowledgment of another, with a delivery of the sum due upon it, would be such a circumstance.

*Taylor v. Sandiford*, (20) 387

#### PENAL STATUTES—5.

Though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal, as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature.

*United States v. Wittberger*, (76, 95) 37, 42

#### PIRACY—5.

1. A commission issued by Aury, as "Brigadier of the Mexican republic" (a republic whose existence is unknown and unacknowledged), or as "Generalissimo of the Floridas" (a province in the possession of Spain), will not authorize armed vessels to make captures at sea.

*United States v. Klintock*, (144, 149) 55, 56

2. *Quere*. Whether a person acting with good faith under such a commission may be guilty of piracy.

*Id.* (149) 56

3. However this may be, in general, under the particular circumstances of this case, showing that the seizure was made, not *jure belli*, but *animo furandi*, the commission was held not to exempt the prisoner from the charge of piracy.

*Id.* (150) 56

4. The opinion of this court in the case of the *United States v. Palmer*, *ante*, Vol. III., p. 610, commented on and explained.

*Id.* (1b.) 56

5. The act of the 30th of April, 1790, c. 36, s. 8, extends to all persons, on board all vessels, which throw off their national character by cruising piratically, and committing piracy on other vessels.

*United States v. Furlong et al.*, (184, 192) 64, 66

6. The act of the 3d of March, 1819, c. 76, sec. 5, referring to the law of nations for a definition of the crime of piracy, is a constitutional exercise of the power of Congress to define and punish that crime.

*United States v. Smith*, (153, 157) 57, 58

7. The crime of piracy is defined by the law of nations with reasonable certainty.

*Id.* (160) 58

8. Robbery, or forcible depredation upon the sea, *animo furandi*, is piracy by the law of nations and by the act of Congress.

*United States v. Furlong et al.*, (184) 64

9. Citations to show that piracy is defined by the law of nations.

*United States v. Smith*, note 4, (163) 59

10. The 8th section of the act of the 30th of April, 1790, c. 36, for the punishment of certain crimes against the United States, is not repealed by the act of the 3d of March, 1819, c. 76, to protect the commerce of the United States, and to punish the crime of piracy.

*United States v. Furlong, alias Hobson et al.*, (184, 192) 64, 66

11. In an indictment for a piratical murder (under the act of the 30th of April, 1790, c. 36, sec. 8), it is not necessary that it should allege the prisoner to be a citizen of the United States, nor that the crime was committed on board a vessel belonging to citizens of the United States; but is sufficient to charge it as committed from on board such a vessel, by a mariner sailing on board such a vessel.

*Id.* (194) 67

12. The words "out of the jurisdiction of any particular state," in the act of the 30th of April, 1790, c. 36, sec. 8, are construed to mean out of the jurisdiction of any particular state of the Union.

*Id.* (200) 68

13. A vessel lying in an open roadstead of a foreign country, is "upon the high seas" within the act of 1790, c. 36, sec. 8.

*Id.* (1b.) 68

14. A citizen of the United States fitting out a vessel in a port of the United States, to cruise against a power in amity with the United States, is not protected by a foreign commission from punishment for any offense committed against the property of citizens of the United States.

*Id.* (201) 68

15. The courts of the United States have jurisdiction under the act of the 30th of April, 1790, c. 36, of murder or robbery committed on the high seas, although not committed on board a vessel belonging to citizens of the United States, as if she had no

Wheat. 5, 6, 7, 8.

national character, but was held by pirates, or persons not lawfully sailing under the flag of any foreign nation.

*United States v. Holmes*, (412, 416) 122, 123

16. In the same case, and under the same act, if the offense be committed on board of a foreign vessel by a citizen of the United States; or on board a vessel of the United States by a foreigner; or by a citizen or foreigner on board of a piratical vessel, the offense is equally cognizable by the courts of the United States.

*Id.* (417) 123.

17. It makes no difference in such a case, and under the same act, whether the offense was committed on board of a vessel, or in the sea, as by throwing the deceased overboard and drowning him, or by shooting him when in the sea though he was not thrown overboard.

*Id.* (418) 123

18. In such a case, and under the same act, where the vessel, from on board of which the offense was committed, sailed from Buenos Ayres where she had enlisted her crew; but it did not appear by legal proof that she had a commission from the government of Buenos Ayres, or any ship's papers or documents from that government, or that she was ever recognized as a ship of that nation, or of its subjects, or who were the owners, where they resided, or when or where the vessel was armed or equipped; but it did appear in proof that the captain and crew were chiefly Englishmen, Frenchmen, and citizens of the United States; that the captain was by birth a citizen of the United States, domiciled at Baltimore, where the privateer was built. Held, that the burthen of proof of the national character of the vessel was on the prisoners.

*Id.* (1b.) 123

19. Late act of Congress for the punishment of piracy.

*Appendix*, Note IV., (149) 179

#### PLEADING—6.

See Practice, 3, 5, 7, 8, 9, 10.

#### PLEADING—8.

1. It is, in general, not necessary, in deriving title to a bill or note, through the indorsement of a partnership firm, or from the surviving partner, through the act of the law, to state particularly the names of the persons composing the firm.

*Childress v. Emory*, (642) 705

2. A declaration, averring that "J. C., by his agent, A. C., made" the note, &c., is good.

*Id.* (1b.) 705

3. A general profert of letters testamentary, is sufficient; and if the defendant would object to their insufficiency, he must crave oyer; or, if it be alleged that the plaintiffs are not executors, the objection must be taken by plea in abatement.

*Id.* (1b.) 705

4. Debt, against an executor, should be in the detinet only, unless he has made himself personally responsible, as by a *devastavit*.

*Id.* (1b.) 705

5. An action of debt lies, upon a promissory note, against executors.

*Id.* (1b.) 705

6. The wager of law, if it ever had a legal existence in the United States, is now completely abolished.

*Id.* (1b.) 705

7. Oyer is not demandable of a record; nor, in an action upon a bond for performance of covenants in another deed, can oyer of such deed be craved; for the defendant, and not the plaintiff, must show it, with a profert of it, or an excuse for the omission.

*Sneed v. Wister*, (690) 717

8. If oyer be improperly demanded, the defect is aided on a general demurrer; but it is fatal to the plea, where it is set down as a cause of demurrer.

*Id.* (1b.) 717

9. *Nil Debet* is an improper plea to an action of debt upon a specialty or deed, where it is the foundation of the action.

*Id.* (1b.) 717

#### POWER—8.

See Devise.

#### PRACTICE—5.

1. An information for a *quo warranto*, to try the title to an office, cannot be maintained but at the instance of the governments; and the consent of the parties will not give jurisdiction in such a case.

*Wallace v. Anderson*, (291) 91

Wheat. 5, 6, 7, 8.

2. The District Judge cannot sit in the Circuit Court in a cause brought by writ of error from the District to the Circuit Court, and the cause cannot in such a case be brought from the Circuit to this court upon a certificate of a division of opinion of the judges.

*United States v. Lancaster*, (434) 127

See Chancery, 4, 5, 6, 7.

See Prize, 2, 3, 5, 11.

#### PRACTICE—6.

1. An equity suit, where an appeal has been taken from the Circuit Court to this court, but not prosecuted, will be dismissed upon producing a certificate from the court below, that the appeal has been taken and not prosecuted.

*Randolph v. Barber*, (128) 223

2. A decree of the highest court of equity of a state, affirming the decretal order of an inferior court of equity of the same state, refusing to dissolve an injunction granted on the filing of the bill, is not a final decree within the 25th section of the judiciary act of 1789, c. 20, from which an appeal lies to this court.

*Gibbons v. Ogden*, (448) 302

3. In order to maintain a suit in the Circuit Court, the jurisdiction must appear on the record; as if the suit is between citizens of different states, the citizenship of the respective parties must be set forth.

*Sullivan v. The Fulton Steamboat Company*, (450) 303

4. An admiralty suit, where an appeal has been taken from the Circuit Court to this court, but not prosecuted, will be dismissed, upon producing a certificate from the court below, that the appeal has been taken, and not prosecuted.

*The Jonquille*, (452) 303

5. The defendant's denial, in his answer in support of his plea, is conclusive, unless contradicted by the testimony of more than one witness, or one witness accompanied with corroborating circumstances.

*Hughes v. Blake*, (453, 468) 303, 307

6. In an equity cause, the *res* in litigation may be sold by order of the Circuit Court, and the proceeds invested in stocks, notwithstanding the pendency of an appeal to this court.

*Spring v. The South Carolina Insurance Co.*, (519) 320

7. In real or personal actions, at common law, the death of parties, before judgment, abates the suit; and it requires the aid of some statutory provision, like that of the 31st section of the judiciary act of 1789, c. 20, to enable the suit to be prosecuted by, or against the personal representative or heir of the deceased, where the cause of action survives.

*Green v. Watkins*, (260) 256

8. In writs of error upon judgments already rendered, in personal actions, if the plaintiff in error dies before assignment of errors, the writ abates at common law; but if after assignment of errors, the defendant may join in error, and proceed to get the judgment affirmed, if not erroneous, and may then revive it against the representatives of the plaintiff.

*Id.* (1b.) 256

9. But a writ of error in personal actions, does not abate by the death of the defendant in error, whether it happen before or after errors assigned; and the personal representatives may not only be admitted voluntarily to become parties, but a *seire facias* may issue to compel them.

*Id.* (1b.) 256

10. By the rules of this court, if either party, in real or personal actions, die, pending the writ of error, his representatives in the personality or realty, may voluntarily become parties, or may be compelled to become parties, in the manner prescribed by the rule.

*Id.* (1b.) 256

#### PRACTICE—7.

1. This court will not grant a rehearing in an equity cause, after it has been remitted to the court below to carry into effect the decree of this court, according to its mandate.

*Brouder v. McArthur*, (58) 397

2. In cases brought to this court by appeal from the highest state court under the 25th section of the judiciary act of 1789, c. 20, this court is confined to an examination of the right, title, claim, or exemption, set up by the party as depending upon the construction of the law or treaty, &c., of the United States, under which it is set up.

*Matthews v. Zane*, (206) 435

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3. Note on the appellate jurisdiction of this court in cases arising in the state courts under the constitution, laws, and treaties of the United States.

*Matthews v. Zane*, Note 1, (1*b.*) 435

4. Inconvenient and unnecessary practice of spreading the judge's charge *in extenso*, upon the record.

*Evans v. Eaton*, (426) 489

5. In real actions, the death of the ancestor, without having appeared to the suit, abates the suit, and it cannot be revived and prosecuted against the heirs of the original defendant.

*Macker's Heirs v. Thomas*, (530) 515

6. If the heirs be made parties by order of the court in which the suit is brought, and judgment is entered against them by default for want of a plea, upon a summons and count against the original defendant, they may sue out a writ of error, and reverse the judgment.

*Id.* (1*b.*) 515

#### PRACTICE—8.

1. The appellate jurisdiction of this court, under the twenty-fifth section of the judiciary act of 1789, c. 20, may be exercised by a writ of error, issued by the clerk of a circuit court, under the seal of that court, in the form prescribed by the act of the 8th of May, 1792, c. 137, s. 9; and the writ itself need not expressly state that it is directed to a final judgment of the state court, or that the court is the highest court of law or equity of the state.

*Buel v. Van Ness*, (312, 320) 624, 626

2. It is not necessary to aver on the record that the defendant in the Circuit Court was an inhabitant of the district, or was found therein at the time of serving the writ. Where the defendant appears, without taking the exception, it is an admission of the regularity of the service.

*Gracie v. Palmer*, (605) 696

See Admiralty, 2, 3, 4, 5, 6, 10.

See Chancery, 17.

See Constitutional Law, 13, 14.

See Construction of Statute, 2.

See Covenant.

See Debt.

See Evidence, 1, 2.

#### PRESUMPTION—7.

See Limitation of Actions, 1, 2.

#### PRIZE—5.

1. A question of proprietary interest on farther proof. Restitution decreed.

*The Venus*, (127, 130) 50, 51

2. Captor's costs and expenses ordered to be paid by the claimant, it being his fault that defective documents were put on board.

*Id.* (131) 51

3. On farther proof, the affidavit of the claimant is indispensably necessary.

*Id.* (127) 50

4. A question of proprietary interest on farther proof. Restitution decreed, with costs and expenses to be paid by the claimant.

*The London Packet*, (132) 52

5. In general, the circumstance of goods being found on board an enemy's ship raises a legal presumption that they are enemy's property.

*Id.* (137) 53

6. Upon a piratical capture, the property remains in the original owners, and cannot be forfeited for the misconduct of the captors in violating the municipal laws of the country where the vessel seized by them is carried.

*The Josefa Segunda*, (338, 357) 104, 108

7. But where the capture is made by a regularly commissioned captor, he acquires a title to the captured property, which can only be divested by recapture, or by the sentence of a competent tribunal of his own country; and the property is subject to forfeiture for a violation, by the captor, of the revenue or other municipal laws of the neutral country into which the prize may be carried.

*Id.* (358) 108

8. *Quere*, Whether, when a prize has been taken by a privateer fitted out in violation of our neutrality, the vessels of the United States have a right to recapture the prize, and bring it into our ports for adjudication.

*La Amistad de Rues*, (385, 388) 115, 116

9. In cases of marine torts, the probable profits of the voyage are not a fit rule for the ascertainment of damages.

*Id.* (389) 116

10. In cases of violation of our neutrality by any of the belligerents, if the prize comes voluntarily within our territory, it is restored to the original owners by our courts. But their jurisdiction for this purpose, under the law of nations, extends only to restitution of the specific property, with costs and expenses during the pendency of the suit, and does not extend to the infliction of vindictive damages, as in ordinary cases of marine torts.

*La Amistad de Rues*, (1*b.*) 116

11. Where the original owner seeks for restitution in our courts upon the ground of a violation of our neutrality by the captors, the *onus probandi* rests upon him, and if there be reasonable doubt respecting the facts, the court will decline to exercise its jurisdiction.

*Id.* (391) 117

12. A question of proprietary interest on farther proof.

*The Atalanta*, (433) 127

13. Note on the subject of prize law.

*Appendix*, Note III., (52) 146

14. Prize chapters of the *Consolato del Mare*.

*Id.* (54) 147

15. Extracts from the French Prize Ordinance of 1400.

*Id.* (62) 149

16. French Ordinance of 1584.

*Id.* (65) 150

17. Swedish Ordinance of 1715.

*Id.* (72) 153

18. Danish Ordinance of 1659.

*Id.* (75) 154

19. Danish Proclamation of Neutrality of 1793.

*Id.* (1*b.*) 154

20. French Prize Ordinance of 1681.

*Id.* (80) 155

21. French Ordinance of 1694.

*Id.* (85) 157

22. French Ordinance of 1696.

*Id.* (86) 157

23. French Ordinance of 1744.

*Id.* (87) 158

24. French Ordinance of 1778.

*Id.* (88) 158

25. Danish Prize Instructions of 1810.

*Id.* (91) 159

26. Ordinances of Congress from 1775 to 1782.

*Id.* (103) 163

27. British Statutes and Prize Instructions.

*Id.* (129) 171

28. Additional documents on the neutrality maintained by the United States during the present war between Spain and her American colonies.

*Id.* Note V., (151) 180

#### PRIZE—6.

1. Whether the capture is made by a duly commissioned captor, or not, is a question between the government and the captor, with which the claimant has nothing to do.

*The Amiable Isabella*, (1, 66) 191, 207

2. If the capture be made by a non-commissioned captor, the government may contest the right of the captor after a decree of condemnation, and before a distribution of the prize proceeds; and the condemnation must be to the government.

*Id.* (1*b.*) 207

3. The 17th article of the Spanish treaty of 1795, so far as it purports to give any effect to passports, is imperfect and inoperative, in consequence of the omission to annex the form of passport to the treaty.

*Id.* (69) 207

4. *Quere*, Whether, if the form had been annexed, and the passport were obtained by fraud, and upon false suggestions, it would have the conclusive effect attributed to it by the treaty.

*Id.* (1*b.*) 207

5. *Quere*, Whether sailing under enemy's convoy be a substantive cause of condemnation.

*Id.* (1*b.*) 207

6. By the Spanish treaty of 1795, free ships make free goods; but the form of the passport, by which the freedom of the ship was to have been conclusively established, never having been duly annexed to the treaty, the proprietary interest of the ship is to be proved according to the ordinary rules of the prize court, and if thus shown to be Spanish, will protect the cargo on board, to whomsoever the latter may belong.

*Id.* (1*b.*) 207

7. By the rules of the prize court, the *onus probandi* of a neutral interest rests on the claimant.

*Id.* (77) 209

Wheat. 5, 6, 7, 8

8. The evidence to acquit or condemn must come, in the first instance, from the ship's papers, and the examination of the captured persons.

*The Amiable Isabella*, (Ib.) 209

9. Where these are not satisfactory, farther proof may be admitted, if the claimant has not forfeited his right to it by a breach of good faith.

*Id.* (Ib.) 209

10. On the production of farther proof, if the neutrality of the property is not established beyond reasonable doubt, condemnation follows.

*Id.* (Ib.) 209

11. The assertion of a false claim, in whole or in part, by an agent, or in connivance with the real owner, is a substantive cause of condemnation.

*Id.* (Ib.) 209

12. A foreign consul has a right to claim or libel, *in rem*, where the rights of property of his fellow subjects are in question, without any special authority from those for whose benefit he acts.

*The Bello Corruces*, (152, 168) 229, 233

13. But a consul cannot receive actual restitution of the *res* in controversy, without a special authority from the particular individuals who are entitled.

*Id.* (169) 233

14. A citizen of the United States cannot claim in their courts, the property of foreign nations in amity with the United States, captured by him in war, wheresoever the capturing vessel may have been equipped, or by whomsoever commissioned.

*Id.* (Ib.) 233

15. In case of an illegal capture, in violation of the neutrality of this country, the property of the lawful owners cannot be forfeited for a breach of its revenue laws, by the captors, or persons who have rescued the property from their possession.

*Id.* (Ib.) 233

16. Whatever difficulty there may be under our municipal institutions, in punishing, as pirates, citizens of the United States who take from a state at war with Spain, a commission to cruise against that power, contrary to the 14th article of the Spanish treaty, yet there is no doubt that such acts are to be considered as piratical acts for all civil purposes, and the offending parties cannot appear, and claim in our courts the property thus taken.

*Id.* (Ib.) 233

17. It seems, that the terms, "a state with which the said King shall be at war," in the 14th article of the treaty, include the South American provinces which have revolted against Spain.

*Id.* (Ib.) 233

18. But, however this may be, the neutrality act of June, 1797, c. 1. extends the same prohibition, with all its consequences, to a colony revolting, and making war against its parent country.

*Id.* (Ib.) 233

19. In the case of such an illegal capture, the property of the lawful owners cannot be forfeited for a violation of the revenue laws of this country, by the captors, or by persons who have rescued the property from their possession.

*Id.* (Ib.) 233

20. The rights of salvage may be forfeited by spoliation, smuggling, or other gross misconduct of the salvors.

*Id.* (Ib.) 233

21. Where a capture is made of the property of the subjects of a nation in amity with the United States, by a vessel built, armed, equipped, and owned in the United States, such capture is illegal, and the property, if brought within our territorial limits, will be restored to the original owners.

*La Concepcion*, (235, 238) 249, 250

22. Where a transfer of the capturing vessel in the ports of the belligerent state, under whose flag and commission she sails on a cruise, is set up in order to legalize the capture, the *bona fides* of the sale must be proved by the usual documentary evidence, in a satisfactory manner.

*Id.* (Ib.) 250

23. This court does not recognize the existence of any lawful court of prize at Galvestown, nor of any Mexican republic or state, with power to authorize captures in war.

*The Nueva Anna and Liebre*, (193) 239

24. Citation from De Steck as to the powers of consuls.

*Note to the Bello Corruces*, Note 2, (156) 230

25. Opinion of M. Portalis on the right of consuls to claim in a court of prize.

*Note to the Bello Corruces*, Appendix, Note V. (59) 362

26. Articles of the Spanish treaty of 1795, referred to in the case of *The Amiable Isabella*, Appendix, Note I. (3) 343

27. Decisions of the French Council of Prizes respecting the form and effect of passports to neutral vessels.

The case of *The Amiable Isabella*.

Appendix, Note II.

(12) 346

28. Articles of the French, Dutch, Swedish, and Prussian treaties, referred to in *The Amiable Isabella*, Appendix, Note III. (23) 350

29. Convention of 1801 between Russia and Great Britain, referred to in the above case.

Appendix, Note IV.

(52) 360

#### PRIZE—7.

1. The commission conclusive proof of the national character of a public ship.

*The Santissima Trinidad*, (284, 335) 454, 467

2. During the existence of the civil war between Spain and her colonies, and previous to the acknowledgment of the independence of the latter by the United States, the colonies were deemed by us belligerent nations, and entitled to all the sovereign rights of war against their enemy.

*Id.* (337) 467

3. Our municipal laws do not prohibit the trade in contraband articles. It is merely subject, by the laws of nations, to the penalty of confiscation, in case of capture.

*Id.* (340) 468

4. In cases of capture, supposed to be in violation of our neutrality, where the enlistment of men within our territory is proved, the *onus probandi* is thrown on the claimant to prove that such enlistment was lawful as being of the subjects of the state under whose flag the capture was made.

*Id.* (342) 469

5. The sixth article of the Spanish treaty of 1795 only provides for the restitution of Spanish ships captured within our jurisdiction.

*Id.* (346) 470

6. *Quere*, As to the right of expatriation?

*Id.* (347) 470

7. Supposing such a right to exist, it cannot be exercised without a *bona fide* change of domicile, and can never be asserted as a cover for fraud, or to justify a crime against the country, or any violation of its laws.

*Id.* (348) 470

8. An augmentation of force or illegal outfit within the neutral territory only affects captures made during the cruise for which such augmentation or outfit was made.

*Id.* (Ib.) 470

9. Captures by public ships, as well as by privateers, if made in violation of our neutrality, are subject to restitution.

*Id.* (350) 471

10. Case of *The Exchange*, 7 Cranch, 116, distinguished from this case.

*Id.* (352) 471

11. *Quere*, How far a condemnation as prize in the court of the captor's country will oust the jurisdiction of the neutral tribunal, proceeding *in rem* against the captured property for a violation of the neutral jurisdiction.

*Id.* (355) 472

12. Such a condemnation will not oust the jurisdiction of the neutral tribunal, which has custody of the *res capta*, before its condemnation in the court of the captor.

*Id.* (Ib.) 472

13. Prizes made by armed vessels which have violated the statutes for preserving the neutrality of the United States, will be restored if brought into our ports.

*The Gran Para*, (471, 486) 502, 504

14. But this court has never decided that the offense adheres to the vessel under whatever change of circumstances that may take place, nor that it cannot be deposited at the termination of the cruise, in preparing for which it was committed; but if this termination be merely colorable, and the vessel was originally equipped with the intention of being employed on the cruise during which the capture was made, the *delictum* is not purged.

*Id.* (487) 504

15. A question of fact respecting the proprietary interest in prize goods, captured by an armed vessel fitted out in violation of the statutes of neutrality of the United States. Restitution to the original Spanish owners decreed.

*Id.* (490) 505

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16. This court will restore to the former owners property captured in violation of the neutrality of the United States, where it is claimed by the original wrong-doer, though it may have come back to his possession after a regular condemnation as prize.

*The Arrogante Barcelones*, (496, 518) 507, 512

17. *Quære*, How far a condemnation would protect the title of a third person, being a *bona fide* purchaser, without notice, in such a case.

*Id.* (519) 512

18. In cases where a condemnation is relied on, the libel as well as the sentence must be produced.

*The Nereyda*, Note 2. (Ib.) 512

19. In such cases, the claimant must show by competent evidence that he was a *bona fide* purchaser for a valuable consideration.

*Id.* (Ib.) 512

20. A question of fact upon the *bona fides* of an alleged salo of Portuguese ships, and their cargoes, which had been captured in violation of our neutrality. Restitution to the original owners decreed.

*The Monte Allegre*, (520) 513

#### PRIZE—8.

1. *Quære*, Whether a regular sentence of condemnation in a court of the captor, or his ally, the captured property having been carried *infra præsidia*, will preclude the courts of this country from restoring it to the original owners, where the capture was made in violation of our laws, treaties, and neutral obligations.

*La Nereyda*, (108, 174) 574, 589

2. Whoever claims under such a condemnation, must show that he is a *bonæ fidei* purchaser, for a valuable consideration, unaffected with any participation in the violation of our neutrality by the captors.

*Id.* (167) 588

3. Whoever sets up a title, under a condemnation, as prize, is bound to produce the libel, or other equivalent proceeding, under which the condemnation was pronounced, as well as the sentence of condemnation itself.

*Id.* (168) 588

4. *Quære*, Whether a condemnation in a court of an ally, of property carried into his ports by a co-belligerent, is valid.

*Id.* (109) 574

5. Where an order for further proof is made, and the party disobeys, or neglects to comply with its injunctions, courts of prize generally consider such disobedience, or neglect, as fatal to his claim.

*Id.* (171) 589

6. Upon such an order, it is almost the invariable practice for the claimant (besides other testimony) to make proof by his own oath of his proprietary interest, and to explain the other circumstances of the transaction; and the absence of such proof and explanation always leads to considerable doubts.

*Id.* (Ib.) 589

7. In cases of collusive capture, papers found on board one captured vessel may be invoked into the case of another, captured on the same cruise.

*The Experiment*, (261) 612

8. A commission obtained by fraudulent misrepresentations will not vest the interests of prize.

*Id.* (264) 613

9. But a collusive capture, made under a commission, is not, *per se*, evidence that the commission was fraudulently obtained.

*Id.* (Ib.) 613

10. A collusive capture vests no title in the captors, not because the commission is thereby made void, but because the captors thereby forfeit all title to the prize property.

*Id.* (Ib.) 613

11. Collusive captures and violations of the revenue laws, committed by a private armed vessel, are a breach of the condition of the bond given by the owners, under the prize act of June 26, 1812, c. 430, s. 3. If such breach appear upon demurrer, the defendants are not entitled to a hearing in equity, under the judiciary act of 1789, c. 20, sec. 26.

*Greeley v. United States*, (256) 611

#### SALE—6.

1. In an action at law by the vendee, against the vendor, for a breach of the contract, in not delivering the thing sold, the proper measure of damages is not the price stipulated in the contract, but the value at the time of the breach.

*Hopkins v. Lee*, (109, 118) 218, 221

2. This rule applies to the sale of real as well as personal property: but, *Quære*, Whether it is the proper measure of damages in the case of an action for eviction.

*Id.* (Ib.) 218

#### SALE—7.

See Chancery, 1, 2, 3, 4, 5.

#### SET-OFF—6.

See Agent and Principal.

#### SHIPPING—8.

By a charter-party, the sum of \$30,000 was agreed to be paid for the use or hire of the ship, on a voyage from Philadelphia to Madeira, and thence to Bombay, and, at the option of the charterer, to Calcutta, and back to Philadelphia (with an addition of \$2,000 if she should proceed to Calcutta), the whole payable on the return of the ship to Philadelphia, and before the discharge of her cargo there, in approved notes, not exceeding an average time of ninety days from the time at which she should be ready to discharge her cargo. The charterer proceeded in the ship to Calcutta, and, with the consent of the master (who was appointed by the ship-owners), entered into an agreement with P. & Co., merchants there, that if they would make him an advance of money he would deliver to them a bill of lading, stipulating for the delivery of the goods purchased therewith, to their agents in Philadelphia, free of freight, who should be authorized to sell the same, and apply the proceeds to the repayment of the said advance, unless the charterer's bills, drawn on G. & S., of Philadelphia, should be accepted; in which event the agents of P. & Co. should deliver the goods to the charterer. The goods were shipped accordingly, and a bill of lading signed by the master, with the clause, "freight for the said goods having been settled here." The bills of exchange, drawn by the charterer, were refused acceptance, and the agents of P. & Co. demanded the goods, which the owners of the ship refused to deliver, without the payment of freight. Held, that the owners of the ship had a lien on these goods for the freight.

*Graeie v. Palmer*, (605) 696

#### SLAVE-TRADE ACT—8.

See Admiralty, 2, 3.

#### SPECIFIC PERFORMANCE—6.

See Chancery, 9, 10, 11, 12.

#### SPECIFIC PERFORMANCE—8.

See Attorney, 3.

#### STATUTES OF CONNECTICUT—7.

See Local Law, 7.

#### STATUTES OF OHIO—6.

See Local Law, 14.

#### STATUTES OF MARYLAND—6.

See Local Law, 19, 20.

#### STATUTES OF MASSACHUSETTS—7.

See Local Law, 7.

#### STATUTES OF NORTH CAROLINA—7.

See Local Law.

#### STATUTES OF VIRGINIA—6.

See Local Law, 2, 3, 4, 8.

#### STATUTES OF VIRGINIA—7.

See Local Law.

#### STATUTES, CONSTRUCTION OF—7.

See Admiralty.

Wheat. 5, 6, 7, 8.

#### REGISTRY ACT—8.

See Admiralty, 9.

## TENANT IN COMMON—5.

See Local Law, 3.

## TITLES TO LAND—8.

See Constitutional Law, 25-38.

## TREATY—6.

See Prize, 3, 4, 5, 6, 16, 17, 26, 27, 28, 29.

## TREATY—7.

Construction of the British treaties of 1783, and 1794, as to titles to land.

*Blight's Lessee v. Rochester*, (544) 518

See Alien, 1, 2, 3, 4, 5.

See Prize, 5.

Wheat. 5, 6, 7, 8.

## TREATY—8.

See Constitutional Law, 18, 19, 20.

## TRUSTEE—8.

See Chancery, 20, 21, 22, 23, 24.

## USURY—8.

It is not usury for a bank to deduct the interest from the amount of a note, at the time of its being discounted.

*Fleckner v. United States Bank*, (338, 354) 631, 635

See Bills of Exchange and Promissory Notes, 3, 4.

See Construction of Statute, 3, 5, 6.

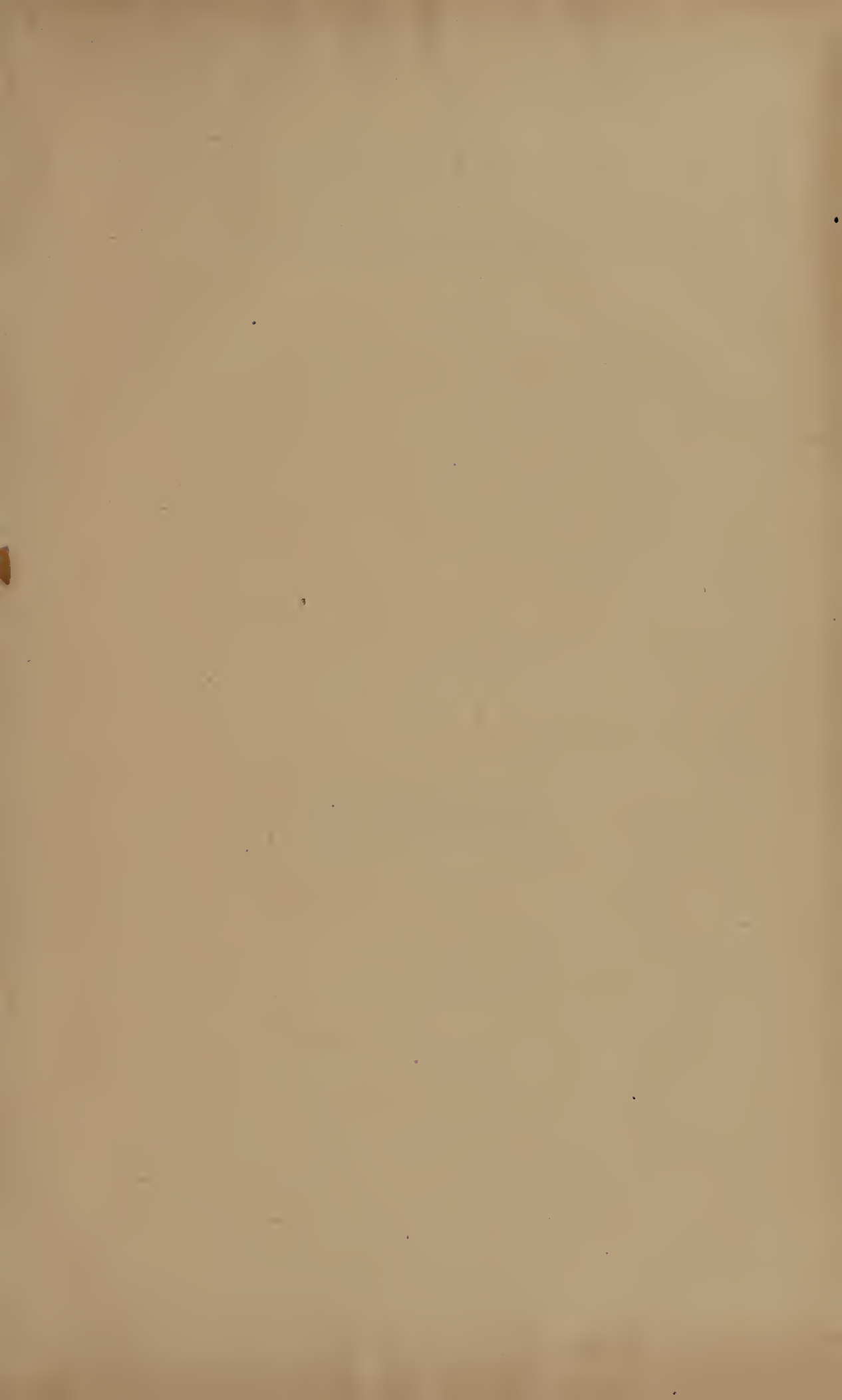




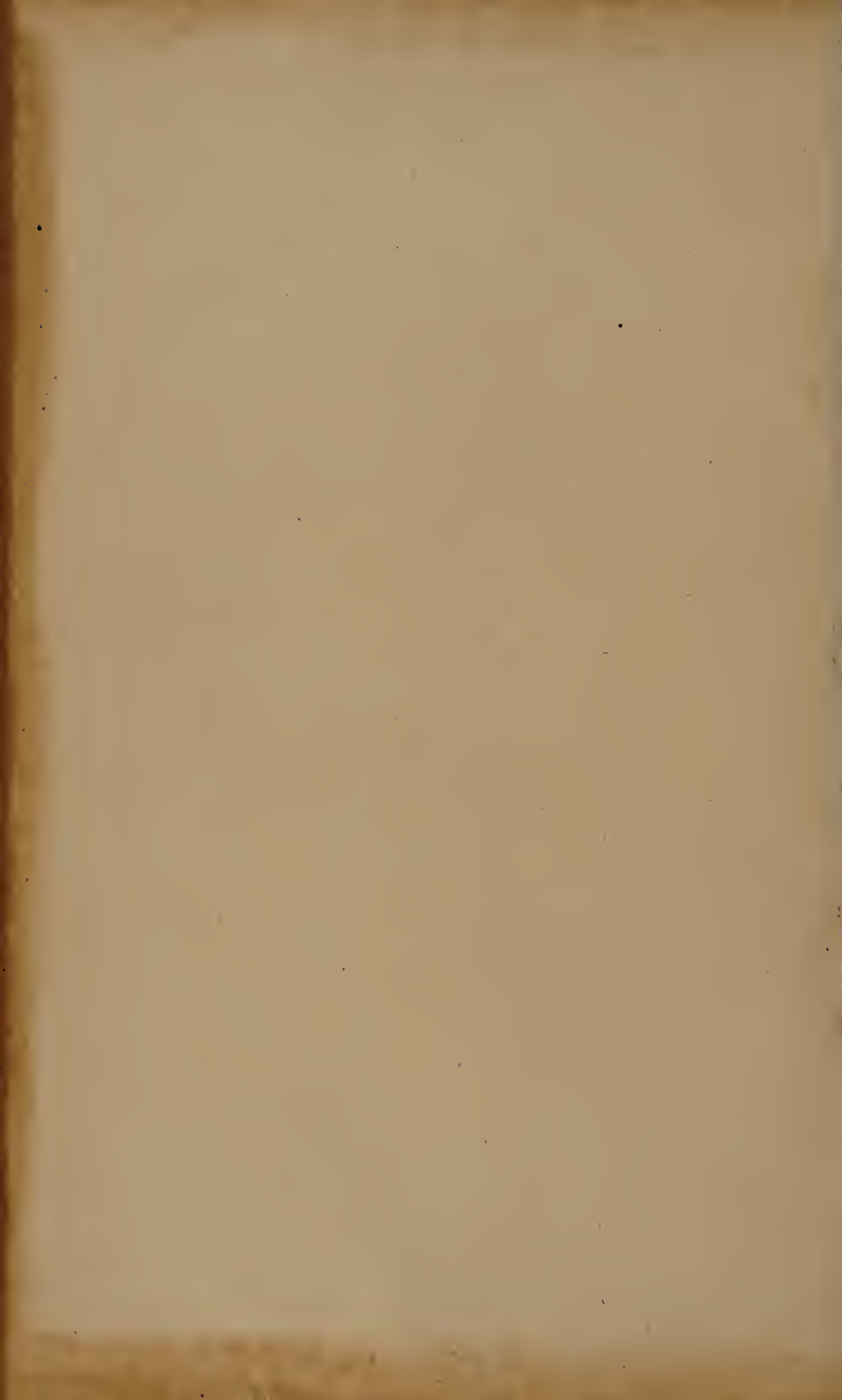












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